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COURT OF SESSION PRACTICE

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COURT OF SESSION PRACTICE

BY

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PREFACE

TWENTY-THREE years have elapsed since the publication by the late Sheriff Æneas J. G. Mackay of his last standard treatise on the practice of the Court of Session. This fact alone would in the usual course of events be sufficient justification for a new work on the subject, but within the period mentioned the practice of the Court has been so modified by Act of Sederunt and by decision, and the additional forms of process introduced to meet the requirements of new legislation have been so important, that Scottish legal literature would not be complete without a new and exhaustive exposition of the subject. How far successful the author has been in remedying this defect the work itself alone can show.

While the author was engaged in the preparation of this work the Codifying Act of Sederunt, 1913, appeared. The fact that a code of procedure in statutory form had been framed may have led some optimistic practitioners to the hasty conclusion that a work like the present was superfluous, but a study of the Act itself and experience of its use in Court have shown that, admirable as the Codifying Act is in many respects, it in no way relieves the practitioner from going beyond its boundaries or of testing its accuracy by reference to other sources of authority.

The work is divided into eleven parts. The first part describes the Court of Session in its various aspects and explains the functions of the Judges, advocates, and law agents, and the various officials connected with the Court. Part two deals generally with the principles of jurisdiction and in particular with the privative jurisdiction of the Court of Session, its concurrent jurisdiction, and the cases where its jurisdiction is excluded. Capacity to sue, with title and interest, is then considered. Procedure in an ordinary action follows, and a separate part is devoted to the respective motions incidental to such an action. Proof and jury trial have a part to themselves. Included in this part is a comprehensive set of forms of issues. The peculiarities of particular forms of action are dealt with in the next part, which is succeeded by procedure by petition. Then comes a consideration of reclaiming notes, appeals from the Sheriff and other inferior Courts, cases removed to the Court

of Session for further procedure, cases reported by the Lord Ordinary to the Inner House, and stated cases. The subject of commission and diligence for the examination of witnesses and for the recovery of documents has been thought by the author worthy of special treatment, and he has devoted a separate part to its consideration. The last part of the work is concerned with decrees or interlocutors, extracts, charging orders, and messengers-at-arms.

The author's original intention was to have combined in one volume practice in the Bill Chamber and in the Court of Session, but as an unwieldy volume would have been the result, Bill Chamber Practice has been published separately. For the same reason the author has been compelled to cut out from the original text of the present volume procedure in appeals to the House of Lords.

It remains for the author to acknowledge the assistance which he has received in the preparation of this volume. In the first place, his thanks are due to Mr. William Wilson, Advocate; Mr. J. R. Wardlaw Burnet, Advocate; Mr. J. A. Lillie, Advocate; Mr. D. R. Scott, Advocate; Mr. R. Macgregor Mitchell, Advocate; Mr. W. B. Menzies, Advocate; and Mr. William Garrett, Advocate, who assisted in verifying references in the text. His thanks are also due in no small measure to Mr. James R. Gibb, Advocate, who, in addition to assisting in checking references, has compiled the Chronological Tables of Scots Acts, 1469-1707, of Statutes from 1707, and of Acts of Sederunt, and the Index of Cases. In conclusion, the author gladly avails himself of this opportunity of gratefully acknowledging the services of Mr. D. Winter Robb, S.S.C., who has ungrudgingly given his valuable time and experience to prepare the Index of Matters. In a work of this nature, where a ready access to its contents is of the last importance, the Index of Matters is a most valuable part of the work, and the author feels certain that the value of the work has been much enhanced by the manner in which Mr. Robb has made the text available for ready and effective reference.

40 India Street,
Edinburgh, *October* 1916.

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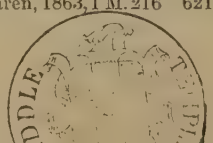

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PART I

THE COURT

THE COURT

THE Court of Session was instituted by an Act of Parliament of James the Fifth, dated 17th May 1532,[1] and, after being several times remodelled, now consists of two Divisions of equal authority of four Judges each and five Lords Ordinary. The two Divisions constitute the Inner House, and the five Lords Ordinary the Outer House.

(1) INNER HOUSE. — The First Division of the Inner House is presided over by the Lord President of the Court of Session; the Second Division has for its President the Lord Justice-Clerk, a Judge whose title is derived from his association with the Court of Justiciary.[2] By the appointment of any three Judges of the Court of Session an Extra Division may be constituted from time to time with the same authority as the other Divisions.[3] The senior Judge of the Extra Division is its President.[3] Three is a quorum in each Division,[4] except in questions relative to *interim* possession, or execution, and payments of costs and expenses already incurred, pending appeal to the House of Lords, in which case four is a quorum.[5] Where, in the case of death, sickness, declinature, or necessary absence of any of the Judges of the Inner House, a quorum cannot be obtained, a Lord Ordinary may be called in to make up a quorum.[6] Contrary to the rule in the High Court of Justiciary,[7] the President of each Division has one vote, but has no casting vote.[8] Where the Judges of a Division are equally divided in opinion, or in cases of difficulty, or where the importance of the case renders it expedient, there are statutory provisions for obtaining the opinion of a greater number of Judges or of the whole Court.[9] Where a motion for a new trial or a bill of exceptions in a

[1] Act 1532, cap. 2 (record edition); Act 1537, caps. 36-41 (12mo edition).

[2] 48 Geo. III. cap. 151, sec. 1; Judicature Act, 1825, sec. 1; 1 Will. IV. cap. 69, sec. 20.

[3] A. S., 20th March 1907; C. A. S., A, i. 2.

[4] 50 Geo. III. cap. 112, sec. 32.

[5] 48 Geo. III. cap. 151, sec. 17; Campbell, Petr., 1854, 17 D. 61.

[6] 2 & 3 Will. IV. cap. 5, sec. 2.

[7] Muir *v.* Hart, 1912, 6 Adam, 601, per Lord Justice-General Dunedin, p. 625.

[8] 48 Geo. III. cap. 151, sec. 8 (now repealed).

[9] Ibid., sec. 10; 6 Geo. IV. cap. 120, secs. 23 and 24; 13 & 14 Vict. cap. 36, sec. 35; 31 & 32 Vict. cap. 100, secs. 59 and 60.

case tried before a Lord Ordinary comes before a Division of the Court, the Judge who tried the cause is called in to hear the motion or bill, and when the cause is advised such Judge gives his judgment with the other Judges.[1] The judgment is in conformity with the opinion of the majority of the Judges present,[1] but no verdict can be set aside unless in conformity with the opinions of the Judges of the Division except in the case of hearings on bills of exception.[2]

Each Division exercises both original and appellate jurisdiction. Its original jurisdiction is partly statutory, partly appropriated to the Inner House by custom, and partly an equitable jurisdiction, called *nobile officium*. Its appellate jurisdiction arises from a common law right of the Inner House of the Court of Session to review all judgments of Lords Ordinary and of inferior Courts, except in cases where its jurisdiction is expressly, or by necessary implication, excluded. A pursuer, when he institutes an action, may select the particular Division to which he desires his cause to belong,[3] but the Lord President has power to transfer causes from one Division to another,[4] and parties, if agreed, have the power to demand such a transference.[5]

(2) Outer House.—The five Lords Ordinary sit in separate Courts in the Outer House and are Judges of first instance in cases above £50 in value, or in cases where the Court of Session has a privative jurisdiction. A pursuer may select any Lord Ordinary he chooses to try his case, except the case is one which is appropriated to a special Lord Ordinary, or is transferred to another Lord Ordinary by the Lord President,[6] or by the Lord Ordinary himself in respect of contingency with another case before another Judge.[7] Thus, petitions for the appointment of Judicial Factors, Entail Petitions, etc., which were formerly Inner House petitions, must now be brought before the Junior Lord Ordinary;[8] Outer House Teind business must be brought before the Second Junior Lord Ordinary;[9] and Exchequer causes before a Lord Ordinary specially appointed for that purpose.[10]

The Outer House has in certain cases an appellate jurisdiction, as in

[1] 31 & 32 Vict. cap. 100, sec. 58.
[2] Ibid., sec. 61.
[3] 48 Geo. III. cap. 151, sec. 9; 1 & 2 Vict. cap. 118, sec. 4.
[4] 20 & 21 Vict. cap. 56, sec. 1.
[5] Ibid., sec. 7.
[6] Ibid., sec. 1.
[7] 48 Geo. III. cap. 151, sec. 9.
[8] 20 & 21 Vict. cap. 56, sec. 4.
[9] 53 Geo. III. cap. 64, sec. 3; 6 Geo. IV. cap. 120, sec. 54.
[10] 19 & 20 Vict. cap. 56, sec. 2.

appeals under the Patents and Designs Act, 1907,[1] and the Ecclesiastical Buildings (Scotland) Act, 1868.[2]

(3) Bill Chamber.[3]—The Junior Lord Ordinary, besides being an ordinary Outer House Judge,[4] and the Judge before whom certain petitions must be brought,[5] is also Judge in the Bill Chamber during session.[6] He is called the Lord Ordinary on the Bills. The Bill Chamber is a Court apart from the Court of Session, with a separate staff and its own procedure and practice, and has jurisdiction in urgent and preliminary business, and in vacation, recess, and adjournment of the Court of Session exercises its *nobile officium*. It has also a limited appellate jurisdiction, such as under the Bankruptcy (Scotland) Act, 1913, and the Small Landholders (Scotland) Act, 1911. Either Division of the Court of Session has a right to review the decisions of the Lord Ordinary on the Bills. In vacation all the Judges, with the exception of the Lord President and the Lord Justice-Clerk, officiate as Lords Ordinary on the Bills in rotation.[7]

(4) Special Courts.—Certain special Courts are formed from among the Judges of the Court of Session for the purpose of hearing and determining certain statutory matters, such as election petitions,[8] appeals under the Valuation of Lands Acts,[9] appeals under the Representation of the People (Scotland) Act,[10] and appeals under the Finance (1909-10) Act, 1910.[11]

The Teind Court is a Court composed of the Judges of the Inner House along with the Lord Ordinary on Teinds,[12] five being a quorum.[13]

Either Division of the Inner House can sit as a Court of Review in Exchequer causes.[14]

There are special Vacation Courts for limited purposes.[15]

[1] 7 Edw. VII. cap. 29; C. A. S., C, vi. 3.
[2] 31 & 32 Vict. cap. 96.
[3] See Maclaren's Bill Chamber Practice.
[4] 1 & 2 Vict. cap. 118, sec. 1.
[5] 20 & 21 Vict. cap. 56, sec. 4.
[6] 53 Geo. III. cap. 64, sec. 2.
[7] Ibid.; 50 & 51 Vict. cap. 35, sec. 44.
[8] 31 & 32 Vict. cap. 125, sec. 58; 42 & 43 Vict. cap. 75; 46 & 47 Vict. cap. 51.
[9] 20 & 21 Vict. cap. 58, sec. 2; 30 & 31 Vict. cap. 80, sec. 8; 42 & 43 Vict. cap. 42, secs. 7-9; 8 Edw. VII. cap. 62, sec. 7 (2).
[10] 31 & 32 Vict. cap. 48, sec. 23.
[11] 10 Edw. VII. cap. 8, sec. 42.
[12] 2 & 3 Vict. cap. 36, sec. 8.
[13] Court of Session Act, 1868, sec. 9.
[14] 19 & 20 Vict. cap. 56.
[15] Court of Session Act, 1868, sec. 93; C. A. S., A, i. 3.

(5) Sittings of Court.—The Court of Session has a Summer and a Winter Session. The Summer Session is from 12th May until 20th July inclusive; the Winter Session is from 15th October until 20th March following inclusive.[1] On the fifth lawful day after each box day in vacation or recess the Lord Ordinary on the Bills holds a Vacation Court for certain limited purposes.[2] There is a recess in the Winter Session of a fortnight at Christmas and a week in February.[3] The Court observes as a holiday the Whitsunday and Martinmas term days and any general holiday.[4] There are provisions for the extension of the Summer Session of the Inner House when the whole of the causes coming into the Inner House in the Winter Session have not been disposed of before the end of the Summer Session,[5] and also for the extension of the sittings of the Outer House for the trial of causes ready for proof at the end of the Summer and Winter Sessions.[6] There is also a provision for the extension of the sittings of the whole Court by order of the Court itself or of His Majesty in Council.[7]

At the end of the Summer and Winter Sessions and during the recess at Christmas the Inner House holds sittings for the trial of jury causes.[8]

The Inner House may sit on Mondays during session to hear and advise causes standing in the Summar and Short Rolls respectively of either Division, but Monday is not, and cannot be reckoned as, a "sederunt day" in the sense of any statute or Act of Sederunt.[9]

The Lord Ordinary on the Bills is always available.

The sittings of the Registration Appeal Court are on Mondays during the sitting of the Court of Session, with power to the Court to continue the hearing on other days.[10]

The Lands Valuation Appeal Court should sit early in November at latest,[11] and the Valuation Appeal Court whenever there are appeals.

The Lord Ordinary on Teinds sits on Fridays,[12] and the Teind Court meets on alternate Fridays during session.[13]

[1] Court of Session Act, 1868, sec. 4.
[2] Ibid., sec. 93; C. A. S., A, i. 3.
[3] Court of Session Act, 1868, sec. 4.
[4] Ibid., and sec. 7.
[5] Ibid., sec. 5.
[6] Ibid., sec. 33.
[7] 11 Geo. IV. and 1 Will. IV. cap. 69, sec. 10; 2 & 3 Vict. cap. 36, secs. 10 and 11; Court of Session Act, 1868, sec. 5.
[8] C. A. S., F, i. 4.
[9] Court of Session Act, 1868, sec. 8.
[10] Ibid., sec. 10.
[11] Stein *v.* Assessor for Falkirk, 1912, S. C. 853, per Lord Johnston, p. 856.
[12] C. A. S., H, i. 7.
[13] Notwithstanding Court of Session Act, 1868, sec. 9.

(6) JUDGES.—The Judges of the Court of Session are sometimes styled Lords of Council and Session and sometimes Senators of the College of Justice. The College of Justice is a collective name given to those persons who take part in the administration of justice in the Court of Session.[1] The Judges require to be at least twenty-five years of age, and learned in the law.[2] They are appointed by the Crown[3] from the Faculty of Advocates, and, after receiving their Commissions under the Great Seal,[4] undergo formal trials.[5] They are appointed *ad vitam aut culpam*, and can only be removed upon address by both Houses of Parliament. Their Commissions continue notwithstanding the demise of the Crown. The salary of the Lord President is £5000 per annum; that of the Lord Justice-Clerk £4800 per annum; and those of the other Judges £3600 each per annum.[6] A retiring allowance of three-fourths of the salary may be granted after fifteen years' service, or on account of permanent disability.[7] In the event of illness or necessary absence of a Judge, the Lord President can nominate another Judge to officiate in his place.[8]

A Judge may be disqualified through corruption, but this plea must be stated *in limine*.[9] A Judge may be disqualified in a particular cause through interest or relationship.[10]

An arbiter may continue as such after his appointment as a Judge.[11]

A Judge is not liable in damages for words spoken in the course of administering justice, or censuring the conduct of an advocate either in the particular cause in which the latter is appearing or generally as a practitioner, even when the words are alleged to have been spoken maliciously.[12] The responsibility of a Judge of the Court of Session is only to Parliament or to the King in Council.[12]

After the death of a Judge who has not certified a shorthand writer's notes of evidence, the parties may agree to treat the notes as so certified.[13] Where a Judge dies before adjusting a bill of exceptions, a remit may

[1] Mackay's Practice, i. 84.
[2] Act 1579, cap. 38 (record edition), cap. 93 (12mo edition); Act 1592, cap. 50 (record edition), cap. 134 (12mo edition).
[3] 10 Geo. I. cap. 19, sec. 1.
[4] Act 1661, cap. 6 (record edition), cap. 2 (12mo edition).
[5] 10 Geo. I. cap. 19, sec. 1; C. A. S., A, i. 1.
[6] 50 & 51 Vict. cap. 35, 45. See also 35 & 36 Vict. cap. 51.
[7] 48 Geo. III. cap. 145, sec. 1.
[8] Court of Session Act, 1868, sec. 12.
[9] Duke of Athole *v.* Robertson, 1869, 8 M. 299.
[10] See Part iv. Chap. vii. (11), (j).
[11] Fisher *v.* Colquhoun, 1844, 6 D. 1286.
[12] Hagart's Trs. *v.* Hope, 1821, 1 S. 47 (N. E. 49).
[13] Walker *v.* Walker, 1870, 8 M. 385.

be made to another Judge to do so.[1] In a case where a consulted Judge returned an opinion and signed the draft, but died without signing the record copy and before the case came to be advised, the Court struck out his vote and reckoned that of his successor.[2]

(7) Judges' Clerks.—Each Judge has a private clerk, whose duty it is to arrange and set out for the Judge's use the papers in cases to be debated before him. He also writes out the Judge's opinion in causes taken to avizandum. In the Inner House the respective clerks of the Lord President and the Lord Justice-Clerk are Keepers of the Rolls of the First and Second Divisions of the Court respectively. The clerk of the Lord President is also the Keeper of the Seal of the Court of Session and of the Roll of Law Agents.[3] In the Outer House the private clerk of each Lord Ordinary makes up the latter's daily and weekly rolls, and it is possible to get an additional motion put upon the daily rolls of any Lord Ordinary at short notice by getting his private clerk to initial the enrolment slip and taking it to the printer, paying the latter sixpence. One of the clerks of the Inner House Judges in rotation is in attendance in the Box Room every lawful day in session, and on the box days in vacation and recess, between the hours of 11 and 1 o'clock, for the purpose of receiving and boxing printed papers, and marking on the record copy that copies have been boxed.[4]

(8) Principal Clerk of Session.—There is now only one Principal Clerk of Session, and he is vested with all the powers previously conferred on the two Principal Clerks of Session.[5] The appointment is made by the Crown, and the office is open to any duly certificated and enrolled law agent.[6] On his appointment the clerk probationer is admitted after trial.[7] He exercises a general supervision over the whole staff of clerks in the Inner and Outer House and Bill Chamber, and has power to provide temporary assistance, to transfer assistant clerks, to fix the holidays, and to suspend any member of the staff, and to select one of the staff to prepare returns ordered by Parliament.[8] He also exercises supervision over the Keeper of the Minute Book and Record of Edictal Citations and his clerk.[9]

He attends the sittings of the Court, and usually sits in the First

[1] Shepherd *v.* Gibson's Trs., 1869, 8 M. 31.
[2] Thomson's Trs. *v.* Alexander, 1851, 14 D. 217.
[3] 36 & 37 Vict. cap. 63, sec. 12.
[4] C. A. S., A, ii. 3.
[5] 2 & 3 Geo. V. cap. 23, sec. 1.
[6] 52 & 53 Vict. cap. 54, sec. 12.
[7] C. A. S., A, ii. 1.
[8] 52 & 53 Vict. cap. 54, sec. 1.
[9] Ibid., sec. 7.

Division. His name is no longer marked on Inner House papers, the names of the Inner House Deputes respectively being now placed on such papers.

He is depute of the Lord Clerk Register at meetings for the election of Scottish Peers.

(9) Inner House Depute-Clerks of Session.—There are two such clerks—one in each Division of the Court. Their respective names are put upon all papers lodged in the First and Second Divisions. It is their duty to make entries in the Sederunt Book; to be responsible for processes; to keep a check-book of fees; to write, and certify copies of, interlocutors, decrees, etc.; to keep a minute-book of such interlocutors, decrees, etc.; to sign warrants; and to take charge of Bill Chamber proceedings in the Inner House. They sit throughout the discussions in their respective Divisions of the Court.

(10) Inner House Ordinary Clerks.—There are two such clerks —one in each Division of the Court. Formerly they did not attend at Court, but only at the offices in the Register House. Now they are in the same position in all respects as Assistant-Clerks of Session, and they accordingly assist the Inner House Depute-Clerks of Session during the forenoon and attend at their respective offices in the afternoon. The hours of attendance at their respective offices are the same as the hours of Assistant-Clerks of Session. See *infra*.

(11) Outer House Depute-Clerks of Session. — There are five Outer House Depute-Clerks of Session—one to the Court of each Lord Ordinary. These officials perform duties in the Outer House similar to those of the Inner House Depute-Clerks of Session.

(12) Assistant Clerks of Session. — There are five Assistant Clerks of Session—one for the Court of each Lord Ordinary. Their duty when in Court is generally to assist their respective Depute-Clerks, and to act on their behalf when the latter are absent. They have also duties to perform at their respective offices at the Register House, and are subject to the following regulation:—

"The Inner House Ordinary Clerks and Outer House Assistant Clerks shall attend at the Register House and keep their offices open for the performance of their official duties during the following hours, viz.:—In time of session, every sederunt day, except Saturday, from 2 till 5 afternoon; and on Monday from 11 forenoon till 3 afternoon. In time of vacation or recess from 11 o'clock forenoon till 1 o'clock afternoon on Monday, Tuesday, Thursday, and Friday in each week, and also on any Wednesday or Saturday which shall be within three

days after any box day; and further, in vacation on the week-day following the day on which the Court rises."[1]

(13) Clerk of the Bills.—There is now only one Clerk of the Bills. He is responsible for the reputed solvency of cautioners, and for consigned money, and discharges in person all the duties attached to the office.[2] There is an Assistant Clerk of the Bills, and two ordinary clerks to aid him in the performance of the duties of the office. The assistant clerk acts under the orders of the Clerk of the Bills in the performance of the duties of the office, and in the necessary absence of the Clerk of the Bills subscribes and authenticates all such writs and documents as the Clerk of the Bills may, by law or practice, subscribe or authenticate.[3]

The Clerk of the Bills does not follow a reclaiming note or report to the Inner House. The clerks in the Inner House act as clerks in Bill Chamber proceedings in the Inner House.

See Maclaren's Bill Chamber Practice.

(14) Macers.—There are seven macers in the Court of Session, of whom six are appointed by the Crown and the seventh by the proprietor of the Barony of Byres.[4] A macer's duty is to carry the mace, keep order in the Court, take charge of witnesses appearing in a proof or jury trial,[5] and execute captions issued against persons who delay or refuse to return processes.

Any macer of the Court of Session who is not at the time engaged in the Court to which he is attached shall, on a request addressed by the Crown Agent to the Principal Clerk of Session, be bound to perform the duties of macer at any sitting of the High Court of Justiciary.[6]

The present fees for macers were regulated by an Order of the Court signed by John Russell, Principal Clerk of Session, dated 19th March 1851.

(15) The Auditor.—In the year 1806[7] an official called "The Auditor of Accounts to the Court" was appointed as an experiment for one year, whose duty it was to tax accounts of expenses found due in

[1] C. A. S., A, ii. 2, as amended by A. S., 20th June 1913.

[2] 20 & 21 Vict. cap. 18, sec. 1.

[3] Ibid., sec. 2.

[4] The grant was made by James III. in 1483 along with the Barony of Byres. It was confirmed by Royal Charter in 1690 and ratified by Parliament in 1695. See also Gardner *v.* Grant, 1835, 13 S. 664; Bruce *v.* Grant, 1839, 1 D. 583.

[5] C. A. S., B, ii. 7.

[6] 52 & 53 Vict. cap. 54, sec. 11.

[7] A. S., 6th February 1806; C. A. S., K, i. 1 and 2. See Maclaren on Expenses, p. 421 *et seq.*

the Court of Session or in the Bill Chamber and to report the result to the Court. This appointment met with such a measure of success that it was continued from year to year by various Acts of Sederunt, and ultimately the office of Auditor of Accounts was established as a permanent office in the Court of Session.[1] The appointment is made by the Crown, and is *ad vitam aut culpam*. The person appointed must have practised for not less than three years as a Writer to the Signet or as a member of the Incorporation of Solicitors before the Supreme Courts, and is not allowed to practise directly or indirectly as an agent before the Court of Session. If the Auditor is temporarily indisposed or absent, the Court may appoint a fit and proper person, though continuing to practise as an agent before the Court, to discharge the duties of such Auditor during his temporary indisposition or absence.[2]

The Auditor may be called upon by the Court to tax accounts of expenses of non-contentious business. He is allowed to undertake audits of accounts at the request of parties, or otherwise than under remit by the Court, and for these he receives fees in addition to his salary. The taxation of accounts paid by a judicial factor to law agents for work done has been held to be outwith the scope of the Auditor's ordinary duties, and the Auditor was allowed to charge separate fees for the same.[3]

(16) The Extractor.—Until the year 1838 the duty of preparing and issuing extracts of decrees pronounced in the Court of Session was discharged by a variety of persons in turn. By the Court of Session (No. 2) Act of that year,[4] however, that duty was entrusted to one Principal Extractor appointed by the Crown, and this office still continues. The Extractor is not allowed to practise before the Court of Session, or hold any official situation in said Court other than in terms of that Act. He is required to attend in, and perform the duties of, the office in person, with the aid of one assistant nominated by him, and holding an appointment at pleasure under him, and for whom he is responsible, and who, in the event of absence from necessary cause of the Principal Extractor, is empowered to subscribe and authenticate the extracts. By the same Act it was provided that "the Junior Principal Clerk of Session for the time being shall superintend and direct the preparation of extracts by giving such directions or instructions from time to time as he may think fit or be by the Court directed to give, which directions or instructions the Extractor is hereby required to

[1] 1 & 2 Geo. IV. cap. 38, sec. 32.
[2] Ibid.
[3] Mason's Trs. (Dundee Suburban Rly.), Petrs., 1902, 9 S. L. T. 464.
[4] 1 & 2 Vict. cap. 118, sec. 18.

comply with; provided always that, in order to give efficiency to the foregoing provisions, the Junior Clerk of Session for the time being, from time to time as he may think proper, and at any rate shall, fourteen days before the determination of each Winter and Summer Session of the Court, report to the Court how far the duties of the Principal Extractor and his assistant and clerks are properly discharged, with such other matters touching the same as he shall deem fit to be so reported."[1]

The office of Junior Principal Clerk of Session has been abolished, and the Principal Clerk of Session is now vested with the aforesaid powers and duties.[2]

(17) Keeper of the Minute-Book and of the Record of Edictal Citations.—The Keeper of the Minute-Book and the Keeper of the Record of Edictal Citations were formerly separate offices, but by the Court of Session (No. 2) Act, 1838,[3] these offices were conjoined.

In his former capacity, it is the duty of the Keeper to prepare for printing the Minute-Book, which he does from separate books kept by the Inner House, Outer House, and Bill Chamber Clerks. This is published twice weekly during session under the immediate superintendence and control of the Court by a printer appointed from time to time by the Lord President.[4] He also prepares and publishes weekly abstracts of petitions for the office of executor, along with abstracts of petitions for general and special services.[5]

In his latter capacity, it is the duty of the Keeper to register, in a book kept for that purpose, an abstract of the copies of edictal citations, charges, publications, citations, and services delivered to him at his office, exhibiting the time of service, the nature of the writ, the names and designations of the parties, and the day against which the party shall be called upon to give obedience or to make appearance. He is bound to keep three distinct and separate registers—one for all citations or summonses and orders of service, as against persons furth of Scotland, to appear before the several supreme civil Courts respectively; another record for all citations by virtue of letters of supplement, to persons furth of Scotland, to appear before one of the inferior Courts of Scotland; and a third for all charges, intimations, and publications to persons furth of Scotland, given by virtue of letters other than summonses passing the signet.[6] The abstracts, so far as they com-

[1] 1 & 2 Vict. cap. 118, sec. 18.
[2] Clerks of Session (Scotland) Regulation Act, 1913 (2 & 3 Geo. V. cap. 23), sec. 1.
[3] 1 & 2 Vict. cap. 118, sec. 21.
[4] C. A. S., A, iv. 1 and 5.
[5] 21 & 22 Vict. cap. 56, sec. 4.
[6] Judicature Act, 1825, sec. 51.

prehend citations by virtue of summonses, precepts, warrants of Court, and letters of supplement, are printed every fortnight and sold.[1] The register itself is open to inspection, and the copies of charge, citation, and service lodged with the Keeper are kept for three years.[2]

(18) Accountant of Court.—This officer of Court was brought into existence by the Judicial Factors Act, 1849,[3] and the general nature of the duty laid upon him was to superintend the conduct of all judicial factors and tutors and curators coming under the provisions of that Act, and to see that they duly observed all rules and regulations affecting them for the time.[4] By the Judicial Factors Act, 1889, an Accountant of Court was of new appointed, and he was empowered to superintend the conduct of the above-mentioned factors and all other factors,[5] and, in addition, to undertake the duties of the Accountant in Bankruptcy.[6] He is appointed by the Crown,[7] and cannot hold any other office; nor can he, directly or indirectly, by himself or any partner, be engaged in or transact any business for profit other than the business devolving upon him as Accountant.[8] He is the sole custodier[9] of all sums of money consigned or deposited in any bank under orders of the Court, or in virtue of the provisions of any Act of Parliament.[10]

Testamentary trustees may apply to the Court for an order on the Accountant to superintend their administration of the estate, and the Court may grant such order.[11]

For fees in the Accountant's department, see C. A. S., K, iii.

(19) Lord Clerk Register.—The duties which were formerly discharged by the Lord Clerk Register have now devolved upon the Deputy-Clerk Register, with the exception that the Lord Clerk Register is still Keeper of the Signet, with the rights, authorities, privileges, and duties attached to that office, including the right of appointing a Deputy-Keeper and the officers in the Signet Office,[12] and he also pre-

[1] Judicature Act, 1825, sec. 52.
[2] Ibid.
[3] 12 & 13 Vict. cap. 51, sec. 9.
[4] Ibid., sec. 10.
[5] 52 & 53 Vict. cap. 39, sec. 6.
[6] Ibid., secs. 5, 15, and 17. See Bankruptcy (Scotland) Act, 1913, secs. 156-162.
[7] 52 & 53 Vict. cap. 39, sec. 1.
[8] Ibid., sec. 2.
[9] 58 & 59 Vict. cap. 19, sec. 3.
[10] Ibid., sec. 2. See C. A. S., G, iii. 1.
[11] 52 & 53 Vict. cap. 39, sec. 18.
[12] 42 & 43 Vict. cap. 44, sec. 3.

sides at the election of Scottish Peers, with all the rights and privileges belonging to that position.[1]

(20) Deputy-Clerk Register.—The appointment to this office is made by the Crown from among those members of the Scottish Bar who are of not less than ten years' standing.[2] He has the whole rights, authorities, privileges, and duties in regard to the public registers, records, and rolls of Scotland, and the keepers and other officers thereof, heretofore vested in the Lord Clerk Register, and any reports, acts, or things required to be made or done to or in relation to the Lord Clerk Register, with the exception of the duties still transacted by the latter, must be made or done to or in relation to the Deputy-Clerk Register.[3]

(21) Signet Office.—The Signet Office is in the General Register House, where summonses and letters for diligence may be signeted every afternoon between 3 and 4 o'clock, except Saturdays, when the hour is from 11 till 12 o'clock forenoon. The office of the Keeper of the Signet was conjoined with that of the Lord Clerk Register by 57 Geo. III. cap. 64, and the Keeper has the right of appointing a Deputy-Keeper and the officers in the Signet Office.[4] The following officials are at present connected with the Signet Office:—The Keeper, Fiscal, Deputy-Keeper, Substitute-Keeper and Clerk, and Assistant Clerk and Extractor.

(22) Fee Stamp Office.—The fees entitled to be collected by the Clerks of Session, the Clerk of the Bills, the Clerk of Teinds, the Keeper of the Register of Edictal Citations, the Auditor, the Extractor, the Deputy-Keeper of the Signet, and the Superintendent of the Court House buildings, or any officer acting for any of them, are collected by means of stamps in the manner prescribed by the Public Offices Fees Act, 1879, or any amending Act, and in accordance with Treasury regulations made under said Act.[5] These stamps are sold by the Distributor of Stamps at the Fee Stamp Office in the General Register House, and may also be had at the Branch Post Office situated in the entrance to the Parliament House.

(23) Advocates.[6]—(a) *Generally.*—A member of the Faculty of Advocates is the only person allowed to plead before the Court of Session, with the exception of a party to the cause. In the Bill Chamber an agent may plead as well as an advocate, but in practice this

[1] 42 & 43 Vict. cap. 44, sec. 4.
[2] Ibid., sec. 5.
[3] Ibid., sec. 6.
[4] Ibid., sec. 3.
[5] C. A. S., K, ii. 1 and 2; 42 & 43 Vict. cap. 58.
[6] See C. A. S., A, vi. 1, 2, and 3.

right is only exercised in vacation. Where a party pleads his own cause and begins an argument he must finish it, and he will not be allowed to break off and call in counsel to finish or supplement the argument.[1] A Sheriff cannot advise, plead, or otherwise act as an advocate before the King's Court in Edinburgh in a cause arising within or coming from his sheriffdom.[2]

An advocate who acts as assessor in an inferior Court should not appear in the Court of Session in support of his judgment.[3]

(b) *Senior and Junior Counsel.*—Formerly senior counsel consisted of the Senior Crown Counsel, viz. the Lord Advocate and the Solicitor-General, and their predecessors in office, all of whom were appointed Queen's Counsel upon the several appointments; the Dean of the Faculty of Advocates, upon whom a similar distinction was conferred; and such of the members of the Bar as had "stopped writing," *i.e.* stopped the preparation of pleadings and written cases. Now that the Scottish Bar has been placed on the same footing as regards King's Counsel as the Bar of England, senior counsel consist of such members of the Bar as have become King's Counsel, the remainder being junior counsel. The older and more experienced junior counsel, however, sometimes act as senior counsel. A King's Counsel is entitled to lead any other counsel not having that rank.

The Lord Advocate for the time being is the leader of the Bar, and is entitled to a seat within the bar on the right side of the clerks' table. The Dean of Faculty is next in the order of precedence, and his seat is in the centre of the bar. Next in order of precedence is the Solicitor-General, with a seat within the bar on the left side of the clerks' table. The other King's Counsel take precedence according to the dates of their respective patents. Their seats are at the bar.

A King's Counsel may give a written opinion although a junior has not been instructed in the case.

A King's Counsel is not entitled to appear in any Court in Scotland in any case in which a junior has not been instructed to appear along with him. This does not refer to the case of an Advocate-Depute appearing in the Court of Justiciary.

A King's Counsel is not entitled to draw or revise pleadings in any case depending or to be called before any Court in Scotland, or to write appeal cases for the House of Lords unless junior counsel has been instructed to act along with him.

[1] Longworth *v.* Yelverton, 1867, L. R. 1 Sc. App. 218, at p. 220.
[2] Sheriff Courts (Scotland) Act, 1907, sec. 21.
[3] Somerville *v.* Edinburgh Assembly Rooms, 1899, 1 F. 1091.

There is no rule against a King's Counsel appearing in arbitration proceedings (whether statutory or not) unaccompanied by a junior.

It is the proper practice for King's Counsel to be accompanied by juniors before the Provisional Order Tribunals, Board of Trade Inquiries, Parliamentary and Royal Commissions, and Departmental Inquiries.[1]

(c) *Mandate.*—An advocate is presumed to have a mandate to appear for a person "from his bare appearance in Court for him,"[2] and this presumption of authority amounts almost to a *presumptio juris et de jure,* and can only be rebutted by a disclaimer.[3] If an advocate appears and acts on the instructions of a practising agent he is not responsible for the consequences;[4] but if he appears without such instructions he may be liable in damages.[5] The party for whom an advocate appears without the party's instructions is liable if a decree is pronounced against him;[6] but he has recourse against the parties who without authority used his name.[7]

No advocate, without very good cause, can refuse to act for any person tendering a reasonable fee, under pain of deprivation of his office of advocate.[8] He is, accordingly, bound, in any cause that comes into Court, to take the retainer of the party who first applies to him.[9] On the other hand, the nature of an advocate's office makes it clear that once he has accepted a retainer he must be entirely independent, and free to act according to his discretion and judgment.[10] Accordingly, an advocate's mandate, unless there be qualifications attached to it, entitles him to consent to a judicial remit;[11] to refer a case to the oath of his opponent's client,[12] or to an arbiter;[13] to abandon his client's claim or

[1] Minutes of Faculty of Advocates, dated 7th February 1907.

[2] Erskine's Inst. iii. 3. 33; Ballantine *v.* Edgar, 1676, Mor. 348; Earl of Marchmont and Morison *v.* Home, 1715, Mor. 358.

[3] Oyston *v.* Turnbull, 1875, 13 S. L. R. 69.

[4] Wallace *v.* Miller, 1821, 1 S. 40 (N. E. 43).

[5] Ballantine *v.* Edgar, 1676, Mor. 348.

[6] Hamilton *v.* Marshall, 25th November 1813, F. C.; Cowan *v.* Farnie, 1836, 14 S. 634; Thomson *v.* Candlemakers of Edinburgh, 1855, 17 D. 774.

[7] Thomson *v.* Candlemakers of Edinburgh, 1855, 17 D. 774.

[8] C. A. S., A, vi. 4.

[9] Batchelor *v.* Pattison and Mackersy, 1876, 3 R. 914, per Lord President Inglis, p. 918.

[10] Ibid.

[11] M'Laren *v.* Ferrier, 1865, 3 M. 833.

[12] Dickson on Evidence, sec. 1444.

[13] Ballandene *v.* Chrystal, 1831, 10 S. 168; Forbes *v.* Lord Duffus, 1837, 12 Fac. 321; Mackenzie *v.* Girvan, 1843, 2 Bell's App. 43; per Lord Campbell, p. 53; Bell's Prin., sec. 219; *cp.* Stewart *v.* Hickman, 1843, 6 D. 151.

defence;[1] or to settle the case.[2] It is, however, advisable, and in most cases proper, to have the authority of his client before an advocate takes any of the above-mentioned steps.

An admission made by an advocate binds his client,[3] but only in the case in which it is made.[4]

(d) *Signing Papers.*—All petitions to the Court of Session, and all defences, answers, notes, minutes, and other papers in causes depending before the said Court must be signed by an advocate, who is looked upon as the drawer thereof, and is answerable for what they contain,[5] and the clerks must not receive into process any paper requiring the signature of counsel without such signature.[6] A summons is not signed by counsel, but by a Writer to the Signet,[7] though in practice counsel initial any adjustments made in the summons. Again, a minute of restriction in an undefended summons may be signed by an agent,[8] and so also may a minute of admissions. In the Bill Chamber papers may be signed by agents as well as by counsel.[9]

An advocate may sign papers for another advocate, but it is not advisable to do so where the paper contains a settlement or adjustment with the opposite party. Thus, special cases should not be signed except by the counsel who have adjusted the case.[10]

(e) *Privilege.*—The privilege of a person exercising the functions of an advocate is absolute, whether the pleading containing the alleged defamatory statement is oral or in writing.[11]

(f) *Confidentiality.*—An advocate is not bound to disclose information which he has obtained in the course of his employment, unless his client, expressly or by implication, waives the plea of confidentiality,[12] or unless the advocate has obtained the information otherwise than

[1] Gilfillan *v.* Brown, 1833, 11 S. 548; Gordon *v.* His Creditors, 1834, 12 S. 401; Currie *v.* Glen, 1846, 9 D. 308; Mackintosh *v.* Fraser, 1860, 22 D. 421; Duncan *v.* Salmond, 1874, 1 R. 329.

[2] Ballach *v.* Kelly, 1900, 8 S. L. T. 52.

[3] Stair, iv. 44, 16; Weston *v.* Broughton, 1830, 8 S. 424.

[4] Wauchope *v.* North British Rly. Co., 1863, 2 M. 326.

[5] C. A. S., A, iii. 14; Denny *v.* Macnish, 1863, 1 M. 268. See, however, Part iv. Chap. vii. (4) and Part ix. Chap. ii. (3).

[6] C. A. S., A, iii. 15. See, however, Watt *v.* Johnston, 1863, 1 M. 269 (note).

[7] Court of Session Act, 1868, sec. 13.

[8] Ibid., sec. 23.

[9] See Maclaren's Bill Chamber Practice.

[10] Hope *v.* Hope's Trs., 1870, 8 M. 699, at p. 702.

[11] Moodie *v.* Henderson, 1800, Mor. 360; Williamson *v.* Umphray and Robertson, 1890, 17 R. 905; Clark *v.* Haddon, 1895, 3 S. L. T. 85; Rome *v.* Watson, 1898, 25 R. 733, per Lord President Robertson, p. 738.

[12] Forteith *v.* Earl of Fife, 1821, 2 Murray, 467; Noble *v.* Scott, 1843, 5 D. 723.

through his client.[1] This rule does not apply where an advocate is called as a haver, in which case he is bound to depone whether he has observed certain writs in the possession of his client,[2] and also to produce such writs as his client would have been bound to produce;[3] or where he is called as a witness in an action of proving the tenor, in which case he is bound to depone whether he has seen a certain writ, and if so the import thereof;[4] or where a charge of fraud is preferred against his client, the advocate as his adviser being cognisant before the fact;[5] or where a transaction has been entered into by an advocate for his client in the course of legal proceedings, such as a compromise;[6] or where there is an averment of *dominus litis* against his client.[7]

If a client adduces his advocate as a witness the plea of confidentiality falls.[8]

(g) *Attendance in the Outer and Inner Houses.*—(i.) *Outer House.*—When a cause is called, either in the Debate or Procedure Roll, and no counsel attends on either side, and no admissible excuse is made for their non-attendance, the Lord Ordinary shall pronounce an interlocutor dismissing the action and finding neither party entitled to expenses, and the said interlocutor shall not be recalled by the Lord Ordinary of consent, but may be recalled only on reclaiming note to the Inner House, upon such conditions as to expenses or otherwise as may be imposed by the Court or by the Lord Ordinary under remit.[9]

When on such calling of a cause counsel shall appear on one side only, and no admissible excuse shall be made for the non-attendance of counsel on the other side, it shall be competent for the counsel appearing to take decree by default in favour of his client, and if he shall not do so, the Lord Ordinary shall pronounce an interlocutor dismissing the action, finding neither party entitled to expenses; and the said interlocutor shall not be recalled by the Lord Ordinary of consent, but may be recalled only in the manner and on the conditions foresaid.[10]

It shall not be competent to have such decree by default recalled

[1] Earl of Northesk *v.* Cheyn, 1680, Mor. 353; Dickson on Evidence, sec. 1663 *et seq.*

[2] Betson *v.* Lord Grange, 1628, Mor. 342; Rollocks, 1666, Mor. 344.

[3] Campbell *v.* Campbell, 1823, 2 S. 139 (N. E. 128); Fisher *v.* Bontine, 1827 6 S. 330.

[4] Wamphray's Creditors *v.* Wamphray, 1675, Mor. 347.

[5] Inglis *v.* Gardner, 1843, 5 D. 1029; Millar *v.* Small, 1856, 19 D. 142

[6] Jaffray *v.* Simpson, 1835, 13 S. 1122; Kid *v.* Bunyan, 1842, 5 D. 193

[7] Fraser *v.* Malloch, 1895, 3 S. L. T. 211.

[8] 15 Vict. cap. 27, sec. 1.

[9] C. A. S., C, ii. 9 (*a*).

[10] Ibid., (*b*).

of consent of parties, but the decree shall be recalled on a reclaiming note only; and unless where the Court shall otherwise direct, the Auditor shall, in taxing any account of expenses incurred to his agent by the party against whom such decree is taken, disallow the expenses of having such decree opened up.[1]

No excuse in respect of another engagement shall be admissible for non-attendance of counsel on Debate or Procedure Roll, except his being engaged in a case before the Inner House, or before another Lord Ordinary, or in a proof or jury trial, and being sole counsel on his own side in attendance, or, if not sole counsel, being the counsel addressing the Court or jury or examining a witness, or being about to reply to the counsel on the other side.[2]

Every debate shall be proceeded with and brought to a close by the counsel at the time in attendance; and except on special cause shown, no delay or adjournment of any debate shall be allowed. But it shall be always competent to the Lord Ordinary on special cause shown to continue or adjourn any debate to another day, not more than eight days afterwards, when the debate shall be proceeded with and completed by the counsel then in attendance.[3]

No counsel shall be entitled to leave the Lord Ordinary's bar on the ground that he is called to a proof or jury trial, or to a cause in the Inner House, unless he be the sole counsel engaged in the said proof, jury trial, or cause in the Inner House, or unless the services of the other counsel, if any, engaged along with him, cannot, for reasons stated to and held satisfactory by the Lord Ordinary, be obtained at the time.[4]

(ii.) *Inner House.*—It is imperative that two counsel be instructed for an Inner House debate. If one only is retained, his absence will not be considered a good reason for delay.[5] When two counsel are retained, and one is engaged in the other Division and the other is engaged in a proof in the Outer House as sole counsel, the latter fact is not considered an excuse for the non-attendance of counsel.[6] Sometimes three counsel are retained, and if the case is an exceptional one, the fees of three counsel will be allowed against the other side.[7]

[1] C. A. S., C, ii. 9 (*c*).
[2] Ibid., (*d*).
[3] Ibid., (*e*).
[4] Ibid., (*f*).
[5] Forbes *v.* Mags. of Banff, 1855, 18 D. 80; Kirk-Session of Wemyss *v.* Inspector of Poor of Wemyss, 1855, 18 D. 273.
[6] Wilson *v.* Mann, 1876, 3 R. 527.
[7] See Maclaren on Expenses, p. 461 *et seq.*

The attendance of two counsel at advising may be charged.[1]

(h) *Fees.*—An advocate cannot sue his client for his fees,[2] but if the agent who instructs an advocate has received payment of counsel's fees from his client, the advocate can sue the agent therefor.[3] He can also sue for recovery of his salary as a standing counsel.[4] For further information on this subject and the subject of clerks to counsel, see Maclaren on Expenses, pp. 447-468.

(i) *Mismanagement of Cause.*—An advocate is not liable in damages for incorrect advice or the mismanagement of a cause,[5] except under express agreement which he has broken, or where he has acted fraudulently or with treachery.[6]

(j) *Censure and Deprivation.*—An advocate may be censured by a Judge for improper conduct, such as using insulting language to the bench,[7] rude expressions in his pleadings,[8] or signing appeals for the sole purpose of delay.[9] He has been suspended for contempt of Court in not appearing when specially ordered to do so,[10] and deprived of his office for buying pleas.[11]

An advocate may be deprived of his office for buying any lands or possessions which are, or have been, in dependence in controversy between parties, which controversy has not been decided.[12]

(24) Advocates' Clerks.—Each advocate has a clerk who attends him in Court and who does his writings. For the former service the clerk receives from the agent who instructs the advocate a fee in proportion to the fee sent to the advocate.[13] For the latter service the clerk is paid by the agent according to certain specified rates.[13] An advocate's clerk has now no special privilege of practising as a law agent.[14]

[1] Lyell *v.* Mudie, 1829, 8 S. 153; Lord Advocate *v.* Raynes, Lupton & Co., 1859, 21 D. 863; Leith Police Commissioners *v.* Campbell, 1867, 5 M. 339; M'Leod *v.* Leslie, 1868, 5 S. L. R. 687.

[2] Batchelor *v.* Pattison and Mackersy, 1876, 3 R. 914, 1086.

[3] James Keay, etc. *v.* A. B., W.S., 1837, 15 S. 748 (note); 9 Jur. 353; Bell and Moncrieff *v.* Jameson, 1848, 10 D. 1413; Cullen *v.* Buchanan, 1862, 24 D. 1132.

[4] M'Kenzie *v.* Town of Burntisland, 1728, Mor. 11421.

[5] Burness *v.* Morris, 1849, 11 D. 1258, at p. 1261; Batchelor *v.* Pattison and Mackersy, 1876, 3 R. 914, per Lord President Inglis, p. 918.

[6] Swinfen *v.* Lord Chelmsford, 1860, 5 H. & N. 890.

[7] Commissaries of Edinburgh *v.* Russell, 1609, Mor. 341.

[8] Mowat, 1st July 1699, 2 Fountainhall, 56.

[9] Gilchrist *v.* Macadam, 1798, 4 Pat. App. 26.

[10] A. S., 23rd June 1756.

[11] A. S., 21st December 1649.

[12] Act 1594, cap. 26 (record edition), cap. 220 (12mo edition).

[13] C. A. S., K, iv. 1; Appendix, i., vi.

[14] Advocate-General *v.* Moncrieff, 1848, 10 D. 987.

(25) Law Agents.[1]—(a) *Generally.* — Every enrolled law agent is entitled to practise in the Court of Session if he has paid the stamp duty required by the Stamp Act of 1891, and has subscribed the roll of agents practising in the Court of Session.[2] He must also take out annually a stamped certificate or licence to practise, and failure to do so renders him liable in a penalty of £50 and incapable of suing for his fees or disbursements.[3] It also prevents him from taking out a decree for expenses in his own name as agent disburser.[4]

A law agent is not entitled to borrow a process before any Supreme Court sitting in Edinburgh unless he has a place of business in Edinburgh or Leith.[5]

All enrolled law agents, whether Writers to the Signet, Solicitors before the Supreme Courts, or ordinary solicitors, are on the same footing whilst practising as law agents in the Court of Session, the only relic of departed privilege being that the last page of a summons must be signed by a Writer to the Signet, who is bound to do so on a fee of 2s. 6d. being tendered to him, but by so doing he does not incur any liability.[6]

(b) *Mandate.*—(i.) *Generally.*—A law agent acting on behalf of a client in the Court of Session is bound to produce a *written* mandate if called upon to do so by the opposite party, and he will be granted a reasonable period for that purpose.[7] The mandate need not be prior in date to the date of the summons or defences, as the case may be, but may be of later date.[8] Where the question of mandate arises between a law agent and his alleged client, or between a law agent and his alleged client on the one part, and the opposite party in a cause on the other part, proof may be by parole,[9] even in the case where a client avers that the law agent undertook to do the work gratuitously.[10] If the contract is of a very unusual character, it can only be proved by writ or oath.[11]

[1] The regulations for examination of candidates are to be found in C. A. S., A, vii.

[2] Law Agents Act, 1873 (36 & 37 Vict. cap. 63), secs. 2, 7, 11, 12, 16, 17.

[3] Stamp Act, 1891 (54 & 55 Vict. cap. 39), secs. 43-48.

[4] Ewing *v.* Wallace, 1832, 6 W. & S. 222; Rennie *v.* James, 1908, S. C. 681.

[5] 36 & 37 Vict. cap. 63, sec. 15.

[6] Court of Session Act, 1868, sec. 13.

[7] Fischer & Co. *v.* Andersen, 1896, 23 R. 395; Ferguson, Davidson & Co. *v.* Paterson and Dobbie, 1898, 1 F. 227.

[8] Wylie *v.* Adam, 1836, 14 S. 430.

[9] M'Pherson's Trs. *v.* Watt, 1877, 5 R. (H. L.) 9; Downie *v.* Black, 1885, 13 R. 271, per Lord President Inglis, p. 273; Mackay *v.* Macarthur, 1899, 36 S. L. R. 662.

[10] A. & A. Campbell *v.* Campbell, 1910, 47 S. L. R. 837. See also Taylor *v.* Forbes, 1853, 24 D. 19; Scotland *v.* Henry, 1865, 3 M. 1125; Moscrip *v.* O'Hara, Spence & Co., 1880, 8 R. 36; Jacobs *v.* M'Millan, 1899, 2 F. 79.

[11] Taylor *v.* Forbes, 1853, 24 D. 19. See also Forbes *v.* Caird, 1877, 4 R. 1141; Copeland *v.* Wimborne, 1912, S. C. 355, per Lord Guthrie, Ordinary.

The presumption is that a country agent acts as agent for the client and not for the Edinburgh agent, the latter having a direct contract of employment with the client.[1]

Where a client is abroad a mandatary will require to be sisted.[2]

(ii.) *Scope of Authority.*—An ordinary mandate by a client empowering a law agent to conduct an action on his behalf is sufficient to enable the agent to bind his client in all ordinary steps taken by the agent for carrying the case to a termination. Thus a law agent under an ordinary mandate may use an inhibition,[3] or arrestment and furthcoming.[4] He may not, however, do extraordinary acts without his client's express authority, either given previously[5] or acquiesced in afterwards.[6] Thus a law agent cannot settle a case,[7] or abandon it,[8] or refer it,[9] or grant delay,[10] without his client's express instructions.

"The mandate of a Sheriff Court practitioner does not entitle him to follow a case to the Court of Session, any more than the mandate of a Court of Session practitioner warrants him to go to the House of Lords."[11] A mandate to appear and object to the granting of a licence at a Licensing Court does not apply to the Appeal Court.[12] In the same way, it is thought that a law agent cannot, without special authority, present a reclaiming note.

Where an agent has power to settle an action on the merits, he is held to have power to settle expenses also.[13]

(iii.) *Termination.*—A law agent's mandate may be terminated by the client either expressly[14] or by implication.[15] It is also terminated by the death of the client,[16] or by the latter's sequestration.[17] A temporary fit of insanity on the part of a client does not operate as a recall of his

[1] Clark and Macdonald *v.* Schulze, 1902, 4 F. 448.

[2] See Part v. Chap. i.

[3] Clarke *v.* M'Nab, 1888, 15 R. 569.

[4] M'Donald *v.* Kelly, 1821, 1 S. 105 (N. E. 102); Laing *v.* Smart, 1840, 12 Jur. 377.

[5] Cormie *v.* Grigor, 1863, 1 M. 357.

[6] Graham *v.* Graham, 1823, 1 Sh. App. 365; Robertson *v.* Foulds, 1860, 22 D. 714.

[7] Thoms *v.* Bain, 1888, 15 R. 613.

[8] Urquhart *v.* Grigor, 1857, 19 D. 853, per Lord Justice-Clerk Hope, p. 855.

[9] Livingston *v.* Johnson, 1830, 8 S. 594; Black *v.* Laidlaw, 1844, 6 D. 1254.

[10] Cameron *v.* Mortimer, 1872, 10 M. 461.

[11] Stephen *v.* Skinner, 1863, 2 M. 287, per Lord President M'Neill, p. 290.

[12] Goodall *v.* Bilsland, 1909, S. C. 1152.

[13] Torbat *v.* Torbat's Trs., 1907, 14 S. L. T. 830.

[14] Cormack *v.* Keith and Murray, 1893, 20 R. 977, per Lord President Robertson, p. 979.

[15] Patten *v.* Carruthers, 1770, 2 Paton's App. 238.

[16] Life Association of Scotland *v.* Douglas, 1886, 13 R. 910.

[17] M'Kenzie *v.* Campbell, 1894, 21 R. 904.

agent's mandate.[1] In a case where a firm of law agents who acted for an *incapax* opposed on his behalf an application for an appointment of a *curator bonis*, and took the case to the House of Lords, they were found entitled to their expenses out of the curatorial estate.[2]

It is in the power of an agent to resign his appointment at any time.[3]

(c) *Confidentiality.*—Although it is competent to examine the law agent in a cause as a witness,[4] the client of the law agent has a right to plead confidentiality so as to prevent the law agent from being examined on communications passing between the law agent and his client, or as to information obtained by the law agent in the course of his employment.[5] This privilege would seem to apply whether the communications were made *in causâ* or otherwise,[6] and does not cease on the termination of employment as law agent.[7] The client may waive his right to plead confidentiality,[8] and when he calls his law agent as a witness it is held to be incompetent for the client to object to any question proposed to be put to such witness on matter pertinent to the issue.[9]

Under the Bankruptcy (Scotland) Act, 1913, the bankrupt's law agent may be examined, and is bound to answer all questions regarding the estate and affairs of the bankrupt.[10] The other exceptions to the general rule are the same as in the case of advocates (*q.v.*) *supra*, p. 17.

(d) *Personal Liability.*—(i.) *Fees and Printing.*—A law agent is personally liable for the following fees in a cause in which he is agent:—Clerks and dues of Court;[11] witnesses cited to a proof, trial,

[1] Wink *v.* Mortimer, 1849, 11 D. 995.

[2] Mitchell and Baxter *v.* Cheyne, 1891, 19 R. 324.

[3] Scott *v.* Christie, 1856, 19 D. 178.

[4] 16 Vict. cap. 20, sec. 2; 37 & 38 Vict. cap. 64, sec. 1.

[5] Lady Bath's Exrs. *v.* Johnston, 12th November 1811, F. C.; Gavin *v.* Montgomerie, 1830, 9 S. 213; Jarvis *v.* Anderson, 1841, 3 D. 990; Rose *v.* Medical Invalid Insurance Society, 1847, 10 D. 156; Hay, etc. *v.* Edinburgh and Glasgow Bank, 1858, 20 D. 701; *cp.* Wamphray's Creditors *v.* Wamphray, 1675, Mor. 347; Earl of Northesk *v.* Cheyn, 1680, Mor. 353.

[6] Lumsdaine *v.* Balfour, 1828, 7 S. 7; M'Cowan *v.* Wright, 1852, 15 D. 229; Munro *v.* Fraser, 1858, 21 D. 103; Haxton *v.* Edinburgh and Glasgow Rly. Co., 1863, 35 Jur. 596.

[7] Lady Bath's Exrs. *v.* Johnston, 12th November 1811, F. C.; Hyslop *v.* Staig, 1816, 1 Murray, 17; Wight *v.* Ewing, 1828, 4 Murray, 587.

[8] Noble *v.* Scott, 1843, 5 D. 723.

[9] Forteith *v.* Earl of Fife, 1821, 2 Murray, 467; 15 Vict. cap. 27, sec. 1.

[10] 3 & 4 Geo. V. cap. 20, secs. 86 and 87; see also Paul *v.* Laing's Tr., 1855, 17 D. 457; A. B. *v.* Binny, 1858, 20 D. 1058; Sawers *v.* Balgarnie, 1858, 21 D. 153; Tod's Tr. *v.* Officer, 1872, 10 M. 980.

[11] A. B. *v.* C. D., 1843, 6 D. 95.

or commission either by himself[1] or by his client;[2] a commissioner[3] and the havers cited to attend a commission;[4] an accountant extra-judicially employed by him in connection with a cause.[5] He is liable for an advocate's fees recovered from his client,[6] and the fees of the clerk of an advocate instructed by him.[7]

The agent of an unsuccessful party in a jury trial is liable for jurors' fees, although in one special case both agents were ordered to pay equally in the first instance.[8]

A law agent is personally responsible for the expense of printing done in the cause.[9]

(ii.) *Expenses of Opposite Party.*—A law agent in a cause is personally liable for the expenses of the opposite party—(*a*) where he has no mandate from his client;[10] (*b*) where he acts improperly,[11] or makes a mistake;[12] or where he is *verus dominus litis.*[13]

(iii.) *Damages or Relief.*—A law agent is personally liable *to his own client* for damages or relief where he has been guilty of gross negligence or mismanagement in the conduct of a case,[14] but the client must distinctly specify what steps the agent ought to have taken.[15] He is

[1] A. S., 21st December 1765; Jamieson *v.* Main, 1830, 5 Murray, 127; Mason, 1830, 5 Murray, 129; M'Donald *v.* Meldrum, 1839, 1 D. 677.

[2] Fraser *v.* Stronach, 1885, 23 S. L. R. 76.

[3] A. B. *v.* C. D., 1843, 6 D. 95; M'Lachlan *v.* Flowerdew, 1851, 13 D. 1345.

[4] Law *v.* Law's Trs., 1904, 12 S. L. T. 240.

[5] Hutcheon *v.* Scott, 1831, 9 S. 511; Mackenzie *v.* M'Leod, 1839, 1 D. 364.

[6] James Keay *v.* A. B., W.S., 1837, 15 S. 748 (note), 9 Jur. 353; Cullen *v.* Buchanan, 1862, 24 D. 1132.

[7] Craig & Co. *v.* Campbell, 1858, 20 D. 444.

[8] Kerr *v.* Murray, 1866, 2 S. L. R. 249.

[9] Neill & Co. *v.* Hopkirk, 1850, 12 D. 618.

[10] Kyd *v.* Fergusson, 1826, 4 S. 549 (N. E. 557); Cowan *v.* Farnie, 1836, 14 S. 634; Philip *v.* Gordon, 1848, 11 D. 175; Robertson *v.* Ross, 1873, 11 M. 910; Ferguson, Davidson & Co. *v.* Paterson and Dobbie, 1898, 1 F. 227; Munro *v.* Matheson, 1877, 5 R. 308. See also Noble *v.* Mags. of Inverness, 1825, 3 S. 516 (N. E. 358).

[11] Horne *v.* Steele, 1825, 3 S. 550 (N. E. 380).

[12] M'Kechnie *v.* Halliday, 1856, 18 D. 659.

[13] Fraser *v.* Dunbar, 1839, 1 D. 882; Fraser *v.* Malloch, 1896, 23 R. 619. See also M'Cuaig *v.* M'Cuaig, 1909, S. C. 355; Harvey *v.* Glasgow Corporation, 1915, S. C. 600.

[14] Purves *v.* Landell, 1845, 4 Bell's App. 46; Hay *v.* Baillie, 1868, 7 M. 32. See also Dougan *v.* Smith, 1817, Hume's Dec. 356; Rae, Complainer, 1741, Mor. 13963; Shortt *v.* Lascelles, 1828, 6 S. 810; Brown *v.* Wemyss and Walker, 1829, 7 S. 626; Henderson *v.* Gilfillan, 1833, 11 S. 653; Hart *v.* Frame, 1839, M'L. & Rob. 595; Brown *v.* M'Kie, 1852, 14 D. 358; Ritchie *v.* Macrosty, 1854, 16 D. 554; M'Kechnie *v.* Halliday, 1856, 18 D. 659; Anderson *v.* Torrie, 1857, 19 D. 356; Urquhart *v.* Grigor, 1857, 19 D. 853; Smith *v.* Grant, 1858, 20 D. 1077; Cormie *v.* Grigor, 1862, 24 D. 985; Simpson *v.* Kidstons, Watson, Turnbull & Co., 1913, 1 S. L. T. 74.

[15] Hume *v.* Baillie, 1852, 14 D. 821.

also liable personally where he fails to use, or uses the wrong, legal diligence.[1]

Where a law agent puts a case into the hands of counsel and acts according to the instructions of the latter, he will not be found liable in any resultant loss to his client.[2]

The fact of insufficient payment by the client,[3] or that the agent gratuitously acts as agent for the poor,[4] is no defence to an action.

A law agent is liable in damages or relief *to the opposite party in a cause* where (*a*) he acts without authority;[5] (*b*) maliciously causes defamatory statements to be inserted in written pleadings prepared by counsel[6] or where the statements are not pertinent to the case;[7] or (*c*) uses diligence wrongously.[8]

A law agent is liable for the gross negligence of anyone employed by him.[9]

(e) *Remuneration from his Own Client.*—(i.) *Generally.*—The ordinary rule is that a law agent is entitled to remuneration from his client at the rate according to the Table of Fees.[10] Where a law agent is employed by several litigants acting in common, he may charge any one of them for the whole expenses of the cause, leaving the latter with a right of relief against the other litigants.[11] Where he discharges one or more of such litigants, his right to charge the remainder depends upon whether he has reserved his right against them.[12]

The following are exceptions to the general rule:—

(*a*) Where there is a special bargain between agent and client.[13]

[1] Garden and Donaldson *v.* Pilmore, 1724, Mor. 3519; Mason *v.* Thom, 1787, Mor. 3535, 13967; Cunningham and Simpson *v.* Buchanan, 1809, Hume's Dec. 349; Slater *v.* Henderson and Scott, 1822, 1 S. 241 (N. E. 229); Highgate *v.* Boyle, 1823, 2 S. 204 (N. E. 181); Pentland *v.* Wight, 1833, 11 S. 804; M'Farlane's Exrs. *v.* Ferguson, 1834, 12 S. 824; *cp.* Hamilton *v.* Emslie, 1868, 7 M. 173.

[2] Burness *v.* Morris, 1849, 11 D. 1258; Batchelor *v.* Pattison and Mackersy, 1876, 3 R. 914, per Lord President Inglis; *cp.* Stewart *v.* M'Duff, 1799, 4 Paton's App. 85; Dixon *v.* Rutherford, 1863, 2 M. 61.

[3] Rae, Complainer, 1741, Mor. 13963.

[4] Hay *v.* Baillie, 1868, 7 M. 32.

[5] Livingston *v.* Johnson, 1830, 8 S. 594.

[6] Bayne *v.* M'Gregor, 1862, 24 D. 1126.

[7] Johnston *v.* Scot, 1829, 7 S. 234.

[8] Smith & Co. *v.* Taylor, 1882, 10 R. 291; Cook *v.* Wallace and Wilson, 1889, 16 R. 565; MacRobbie *v.* M'Lellan, 1891, 28 S. L. R. 322; *cp.* Henderson *v.* Rollo, 1871, 10 M. 104.

[9] Wood *v.* Fullarton, 1710, Mor. 13960.

[10] Bell *v.* Ogilvie, 1863, 2 M. 336, per Lord Justice-Clerk Inglis, p. 340; C. A. S., K, iv.

[11] Webster *v.* M'Lellan, 1852, 14 D. 932.

[12] Smith *v.* Harding, 1877, 5 R. 147.

[13] Clyne *v.* Swanson, 1830, 8 S. 391; Henderson *v.* Gilfillan, 1833, 11 S. 653; Swanson *v.* Robertson, 1833, 11 S. 718; Landale *v.* Anderson, 1834, 12 S. 724;

(*b*) Where the agent has grossly mismanaged the cause.[1]

(*c*) Where the agent stands in a fiduciary relation towards his client.[2]

(*d*) Where the agent is not fully qualified.[3]

(ii.) *Lien.*[4]—A law agent is entitled to a general lien over any papers belonging to his client which may have come into his possession in the course of his employment. It confers no active right, and is a mere right of retention and security.[5] It extends to the agent's personal representatives after his death,[6] or his trustee in bankruptcy,[7] and is available against the client's representatives, singular successors, creditors, real as well as personal, and the trustee in his sequestrated estate.[8] It is available in respect of all title-deeds, securities, documents of debt, and other papers belonging to the agent's client which have come lawfully into the agent's possession either previous to or in the course of the litigation for which the charges are made, but not after the litigation is over and the agency has ceased.[9] It covers the whole of the agent's professional account, though the greater part, or the whole of it, may have no relation whatever to the law rights included in the title-deeds.[10]

The right of lien may be waived by agreement,[11] and is subject

Bayne *v.* Steele's Representatives, 1836, 15 S. 22; Jacobs *v.* M'Millan, 1899, 2 F. 79. See Maclaren on Expenses, pp. 246-248.

[1] Purves *v.* Landell, 1845, 4 Bell's App. 46; Stewart *v.* M'Duff, 1799, 4 Pat. App. 85; Shortt *v.* Lascelles, 1828, 6 S. 810; Grahame *v.* Alison, 1830, 9 S. 130; Lockhart *v.* Wighton, 1830, 9 S. 134; Dixon *v.* Rutherford, 1863, 2 M. 61; Torbat *v.* Torbat's Trs., 1907, 14 S. L. T. 830; C. A. S., C, ii. 2; C. A. S., C, ii. 6. See Maclaren on Expenses, pp. 248-250.

[2] Home *v.* Pringle, 1837, 16 S. 142; 1841, 2 Rob. App. 384; Seton *v.* Dawson, 1841, 4 D. 310; Cullen *v.* Baillie, 1846, 8 D. 511; affd. 18 D. (H. L.) 40; Bon Accord Marine Insurance Co. *v.* Souter's Trs., 1850, 12 D. 1010; Fegan *v.* Thomson, 1855, 17 D. 1146; Lord Gray, etc., Petrs., 1856, 19 D. 1; Wellwood's Trs. *v.* Boswell or Hill, 1856, 19 D. 187; Mitchell *v.* Burness, 1878, 5 R. 1124; Maclaren on Expenses, pp. 250-252.

[3] Stamp Act, 1891 (54 & 55 Vict. cap. 39), sec. 43; 54 & 55 Vict. cap. 30, sec. 3; Innes *v.* M'Donald, 1899, 2 F. 6; Maclaren on Expenses, pp. 252-260.

[4] See Maclaren on Expenses, p. 253 *et seq.*

[5] Bell's Comm. (7th ed.), ii. 107, 108.

[6] Wilson *v.* Lumsdaine, 1837, 15 S. 1211; Paul *v.* Meikle, 1868, 7 M. 235.

[7] Inglis *v.* Moncrieff, 1851, 13 D. 622.

[8] Bell's Prin., sec. 1442; Lidderdale's Creditors *v.* Nasmyth, 1749, Mor. 6248; Dalrymple *v.* Earl of Selkirk, 18th July 1751, Elch. Hypothec, No. 17; Wight *v.* Kidd, 1828, 7 S. 70; Guthrie *v.* Ogilvie, 1830, 2 Jur. 193.

[9] Renny and Webster *v.* Myles, 1847, 9 D. 619; Gray *v.* Graham, 1851, 13 D. 963; affd. 1855, 2 Macq. 435.

[10] Menzies *v.* Murdoch, 1841, 4 D. 257, per Lord Fullerton; Maclaren on Expenses, pp. 254, 255. In company winding up, see Companies (Consolidation) Act, 1908, secs. 164 and 174, and Wilton, pp. 65, 132, 290, 300-2.

[11] Bell's Comm. (7th ed.), ii. 109. See Maclaren on Expenses, p. 255.

to the equitable control of the Court in order to prevent its abuse.[1]

The exercise of the right does not stop the triennial prescription.[2]

(iii.) *Charging Order.*[3]—A law agent has a preference over the principal sum decerned for in a decree pronounced in his client's favour, and also the fund which a favourable decree has preserved to his client.[4] The Court has full discretion in making such an award.[5] The right of a law agent is preferable to creditors of the client,[6] even where the client has been sequestrated prior to the date of the decree.[7]

Country, as well as Edinburgh, agents are entitled to a charging order.[8]

(f) *Remuneration from the Opposite Party.*—(i.) *Where an Agent Conducts his Own Case.*[9]—A law agent who successfully conducts his own case is entitled to make professional charges against the unsuccessful party for those parts of the case where a law agent would have been required if the party had not been a law agent.[10] If the agent is not certificated, however, he can only charge in the same way as an ordinary party who conducts his own case, viz. actual outlays, but no charges for trouble and loss of time in attending Court, nor for personal expenses, railway fares, hotel bills, etc.[11]

(ii.) *Where an Agent Acts for a Client.*[12]—Where a law agent successfully conducts a litigation for a client who obtains an award of expenses, the former has a right of hypothec or preference which entitles him to take decree in his own name as *Agent Disburser* for the expenses found due to his client. The principle upon which the right is based is that there is an implied assignation by the client to the law agent of his right to such expenses.[13]

[1] Ferguson and Stuart *v.* Grant, 1856, 18 D. 536. See Maclaren on Expenses, pp. 255, 256.

[2] Mason *v.* Earl of Aberdeen, 1709, Mor. 11094; Foggo *v.* M'Adam, 1780, Mor. 6252; Blake *v.* Turner, 1860, 23 D. 15; Maclaren on Expenses, p. 256.

[3] Maclaren on Expenses, pp. 269-271. See also Part xi. Chap. iii.

[4] Law Agents and Notaries Public (Scotland) Act, 1891 (54 & 55 Vict. cap. 30), sec. 6.

[5] Carruther's Tr. *v.* Fairley and Wilson, 1897, 24 R. 363.

[6] Automobile Gas Producer Syndicate, Ltd. *v.* Caledonian Rly. Co., 1909, 1 S. L. T. 499; Philip *v.* Willson, 1911, S. C. 1203.

[7] Paton *v.* Paton's Trs., 1905, 13 S. L. T. 96; *cp.* Tait *v.* Wallace, 1894, 2 S. L. T. 261.

[8] Bannatyne, Kirkwood, France & Co., Minuters, 1907, S. C. 705.

[9] Maclaren on Expenses, pp. 244, 245.

[10] Cuthbertson *v.* Eliott, 1860, 22 D. 389.

[11] Stewart *v.* A. B., 1827, 5 S. 658 (N. E. 614); Ireland *v.* Wilson, 1851, 13 D. 1226; Forbes *v.* Whyte, 1891, 18 R. 688.

[12] Maclaren on Expenses, p. 256 *et seq.*

[13] Gordon *v.* Davidson, 1865, 3 M. 938, per Lord Justice-Clerk Inglis. See also Bell's Comm. (7th ed.), ii. 35; Munro *v.* Bothwell, 1846, Arkley, 118; Lochgelly Iron and Coal Co., Ltd. *v.* Sinclair, 1907, S. C. 442, per Lord President Dunedin.

This right may be defeated by the intervention of the Court *ex proprio motu*;[1] or in respect of the following objections taken by the opposite party:—

(*a*) That the successful party's law agent is not certificated.[2]

(*b*) That the agent has not actually disbursed the expenses.[3]

(*c*) That the expenses found due to the successful party are compensated by a counter claim.[4]

Where a client settles his case to the detriment of his law agent, the latter may, in certain circumstances, interfere in the process to recover his expenses. These circumstances are:—

(*a*) Where expenses have actually been found due;

(*b*) Where expenses follow as a necessary consequence from an interlocutor already pronounced; and

(*c*) Where the opposite parties have entered into a collusive device for the purpose of defeating the law agent's claim.[5]

(g) *Profit-Sharing Agreement.*—Agreements between law agents acting for the same client to share fees or profits are lawful, and a law agent authorised and acting for a client whom he discloses incurs no liability to any other law agent employed by him, except such as he shall expressly undertake in writing.[6]

Where a country law agent employs an Edinburgh agent, with the knowledge and consent of his client, the Edinburgh agent may recover his account from the client,[7] but not where the employment of the Edinburgh agent has been outwith the client's knowledge.[8]

(h) *Censure and Deprivation.*—The jurisdiction of the Court to deal with the misconduct of a law agent is not confined to the jurisdiction conferred by the Law Agents Act, 1873. There is also a common law jurisdiction, under which anyone interested may bring the conduct of a

[1] Baillie *v.* Baxter and Mitchell, 1872, 10 M. 414; Bloe *v.* Bloe, 1882, 9 R. 894. See also Campbell *v.* Montgomerie, 9th July 1802, F. C. (note, p. 118).

[2] 54 & 55 Vict. cap. 30, sec. 3; 54 & 55 Vict. cap. 39, sec. 43; Innes *v.* M'Donald, 1899, 2 F. 6; Fowler *v.* Monmouthshire Canal Co., 1879, 4 Q. B. D. 334; *In re* Sweeting, [1898] L. R. 1 Ch. 268.

[3] Rennie and Playfair *v.* Aitken, 8th June 1811, F. C.; *cp.* Campbell *v.* Montgomerie, 9th July 1802, F. C. (note, p. 115).

[4] See Maclaren on Expenses, p. 261 *et seq.*

[5] Hamilton *v.* Bryson, 17th June 1813, F. C.; M'Lean *v.* Auchinvole, 1824, 3 S. 190 (N. E. 821); Hamilton *v.* Dixon, 1824, 3 S. 242 (N. E. 170); Fergusson *v.* Richardson, 1826, 4 S. 814 (N. E. 821); Cornwall *v.* Walker, 1871, 8 S. L. R. 442; Ammon *v.* Tod, 1912, S. C. 306; Maclaren on Expenses, pp. 265-269.

[6] Law Agents Act, 1873, sec. 21.

[7] Clark and Macdonald *v.* Schulze, 1902, 4 F. 448.

[8] M'Laren *v.* M'Dougall, 1881, 8 R. 626, per Lord Young, p. 629.

law agent under the notice of the Court.[1] Accordingly the Court may censure or suspend a law agent for misconduct *ex proprio motu*, or upon its attention being called to anything done in a cause which is instantly verifiable.[2] The usual method of procedure, however, is by petition and complaint,[3] and the usual petitioner is the law society to which the law agent belongs.[4] Upon having the complaint served upon him, the law agent is allowed to be heard in his defence.[5]

[1] Incorporated Society of Law Agents in Scotland *v.* Clark, 1886, 14 R. 161, per Lord President Inglis, p. 162.

[2] A. B. *v.* C. D., 1834, 12 S. 504. See also Munro *v.* Matheson, 1877, 5 R. 308; Broatch, Petr., 1878, 5 R. 702.

[3] Law Agents Act, 1873, sec. 22.

[4] See Part viii. Chap. xiii.

[5] Law Agents Act, 1873, sec. 14.

PART II

JURISDICTION

CHAPTER I

INTRODUCTORY

THE term jurisdiction has been used in several senses. It is often used to denote the area of territory over which a Court exercises judicial authority;[1] less often the place where justice is administered. It has also received other meanings of a rather technical character. In the law of Scotland, however, jurisdiction means the power conferred by the State upon a Court to try appropriate causes regularly brought before it by competent persons, and to pronounce therein valid and effective decrees.[2]

The jurisdiction of the Court of Session may be considered under four heads:—

I. The General Principles on which Jurisdiction is founded against Persons in Different Kinds of Action;
II. Privative Jurisdiction;
III. Concurrent Jurisdiction; and
IV. Jurisdiction Excluded.

[1] Sheriff Courts (Scotland) Act, 1907, sec. 6, as amended by the Sheriff Courts (Scotland) Act, 1913.

[2] Miller's Data of Jurisprudence, p. 112 *et seq.*; Erskine's Inst. i. 2. 2; Mackenzie's Inst. i. 2. 2 and 3.

CHAPTER II

JURISDICTION—GENERAL PRINCIPLES

JURISDICTION against persons, corporations, companies, etc., may be founded in various ways, depending upon the nature of the remedy sought by the pursuer and the particular circumstances under which the action is raised or defended. It is, accordingly, intended to deal with the general principles underlying the subject of jurisdiction in the Court of Session under the following heads:—

I. Ordinary Personal or Petitory Actions.
II. Actions Involving *Status*.
III. Interdicts.
IV. Real Actions.
V. Declarators and Reductions.
VI. Successions and Trusts.
VII. Bankruptcy Proceedings.
VIII. Guardianship.
IX. Prorogation of Jurisdiction.
X. Reconvention.
XI. *Forum non Conveniens*.

I. ORDINARY PERSONAL OR PETITORY ACTIONS.—In these actions jurisdiction may be founded in the following ways:—

(1) *Ratione Domicilii;* or, on account of domicile.—(a) *Meaning of "Domicile."*—"Domicile" in this connection does not mean domicile in its ordinary acceptation, but is used to denote residence for forty days by the defender within the territory over which the Court of Session exercises control.[1] As Lord President Inglis has said:[2] "It is clear that the term 'domicile,' as used by all jurists in this branch of law, means no more than the place of residence for the time, whether permanent or temporary. Any other rule would lead to the most inconvenient and absurd results; for if it were necessary in

[1] Erskine's Inst. i. 2. 16; Paterson *v.* Fermour, 20th November 1672, Mor. 3724; Calder *v.* Wood, 19th January 1798, F. C.; Mor. 2250; Ringer *v.* Churchill, 1840, 2 D. 307.

[2] Joel *v.* Gill, 1859, 21 D. 929, at p. 938.

every case to fix where is the domicile of the defender, by which his succession, status, and personal rights and privileges will fall to be regulated, before ordinary civil jurisdiction can be exercised over him, it is obvious that one might live for years in a country and carry on the most extensive business without being subject to the ordinary civil tribunals. . . . The general principle then being that residence within the Judge's territory gives the Judge jurisdiction over the person, and the principle being *juris gentium*, it is for each country to determine, as matter of practice, what it will account to be sufficient residence to form a domicile for jurisdiction. In our own system of jurisprudence, to prevent disputes, constant practice has fixed that a residence of forty days is sufficient—not mere presence within the territory, travelling about and never fixed in one place—but continuous residence in one locality for forty days. According to the principles of Scotch law, therefore, one who has so resided constantly at one place within Scotland for forty days is subject to the jurisdiction of the Scotch Court *ratione domicilii*."

Where a Scotsman has lost his domicile of origin, and has not resided for forty days in Scotland previous to the service of a summons, jurisdiction is not constituted against him,[1] even although there is personal service.[2]

(b) *Animo Remanendi.*—Although forty days' *continuous* residence is thus laid down as being necessary to found jurisdiction, in a couple of old cases[3] a person was held to subject himself to jurisdiction by merely taking up his abode *animo remanendi*. Certain writers[4] have looked upon these cases with approval, but to accept the judgment in these cases would mean the acceptance of the doctrine that domicile in its ordinary sense may alone found jurisdiction *ratione domicilii*—a doctrine no longer held.[5] It is, accordingly, humbly submitted that these cases are no longer to be regarded as authorities.

(c) *Interruptions of Continuity.*—In one case[6] it was indicated that there might be interruptions of continuity that would not affect the character of the residence, and that there might be residence sufficient to create jurisdiction, even though the defender paid visits to London

[1] Tasker *v.* Grieve, 1905, 8 F. 45.

[2] Hutchison *v.* Hutchison, 1912, 1 S. L. T. 219.

[3] Irvine *v.* Deuchar, 1707, Mor. 3703; Home *v.* Lady Eccles' Creditors, 1725, Mor. 3704.

[4] Nicholson's Erskine's Inst. i. 2. 16 (note *d*); Dove Wilson's Sheriff Court Practice, 4th ed. p. 66.

[5] Pedie *v.* Grant, 1825, 1 W. & S. 716; M'Bey *v.* Knight, 1879, 7 R. 255, per Lord Gifford, p. 258; Buchan *v.* Grimaldi, 1905, 7 F. 917; Tasker *v.* Grieve, 1905, 8 F. 45; Glasgow Corporation *v.* Johnston, 1915, S. C. 555, and cases therein cited.

[6] Ritchie *v.* Fraser, 1852, 15 D. 205.

and Ireland during the forty days; and this view was given effect to in a subsequent case[1] in the Outer House. It has to be observed, however, that the fact that the domicile of origin of the defender was Scottish entered very largely into the determination of the question,[2] and it would be unsafe to rely upon either of these cases in support of the proposition that the continuity of the residence can be interrupted.

(d) *Place of Residence.*—The residence of the defender does not require to be with his family,[3] but may be in an inn or hired chamber,[4] or as guest with a business agent,[5] or as a guest in his father's house.[6]

(e) *When Jurisdiction Ceases.*—Jurisdiction ceases immediately upon the departure of the defender from Scotland before judicial proceedings are raised.[7] A contrary opinion was given in the Outer House by Lord Stormonth-Darling,[8] who decided that jurisdiction constituted by residence of forty days endured for forty days after the actual termination of residence, and this opinion was adopted by Lord Kincairney in the Outer House in a subsequent case;[9] but Lord President Robertson, when the latter judgment was reclaimed against, disapproved of the judgment of Lord Stormonth-Darling, and the law is now as first mentioned.

In a recent action[10] of damages for breach of a promise of marriage made in Scotland, the defender was a domiciled Scotsman, and left his parents' house in Scotland to go as a soldier to Shorncliffe. On the day of his arrival at the latter place a summons was served upon him at his father's house, and Lord Guthrie in the Outer House sustained the jurisdiction. There were two grounds of judgment—first, that the case fell within sec. 53 of the Judicature Act;[11] and second, that the defender was a domiciled Scotsman. It is to be noted that the foregoing section only applies to citation, which supposes jurisdiction

[1] Prescott *v.* Graham, 1883, 20 S. L. R. 573.

[2] Tasker *v.* Grieve, 1905, 8 F. 45. See also Corporation of Glasgow *v.* Johnston, 1915, S. C. 555, per Lord President Strathclyde.

[3] Erskine's Inst. i. 2. 16 (note 20).

[4] Paterson *v.* Fermour, 1672, Mor. 3724; Calder *v.* Wood, 19th January 1798, F. C.; Mor. 2250.

[5] Ritchie *v.* Fraser, 1852, 15 D. 205.

[6] Prescott *v.* Graham, 1883, 20 S. L. R. 573.

[7] Johnston *v.* Strachan, 1861, 23 D. 758, per Lord Kinloch, p. 762; Pickering *v.* Aitken, 1883, 20 S. L. R. 574; Corstorphine *v.* Kasten, 1898, 1 F. 287; Watt *v.* Watt and Another, 1902, 9 S. L. T. 400; Colley *v.* Cameron, 1902, 9 S. L. T. 462; Buchan *v.* Grimaldi, 1905, 7 F. 917; Bald *v.* Dawson, 1911, 2 S. L. T. 459.

[8] International Exhibition, 1890 *v.* Bapty, 1891, 18 R. 843, and authorities cited therein.

[9] Corstorphine *v.* Kasten, 1898, 1 F. 287.

[10] Walter *v.* Campbell, 1907, 15 S. L. T. 412.

[11] 6 Geo. IV. cap. 120.

constituted antecedently,[1] and in itself has nothing to do with the founding of jurisdiction.[2] It is to be further noted that neither domicile of origin,[3] nor a subsisting domicile of succession, in Scotland,[4] even when in the former case it is conjoined with personal citation,[5] can of itself found jurisdiction. The only ground upon which Lord Guthrie's decision can be supported seems to be a ground not founded upon, viz. domicile of origin combined with the *locus contractus* being in Scotland.[6]

(f) *Domicile of Wife.*—Although in cases involving status, where the domicile of succession regulates jurisdiction, the domicile of the wife follows the domicile of the husband, this is not so where jurisdiction is founded *ratione domicilii*. A husband may become subject to the jurisdiction of the Court of Session by reason of residence for forty days in Scotland, but this will not subject his wife, who has not so resided, to the same jurisdiction. "Her *forum* remains the *forum* of her husband's proper domicile."[7]

(g) *Minors.*—Minors may subject themselves to the jurisdiction of the Court of Session by residence in Scotland for forty days.[8]

(h) *Companies.*—Companies have a domicile wherever they carry on business.[9] If, therefore, a foreign company carries on business in Scotland by means of a branch office, it is subject to the jurisdiction of the Court of Session.[10] Where, however, such a company has no place of business of its own in Scotland, but merely indicates where people

[1] Johnston *v.* Strachan, 1861, 23 D. 758, per Lord Kinloch, pp. 764, 765.

[2] Joel *v.* Gill, 1859, 21 D. 929, per Lord President Inglis, p. 939. See also Sinclair *v.* Smith, 1860, 22 D. 1475; Tasker *v.* Grieve, 1905, 8 F. 45, per Lord Kyllachy, p. 49.

[3] Pedie *v.* Grant, 1825, 1 W. & S. 716; M'Bey *v.* Knight, 1879, 7 R. 255, per Lord Gifford, p. 258.

[4] Buchan *v.* Grimaldi, 1905, 7 F. 917; Tasker *v.* Grieve, 1905, 8 F. 45.

[5] Tasker *v.* Grieve, 1905, 8 F. 45, per Lord Justice-Clerk Macdonald, p. 51.

[6] Glasgow Corporation *v.* Johnston, 1915, S. C. 555, per Lord President Strathclyde.

[7] Lord Jeffrey in Ringer *v.* Churchill, 1840, 2 D. 307, at p. 320. See also Warrender *v.* Warrender, 1835, 2 S. & M'L. 154.

[8] Scoffier *v.* Read, 1783, Mor. 8936; Steel *v.* Lindsay, 1881, 9 R. 160; Mowbray *v.* Bruce, 1899, 15 Sh. Ct. Rep. 283.

[9] Reid and M'Call *v.* Douglas, 11th June 1814, F. C.; Aberdeen Rly. Co. *v.* Ferrier, 1854, 16 D. 422; Young *v.* Livingstone, 1860, 22 D. 983; Harris *v.* Gillespie, Cathcart, and Fraser, 1875, 2 R. 1003.

[10] St. Patrick Assurance Co. *v.* Brebner, 1829, 8 S. 51; Bishop *v.* Mersey and Clyde Navigation Steam Co., 1830, 8 S. 558; Fraser *v.* British Workmen's Insurance Co., 1898, 14 Sh. Ct. Rep. 148. See also Aberdeen Rly. Co. *v.* Ferrier, 1854, 16 D. 422; Jack *v.* North British Rly. Co., 1885, 12 R. 1029; Hughes *v.* J. & W. Stewart, 1907, S. C. 791; Hay's Trs. *v.* London and North-Western Rly. Co., 1909, S. C. 707.

may apply in Scotland if they desire to do business with the company,[1] or where the company merely employs canvassers and a superintendent without having a proper office in Scotland,[2] there is no jurisdiction.

(i) *Trade Union.*—A trade union registered in England and having its registered office there is subject to the jurisdiction of the Court of Session if a copy of its rules are recorded with the Registrar for Scotland in terms of sec. 6 of the Trade Union Act Amendment Act, 1876.[3]

(j) *Wrong Committed Abroad.*—Where a delict or *quasi*-delict is said to have been committed in a foreign country, and there is jurisdiction in the Court of Session against the defender in respect of the defender's residence in Scotland, or upon other grounds, the wrong must be one for which an action can be maintained both by the law of Scotland and by the law of the country in which it is said to have been done.[4]

(2) *Ratione Contractus;* or, on account of contract.—(a) *Requisites.*—Where the contract founded on has been made or has its place of performance within Scotland, the Court of Session has jurisdiction to deal with an action for specific performance or for damages in respect of failure to perform.[5] The defender must, however, be present in Scotland at the date of raising and executing the action,[6] and must be cited in regular and competent form.[7] This latter takes the form of personal service,[8] and the reason is thus explained by Lord President Inglis.[9] "The only reason why personal service is necessary, or indeed of any advantage, is, that in every such case as the present it is assumed that the defender had no dwelling-house at which service could be duly made without finding the defender personally, and consequently that service could not be duly made except personally; for if he had such a

[1] Laidlaw *v.* Provident Plate Glass Insurance Co., Ltd., 1890, 17 R. 544; Williams *v.* Royal College of Veterinary Surgeons, 1897, 5 S. L. T. 208.

[2] Roberts *v.* Provincial Homes Investment Co., 1907, S. C. (J.) 7.

[3] Mackendrick *v.* National Union of Dock Labourers, 1911, S. C. 83. See also M'Dowall *v.* M'Ghee, 1913, 2 S. L. T. 238.

[4] Goodman *v.* London and North-Western Rly. Co., 1877, 14 S. L. R. 449; Horn *v.* North British Rly. Co., 1878, 5 R. 1055; M'Larty *v.* Steele, 1881, 8 R. 435; Rosses *v.* H. H. Sir Bhagvat Singhee, 1891, 19 R. 31; Kendrick *v.* Burnett, 1897, 25 R. 82; Evans & Sons *v.* Stein & Co., 1904, 7 F. 65.

[5] Sinclair *v.* Smith, 1860, 22 D. 1475; Pirie & Sons *v.* Warden, 1867, 5 M. 497, per Lord Cowan, p. 500; Kermick *v.* Watson, 1871, 9 M. 984; Bar's International Law (Gillespie), p. 917; Guthrie's Savigny, 2nd ed. p. 197.

[6] Johnston *v.* Strachan, 1861, 23 D. 758.

[7] Sinclair *v.* Smith, *supra*, p. 1480; Kermick *v.* Watson, *supra*, p. 985; Bird *v.* Brown, 1887, 25 S. L. R. 1.

[8] Wylie *v.* Laye, 1834, 12 S. 927; A. B. *v.* C. D., 1888, 25 S. L. R. 736; Bald *v.* Dawson, 1911, 2 S. L. T. 459.

[9] Sinclair *v.* Smith, 1860, 22 D. 1475, at p. 1480.

dwelling-house, *i.e.* a place of residence for forty days previously, the present question would not arise, for he would be subject to the jurisdiction of the Courts of the country *ratione domicilii*, as was established in *Joel* v. *Gill*,[1] following and confirming many previous cases."

Where, however, the defender is a domiciled Scotsman and the *locus contractus* is in Scotland, it would appear from a recent case that there is jurisdiction.[2]

(b) *Actions Included.*—Actions of breach of promise of marriage where the contract has been made in Scotland;[3] actions of implement of contracts entered into in Scotland, such as antenuptial contracts;[4] and actions of declarator that contracts have been entered into in Scotland, such as actions of declarator of marriage,[5] fall under this head, as do also such of the actions referred to by Lord Mackenzie in *Ringer* v. *Churchill*[6] as do not fall under delict or *quasi*-delict.

(c) *Representatives of Defender.*—The representatives of a defender whose contract is founded upon have been held liable in the same manner as the contracting party himself. Thus,[7] where a person who impetrated a deed in Scotland died, and an action of reduction was brought against his representative, a domiciled Englishwoman, it was held that the contract of reparation which is implied in every delict or *quasi*-delict fell to be implemented in Scotland, and that his representative, who was personally cited in Scotland, was subject to the jurisdiction of the Court of Session.

(3) *Ratione Delicti;* or, on account of delict or *quasi*-delict.—Where a delict or *quasi*-delict is committed in Scotland, and an action of damages in respect thereof is personally served on the defender in Scotland, the Court of Session has jurisdiction[8] (see *Ratione Contractus, supra*, p. 38). It is not necessary that the delict or *quasi*-delict should be committed by the defender personally. It is sufficient that it has been done by someone for whom the defender is civilly responsible, but personal service upon the defender is

[1] 1859, 21 D. 929.

[2] Glasgow Corporation *v.* Johnston, 1915, S. C. 555.

[3] Sinclair *v.* Smith, 1860, 22 D. 1475; Bald *v.* Dawson, 1911, 2 S. L. T. 459.

[4] Hutchison *v.* Hutchison, 1912, 1 S. L. T. 219.

[5] Scruton *v.* Gray, 1772, Mor. 4822; Wylie *v.* Laye, 1834, 12 S. 927; Fraser, Husband and Wife, p. 1272 *et seq.* See also Longworth *v.* Yelverton, 1868, 7 M. 70.

[6] 1840, 2 D. 307.

[7] Kirkpatrick *v.* Irvine, 1838, 16 S. 1200, per Lords Mackenzie and Corehouse.

[8] Johnston *v.* Strachan, 1861, 23 D. 758, per Lord Justice-Clerk Inglis, p. 769; Kermick *v.* Watson, 1871, 9 M. 984. See also Smith *v.* Rosenbloom, 1915, 2 S. L. T. 18.

necessary.[1] In a recent case, however, where the defender was born in Scotland, and at the date of the summons had not lost his domicile of origin or acquired a domicile elsewhere, but was abroad and had no heritable property in Scotland, the Court held that the fact of the domicile of origin, combined with a delict committed in Scotland, was sufficient to give the Court jurisdiction.[2]

The representatives of a deceased person who are sued in respect of the latter's delict or *quasi*-delict are subject to jurisdiction in the same manner as their author would be, if alive.[3]

Where one domiciled Scotsman slandered another domiciled Scotsman in Penang, it was held that the case should be tried as if the slander was uttered in Scotland.[4]

It has been held, with regard to a slanderous statement contained in a telegram despatched from London and delivered in Glasgow, that the wrong was completed by delivery of the telegram in Glasgow, and that the pursuer's right of action fell to be determined by the law of Scotland.[5] The mere publication in Scotland of a foreign newspaper containing libels, however, does not found jurisdiction against the newspaper in the matter of the libels.[6]

(4) *Mere Presence of the Defender in Scotland.*—This method of founding jurisdiction is only permissible in cases of itinerant defenders who have no fixed place of residence anywhere. Such persons are subject to the jurisdiction of the Court of Session, irrespective of the place where the cause of action arose, although they have not resided in Scotland for forty days, provided that they have been personally cited in Scotland.[7]

(5) *Possession of Heritage in Scotland by the Defender.*—(a) *In what Actions Effective.*—While it has always been the law that the possession of heritable estate in Scotland by a defender subjected him to the jurisdiction of the Court of Session in actions regarding the heritage itself,[8] it was only in 1831[9] that a judgment of the whole Court definitely

[1] Parnell *v.* Walter, 1889, 16 R. 917.

[2] Corporation of Glasgow *v.* Johnston, 1915, S. C. 555.

[3] Kirkpatrick *v.* Irvine, 1838, 16 S. 1200.

[4] M'Larty *v.* Steele, 1881, 8 R. 435 ; *cp.* Goodman *v.* London and North-Western Rly. Co., 1877, 14 S. L. R. 449.

[5] Thomson *v.* Kindell, 1910, 2 S. L. T. 442. See also Evans *v.* Stein & Co., 1904, 7 F. 65.

[6] Parnell *v.* Walter, 1889, 16 R. 917.

[7] Erskine's Inst. i. 2. 16 ; Lees *v.* Parlan, 12th November 1709, Mor. 4791 ; M'Niven *v.* M'Kinnon, 1834, 12 S. 453 ; Linn *v.* Casadinos, 1881, 8 R. 849.

[8] Kames, Law Tracts, i. 365 ; Erskine's Inst. i. 2. 18.

[9] Ferrie and Fairley *v.* Woodward, 1831, 9 S. 854. See also Hepburn *v.* Monteith, 1627, Mor. 4814 ; Haldane *v.* York Building Co., 1724, Mor. 4818.

settled that the possessor of heritable property in Scotland was subject to the jurisdiction of the Court of Session in all ordinary petitory actions. This doctrine has been acted upon ever since.[1]

(b) *Conditions Necessary or Sufficient.*—The value of the heritable property is immaterial. It is sufficient that there is heritable property belonging to the defender of any value, however small, within the territory which admits of being made available to the pursuer through the means of a judgment of the Court.[2] The heritable property must be held by the defender in the same capacity as that in which he is sued.[3] It is not necessary that the defender should be infeft; real ownership is always the question to be solved. "A personal right under a disposition,[4] a mere title of apparency without any possession,[5] a beneficial interest in lands held in trust,[6] and a lease of heritable subjects,[7] have been held sufficient to give jurisdiction. That being so, I see no reason why, if an Englishman has actually bought an estate in Scotland, there should not be jurisdiction, although he has not yet obtained the feudal title which it is his right to demand."[8] In one case,[9] where an Englishman sold his heritable property in Scotland and delivered the conveyance to the purchaser two days before the summons was served, he was held not to be subject to the jurisdiction of the Court of Session, though the purchaser was not infeft. An opinion has been expressed that this would still be the case where the possessor of heritage disposed of it in order to escape jurisdiction, but that it would not be so if the conveyance was merely a simulate one.[10] In another case,[11] where an American

[1] M'Arthur *v.* M'Arthur, 1842, 4 D. 354; Fraser *v.* Fraser and Hibbert, 1870, 8 M. 400; M'Bey *v.* Knight, 1879, 7 R. 255, per Lords Ormidale and Gifford; Hastie *v.* Steel, 1886, 13 R. 843, per Lord Young, p. 849; Ashburton *v.* Escombe, 1892, 20 R. 187, per Lord Kinnear, p. 195; Smith *v.* Stuart, 1894, 22 R. 130.

[2] M'Arthur *v.* M'Arthur, 1842, 4 D. 354, per Lord Fullerton, p. 362; Bowman *v.* Wright, 1877, 4 R. 322, per Lord Ormidale, p. 325; Smith *v.* Stuart, 1894, 22 R. 130, per Lord Kinnear, p. 134.

[3] Ferrie and Fairley *v.* Woodward, 1831, 9 S. 854; Charles *v.* Charles' Trs., 1868, 6 M. 772; Mackenzie *v.* Drummond's Exrs., 1868, 6 M. 932; Kennedy *v.* Kennedy, 1884, 12 R. 275; Hastie *v.* Steel, 1886, 13 R. 843; Robertson's Tr. *v.* Nicholson, 1888, 15 R. 914; Heritable Reversionary Co. *v.* Millar, 1892, 19 R. (H. L.) 43 Ashburton *v.* Escombe, 1892, 20 R. 187.

[4] Fraser *v.* Fraser and Hibbert, 1870, 8 M. 400.

[5] M'Arthur *v.* M'Arthur, 1842, 4 D. 354; Fraser *v.* Fraser and Hibbert, 1870, 8 M 400, per Lord Kinloch, p. 407.

[6] Smith *v.* Stuart, 1894, 22 R. 130.

[7] Fraser *v.* Fraser and Hibbert, 1870, 8 M. 400.

[8] Lord Low (Ordinary) in Thorburn *v.* Dempster, 1900, 2 F. 583.

[9] Bowman *v.* Wright, 1877, 4 R. 322. See also Hastie *v.* Steel, 1886, 13 R. 843.

[10] Lord Stormonth-Darling in Buchan *v.* Grimaldi, 1905, 7 F. 917, at p. 923. See also Shaw *v.* Dow and Dobie, 1869, 7 M. 449.

[11] Dowie & Co. *v.* Tennant, 1891, 18 R. 986.

sold his Scottish heritable property by means of improbative missives, and the conveyance, which was despatched from America, did not reach the purchaser until after the service of the summons, the plea of no jurisdiction was rejected in an action against the American brought in the Court of Session for a personal debt.

(c) *Beneficiaries.*—Jurisdiction against beneficiaries under a trust settlement differs according to the terms of the trust deed. If the beneficiary has a right to the conveyance of heritable subjects, it is thought that the beneficiary, as possessor of heritage, is subject to jurisdiction as such.[1] Where, however, the direction to the trustees is to sell the heritable estate and distribute the proceeds among the beneficiaries, such beneficiaries would not be subject to jurisdiction in respect of the legacy so obtained.[2]

(d) *Liferenter or Heir of Entail.*—The possession of heritage by a liferenter or an heir of entail, though his possession may be temporary and uncertain, is quite sufficient to found jurisdiction in respect of such possession.[3]

(e) *Miscellaneous.*—It has not yet been definitely decided whether the holder of a security over heritage is subject, as such, to jurisdiction in personal actions.[4]

The owner of a defeasible mid-superiority has been held, as such, to be subject to the jurisdiction of the Court of Session.[5]

The mere fact, however, that a defender has a claim on a trust estate, part of which consists of heritage in Scotland in the name of trustees of which the defender is not one, will not found jurisdiction against him.[6]

(6) *Arrestment ad Fundandam Jurisdictionem or Jurisdictionis Fundandæ Causa*—the arrestment in the hands of a third party of moveables in Scotland belonging to a defender.—(a) *Its Origin and Effect.* — This ground of jurisdiction is plainly in opposition to the general doctrine of Roman law and modern jurisprudence. It is a rule of Scots law, however, which from a comparatively early period has been constantly recognised,[7] and was borrowed from

[1] Duncan and Dykes, Principles of Civil Jurisdiction, p. 65.

[2] Bell *v.* Stewart, 1852, 14 D. 837.

[3] Fraser *v.* Fraser and Hibbert, 1870, 8 M. 400, per Lord Kinloch, p. 407.

[4] Ashburton *v.* Escombe, 1892, 20 R. 187 ; Love *v.* Love, 1907, S. C. 728.

[5] Kirkpatrick *v.* Irvine, 1838, 16 S. 1200, per Lord Corehouse, pp. 1202, 1203.

[6] Gemmell *v.* Emery and Others, 1905, 13 S. L. T. 490.

[7] Erskine's Inst. i. 2. 19 ; Ford, 1758, Mor. 4835 ; Scruton *v.* Gray, 1772, Mor. 4822 ; Grant *v.* Pedie, 1825, 1 W. & S. 716, at p. 720 ; Douglas *v.* Jones, 1831, 9 S. 856 ; Cameron *v.* Chapman, 1838, 16 S. 907 ; Parker *v.* The Royal Exchange Assurance Co., 1846, 8 D. 365.

the law of Holland, where it had been introduced from views of expediency and for the encouragement of commerce.[1] It has since been extended to all personal actions.[2] It must, however, be strictly interpreted, and several Judges have expressed their opinion that it must not be carried further than is expressly warranted by authority and precedent.[3] It does not apply to actions involving *status*,[4] or with merely declaratory or rescissory conclusions.[5] It applies, however, to an action for delivery of goods or alternatively for damages.[6]

(b) *Procedure to Obtain Warrant.*—The warrant for arrestment *ad fundandam jurisdictionem* is either signet letters on a *fiat* from the Bill Chamber, or a precept from the Sheriff Court. To obtain letters of arrestment application is made in the Bill Chamber by bill. No productions are necessary, and the bill, which concludes with the name of a Writer to the Signet, need not be signed by the latter. On presentation of the bill in the Bill Chamber the clerk writes the deliverance "*Fiat ut petitur*" on the bill. The bill and the letters of arrestment, which latter document bears the date of the *fiat* and is prepared by the agent and signed by a Writer to the Signet, are then presented at the Signet Office, where the letters are signeted and the bill retained. In the Sheriff Court the procedure is by initial writ praying the Court to grant warrant for arrestment *ad fundandam jurisdictionem*, and the deliverance on this writ is the warrant for arrestment. The letters are executed as in an ordinary arrestment for debt. The warrant must be regular, and the parties properly named and designed. An error which invalidates the diligence as to one of several defenders does not, however, render it ineffectual as regards

[1] Cameron *v.* Chapman, 1838, 16 S. 907.

[2] London and North-Western Rly. Co. *v.* Lindsay, 1858, 3 Macq. 99; Longworth *v.* Hope, 1865, 3 M. 1049; Parnell *v.* Walter, 1889, 16 R. 917; Powell *v.* Mackenzie & Co., 1900, 8 S. L. T. 182; Finlay *v.* Finlay, 1885, 23 S. L. R. 583; Leggat Bros. *v.* Gray, 1908, S. C. 67.

[3] Cameron *v.* Chapman, 1838, 16 S. 907, at p. 918; Trowsdale's Tr. *v.* Forcett Rly. Co., 1870, 9 M. 88; Baines and Tait *v.* Campagnie Générale des Mines d'Asphalte, 1879, 6 R. 846, at p. 850; Millar and Lang *v.* Polak, 1907, 14 S. L. T. 788.

[4] Scruton *v.* Gray, 1772, Mor. 4822; Brackenridge *v.* Kenneth, 1834, 12 S. 654; Clements *v.* Macaulay, 1866, 4 M. 583, at pp. 593, 594; Morley *v.* Jackson, 1888, 16 R. 78.

[5] London and North-Western Rly. Co. *v.* Lindsay, 1858, 3 Macq. 99; Longworth *v.* Hope, 1865, 3 M. 1049, per Lord President M'Neill, p. 1053; Jones *v.* Samuel, 1862, 24 D. 319, per Lord Justice-Clerk Inglis and Lord Mackenzie, p. 322; Shaw *v.* Dow and Dobie, 1869, 7 M. 449; Trowsdale's Tr. *v.* Forcett Rly. Co., 1870, 9 M. 88; Williams *v.* The Royal College of Veterinary Surgeons, 1897, 5 S. L. T. 208; Hope *v.* Derwent Rolling Mills Co., Ltd., 1905, 7 F. 837, per Lord President Dunedin.

[6] Union Electric Co., Ltd. *v.* Holman & Co., 1913, S. C. 954.

the rest.[1] Nor does it invalidate letters of arrestment that the year of the King's reign contains an unauthorised alteration, the date according to the year of grace being correct.[2]

(c) *Date when Validity is Tested.* — It is not necessary that arrestments should be laid on before the summons is signeted;[3] it is sufficient if they are executed previous to the commencement of the action, which has been held to be the date of the service of the summons.[4]

(d) *Possession of Moveables Arrested.*—An arrestment is incompetent if the defender has not parted with possession of the subject arrested.[5] The question of possession is sometimes a very fine one. Thus, where *A.* owed money to *B.*, and *A.'s* law agents handed to *B.'s* law agents a cheque drawn by *A.* upon a branch of the Bank of Scotland in Glasgow, *B.'s* law agents handed the cheque to their bankers in Paisley, who in turn sent it to the headquarters in Glasgow for collection. As soon as the cheque was presented and honoured, but before intimation of its acceptance was made to the payee's bank or the payee, *A.'s* agents caused all sums due by *B.'s* agents to *B.* to be arrested. The Court held that the arrestment validly attached the proceeds of the cheque.[6] Again, where a person rejected goods as disconform to contract and refused to pay for the same, and the goods were in transit back to the sellers by an arrangement with the latter, the goods were held to be arrestable to found jurisdiction against the sellers.[7]

(e) *Value of Moveables Arrested.* — The value of the moveables arrested is of no moment so long as it is not illusory.[8] The sum of 9s. 3d. has been held not to be illusory,[9] and the arrestment of a door-plate has been held sufficient to found jurisdiction.[10] Where, however, the subjects arrested are *extra commercium*, as plans of no

[1] Gibson *v.* Smith, 1849, 11 D. 1024.

[2] Baird *v.* Baird, 1910, 1 S. L. T. 95.

[3] Walls' Trs. *v.* Drynan, 1888, 15 R. 359; Stewart *v.* North, 1890, 17 R. (H. L.) 60, per Lord Watson.

[4] Alston *v.* Macdougall, 1887, 15 R. 78; Stewart *v.* North, 1890, 17 R. (H. L.) 60, per Lord Watson. See also Dickson, De Wolf & Co. *v.* Wilkin, 1859, 31 Jur. 595.

[5] Hutchison *v.* Hutchison, 1912, 1 S. L. T. 219.

[6] Pollock, Whyte, and Waddell *v.* The Old Park Forge, Ltd, 1907, 15 S. L. T. 3.

[7] Braby & Co., Ltd. *v.* Danks & Co. (Oldbury), Ltd., 1907, 15 S. L. T. 161; *cp.* Moore and Weinberg *v.* Ernsthausen, Ltd., 1915, 1 S. L. T. 70.

[8] London and North-Western Rly. Co. *v.* Lindsay, 1855, 18 D. 62, per Lord Deas, p. 69; Lord Chancellor Cranworth, 3 Macq. 99, at pp. 106, 107; Shaw *v.* Dow and Dobie, 1869, 7 M. 449; Ross *v.* Ross, 1878, 5 R. 1013.

[9] Ross *v.* Ross, 1878, 5 R. 1013.

[10] Dalrymple's Trs. *v.* Lancashire Trust and Mortgage Insurance Corporation, 1894, 2 S. L. T. 79.

value, family letters, certificates of character, testimonials, books of samples, etc., jurisdiction will not be founded.[1]

(f) *Nature of Moveables Arrested.*—Generally speaking, the arrestment of an alimentary fund will not found jurisdiction.[2] An alimentary fund, however, may be arrested to found jurisdiction so far as not required for the maintenance of the person entitled thereto.[3] It may also be arrested by an alimentary debtor.[4] The arrestment of an interest in a will, which may be, and is not, restricted to an alimentary liferent, is good.[5] Where a person was entitled under a settlement to the liferent of an estate in Scotland, and he executed a trust deed conveying the same for behoof of himself and his wife to a trustee, an arrestment in the hands of the trustee of the original deed of settlement was held good to found jurisdiction.[6]

A defeasible[7] or a contingent[8] debt can be arrested to found jurisdiction, and the fact that the debt arrested is subject to the triennial prescription will not prevent jurisdiction being founded.[9]

The arrestment of shares in a limited company registered in Scotland is good to found jurisdiction.[10]

Where there is a present liability of the arrestee to account to the common debtor at the date of arrestment, jurisdiction will be sustained.[11] If there has been a proof and the result is, at the date of arrestment, that the arrestee was neither indebted to the common debtor, nor bound to account to him, or that there had been a previous assignation of the debt, or that there had been no assets in

[1] Trowsdale's Tr. *v.* Forcett Rly. Co., 1870, 9 M. 88; Millar and Lang *v.* Polak, 1907, 14 S. L. T. 788; Millar and Lang *v.* Poole, 1907, 15 S. L. T. 76; Hurst, Nelson & Co. *v.* Spenser Whatley, Ltd., 1912, 1 S. L. T. 391.

[2] Trowsdale's Tr. *v.* Forcett Rly. Co., 1870, 9 M. 88, per Lord Justice-Clerk Moncreiff, p. 92.

[3] Kidstons, Watson, Turnbull & Co. *v.* M'Farlane's Trs., 1905, 12 S. L. T. 722; Thomson *v.* Thomson, 1905, 42 S. L. R. 711.

[4] Earl of Buchan *v.* His Creditors, 1835, 13 S. 1112; Baird *v.* Baird, 1910, 1 S. L. T. 95.

[5] Baird *v.* Baird, 1910, 1 S. L. T. 95.

[6] Rigby *v.* Fletcher, 1833, 11 S. 256.

[7] North *v.* Stewart, 1890, 17 R. (H. L.) 60.

[8] MacLaren *v.* Preston, 1893, 1 S. L. T. 75; Erskine's Inst. iii. 6. 6.

[9] Shaw *v.* Dow and Dobie, 1869, 7 M. 449.

[10] American Mortgage Company of Scotland, Ltd. *v.* Sidway, 1908, S. C. 500.

[11] Douglas *v.* Jones, 1831, 9 S. 856; Lindsay *v.* London and North-Western Rly. Co., 1860, 22 D. 571, per Lord Curriehill, pp. 593, 594; Baines and Tait *v.* Compagnie Générale des Mines d'Asphalte, 1879, 6 R. 846; Napier, Shanks and Bell *v.* Halvorsen, 1892, 19 R. 412; Jacobo *v.* Scott, 1895, 2 S. L. T. 455; Riley *v.* Ellis, 1910, S. C. 934, per Lord President Dunedin, p. 941; Shankland & Co. *v.* M'Gildowny, 1912, 1 S. L. T. 410.

the hands of the arrestee, the plea of no jurisdiction will be sustained.[1]

Generally speaking, those subjects which can be arrested in security or in execution can be arrested to found jurisdiction.[2]

(g) *Defender must be Owner.*—The defender must, as a general rule, be owner of the property arrested. Thus, arrestment of debts due to a firm will not found jurisdiction against an individual partner,[3] but only against the firm.[4] Arrestments, however, in the hands of a debtor of a partner will hold good in an action directed against the firm of which he is a partner.[5] Arrestments in the hands of a person who is due money to a firm, of all moneys due to an individual who is sole partner of said firm, are effectual.[6] Arrestments in the hands of a firm of which a foreigner is a partner are good to found jurisdiction against the foreign partner as an individual, even though the latter offers to prove that he has no claim on the funds of the firm.[7] Arrestment in the hands of a partner of a firm which, as a firm, was owing money to the defenders, was held not to be effectual.[8] An arrestment is good against a foreign mercantile company trading under a proper firm name.[9] An arrestment of a fund in Scotland specially set aside by a foreign testator to his foreign executors in order to pay specific legacies in Scotland was held good to found jurisdiction in an action by the *legatees* against the executors, although the latter were not confirmed;[10] but where funds were arrested in the hands of debtors of a deceased person to found jurisdiction in an action by creditors against the executors of the deceased, who had lodged claims in a sequestration and sisted themselves as parties to actions in Scotland, but who were not confirmed, the arrestments were held to be inept.[11]

Where a pursuer failed to prove that the defenders were owners of sacks purchased by pursuer, but not being conform to contract deposited

[1] Wyper *v.* Carr & Co., 1877, 4 R. 444; Graeme's Tr. *v.* Giersburg, 1888, 15 R. 691; M'Guire *v.* Smith, 1889, 27 S. L. R. 14; Young *v.* Aktiebolaget Ofverums Bruk, 1890, 18 R. 163; Whittall *v.* Christie, 1894, 22 R. 91; Heron *v.* Winfields, Ltd., 1894, 22 R. 182; Union Bank of Scotland *v.* Donnington's Tr., 1901, 8 S. L. T. 404; Jackson *v.* Elphick, 1902, 10 S. L. T. 146.

[2] Graham Stewart, Law of Diligence, p. 254.

[3] Parnell *v.* Walter, 1889, 16 R. 917.

[4] Macbeth *v.* Proprietors and Publishers of the "Standard," 1897, 5 S. L. T. 194.

[5] Galloway *v.* Liddell and Reid, 3rd February 1815, F. C.; Ewing *v.* M'Clelland, 1860, 22 D. 1347.

[6] Caw, Prentice, Clapperton & Co. *v.* Creighton & Co., 1898, 25 R. 518.

[7] Douglas *v.* Jones, 1831, 9 S. 856.

[8] Hay *v.* Dufourcet & Co., 1880, 7 R. 972.

[9] Forsyth *v.* Hare & Co., 1834, 13 S. 42.

[10] Innerarity & Co. *v.* Gilmore, 1840, 2 D. 813.

[11] Houston *v.* Stirling, 1824, 2 S. 672 (N. E. 564); 1 W. & S. 199.

with third parties under arrangement between pursuer and defender, it was held there was no jurisdiction.[1]

Where an arrestment was made of funds in a trust belonging to a beneficiary who had previously transferred his right to marriage-contract trustees and intimated the same, it was held not to have arrested any funds of the common debtor.[2]

If the property arrested is not admitted to be the property of the defender there must be a proof.[3]

(h) *Ownership in same Capacity as Sued.*—The defender must be owner of the subjects arrested in the same capacity as that in which he is sued.[4] Where, however, a sole executrix was defender, arrestment of her private funds in the hands of a third party was held to be good.[5]

In making arrestments in the hands of trustees, care should be taken that they are laid on in the hands of the whole trustees, or at least of a quorum,[6] and that the trust debt is sufficiently described.[7]

(i) *Evidence of Ownership by Entry in Register.*—The certificate of registration in a register, whether of stock or ships, is *primâ facie* evidence of ownership.[8] It is, however, not conclusive, and if an arresting creditor can prove that the stock or ship belongs to the defender when arrested, the arrestment is good, notwithstanding the entry in the register.[9]

(j) *In whose Hands Effective.*—Arrestments laid on in the hands of an agent of a bank have been held effectual to arrest money on deposit-receipt where the receipt was issued by said agent and the arrestments were not intimated to the head office.[10] An arrestment in the hands of an agent in Scotland of an insurance company, with its head office in England, of a sum which had become due to the common debtor in respect of a fire in Ireland, was held to be inept.[11] An arrestment in the hands of a bank in Scotland, where parties, to whom shares were allocated

[1] Moore and Weinberg *v.* Ernsthausen, Ltd., 1915, 1 S. L. T. 70.

[2] Blair's Exrs. *v.* Mitchell, 1915, 2 S. L. T. 97.

[3] Smith *v.* Rosenbloom, 1915, 2 S. L. T. 18.

[4] M'Morine *v.* Cowie, 1845, 7 D. 270; Mackenzie *v.* Drummond's Exrs., 1868, 6 M. 932; Gibb *v.* Lee, 1908, 45 S. L. R. 833.

[5] Macadam *v.* Macadam, 1873, 11 M. 860.

[6] Black *v.* Scott, 1830, 8 S. 367.

[7] Gracie *v.* Gracie, 1910, S. C. 899.

[8] Duffus and Lawson *v.* Mackay, 1857, 19 D. 430; Lindsay *v.* London and North-Western Rly. Co., 1860, 22 D. 571; 3 Macq. 99; Grant *v.* Grant, 1867, 6 M. 155.

[9] Bell *v.* Gow, 1862, 1 M. 183.

[10] Allan's Exr. *v.* Union Bank of Scotland, 1908, 15 S. L. T. 686, per Lord Mackenzie (Ordinary), and acquiesced in on this point, 1909, S. C. 206.

[11] Ewing & Co. *v.* M'Lelland, 1860, 33 Jur. 1.

in a newly formed railway company, had paid their deposits, was held good in an action by creditors of the company against the company and the provisional committee, the members of which were domiciled in England.[1] An arrestment in the hands of a bank in Scotland of money received on the instructions of a London bank, who were asked to collect it by a customer, has been held not to found jurisdiction against the customer.[2]

(k) *Arrestment in Hands of Clerk of Court.*—Arrestment in the hands of a clerk of Court of a consigned sum is good,[3] but only where the right to the consigned sum is in the common debtor alone.[4]

(l) *Arrestment of Subject of Action.*—Where the action is for the purpose of deciding that a certain subject is not the property of the defender, an arrestment of the subject of the action in the hands of a third party will not found jurisdiction.[5]

(m) *Arrestment by Trick.*—Subjects arrested by means of a trick or *in mala fide* are held not to found jurisdiction.[6] There is no personal bar in purchasers arresting money paid by them to third parties for behoof of the sellers.[7]

(n) *Arrestment not Universal.*—The jurisdiction thus founded exists only for the particular action in respect of which the arrestment is used,[8] which must be of a personal nature or *ad factum præstandum.*[9] Of course an action may be competently amended and yet remain the same action.[10]

(o) *Extent of Nexus.*—According to the view now accepted, an arrestment is spent and the *nexus* removed as soon as the summons

[1] Gray and Illidge *v.* Polhill, 1847, 9 D. 1146.

[2] J. & C. Murray *v.* Wallace, Marrs & Co., 1914, S. C. 114.

[3] Pollock *v.* Scott, 1844, 6 D. 1297 ; More's Notes on Stair, cclxxxvi.

[4] Shankland & Co. *v.* M'Gildowny, 1912, S. C. 857.

[5] Grant *v.* Grant, 1867, 6 M. 155 ; Hope's Tr. *v.* Hope, 1904, 11 S. L. T. 625.

[6] Rintoul & Co. *v.* Bannatyne, 1862, 1 M. 137 ; Pollock, Whyte and Waddell *v.* The Old Park Forge, Ltd., 1907, 15 S. L. T. 3 ; Millar and Lang *v.* Poole, 1907, 15 S. L. T. 76 ; Frederick Braby & Co., Ltd. *v.* Edwin Danks & Co. (Oldbury), Ltd., 1907, 15 S. L. T. 161 ; J. & C. Murray *v.* Wallace, Marrs & Co., 1913, 1 S. L. T. 291. See also M'Gregor *v.* Macandrew, 1828, 7 S. 59 ; Trowsdale's Tr. *v.* Forcett Rly. Co., 1870, 9 M. 88.

[7] J. & C. Murray *v.* Wallace, Marrs & Co., 1914, S. C. 114.

[8] Goodwin and Hogarth *v.* Purfield, 1871, 10 M. 214 ; Andersen *v.* Harboe, 1871, 10 M. 217.

[9] Powell *v.* Mackenzie & Co., 1900, 8 S. L. T. 182. See *supra* (a).

[10] Hope *v.* Derwent Rolling Mills Co., Ltd., 1905, 7 F. 837, per Lord President Dunedin, p. 845 ; *cp.* Andersen *v.* Harboe, 1871, 10 M. 217 ; Morley *v.* Jackson, 1888, 16 R. 78.

is served on the defender.[1] In a comparatively recent case[2] it would appear as if the Judges were of opinion that arrestment *ad fundandam jurisdictionem* simply implied an intimation to the defender that some moveable subject owned by him was subject to the jurisdiction of the Court, and that an action was about to be raised against him in respect of its presence within the territory. It is to be observed, however, that the opinions so delivered were in consequence of an admission by counsel that there was no *nexus*, a fact which entirely discounts the value of the decision.

(p) *Representatives of Defenders.*—It has been settled that jurisdiction founded by arrestment of moveables against a defender will not be effectual against his representatives on his death *pendente processu*.[3] This also applies to jurisdiction founded on any other ground except in the case of a deceased trustee in a Scottish trust.[4] It has not, however, been settled whether the representatives of a pursuer who has died after making such arrestments can carry on an action commenced by their author. Mr. Graham Stewart[5] is of opinion that they can do so in respect that the representatives simply sue in place of the original pursuer in the identical action in which he has founded jurisdiction, and Mr. Stewart is inclined to extend the doctrine to a pursuer's assignee. It must, however, be observed that arrestments used by a limited company to found jurisdiction have been held to be inept in a case[6] where a liquidator has been sisted in place of the company.

(q) *Delay in Service of Summons.*—A delay in the service of the summons after arrestments have been used *ad fundandam jurisdic-*

[1] Lindsay *v.* London and North-Western Rly. Co., 1860, 22 D. 571, per Lord Ivory, p. 592; Longworth *v.* Hope, 1865, 3 M. 1049, per Lord Curriehill, p. 1055; Carlberg *v.* Borjesson, 1877, 5 R. 188 and 390; 5 R. (H. L.) 215, 217; Malone and M'Gibbon *v.* Caledonian Rly. Co., 1884, 11 R. 853; North *v.* Stewart, 1890, 17 R. (H. L.) 60; Hope *v.* Derwent Rolling Mills Co., Ltd., 1905, 7 F. 837, per Lord President Dunedin, p. 845; Leggat Bros. *v.* Gray, 1908, S.C. 67, per Lord President Dunedin, p. 71. For earlier authorities see Erskine's Inst. i. 2. 19; Young *v.* Arnold, 1683, Mor. 4833; Chalmer *v.* Gore, 1751, Mor. 2042; Rowand *v.* Freeman & Co., 1755, Mor. 2043; Herries *v.* Lidderdales, 1755, Mor. 2044; Ray *v.* Bellamy, 1763, Mor. 2051; Anderson, Child and Child *v.* Pott and M'Millan, 1829, 7 S. 499. These cases express divergent views.

[2] Craig *v.* Brunsgaard, Kjosterud & Co., 1896, 23 R. 500.

[3] M'Lachlan *v.* Rob, 1831, 9 S. 588, per Lord Gillies, p. 593; Cameron *v.* Chapman, 1838, 16 S. 907; Crockart *v.* Dundee and Arbroath Rly. Co., 1852, 15 D. 202, per Lord President M'Neill, p. 203; Mackenzie *v.* Drummond's Exrs., 1868, 6 M. 932, per Lord President Inglis, p. 935; Rintoul *v.* Garroway, 1898, 5 S. L. T. 306.

[4] Rintoul *v.* Garroway, 1898, 5 S. L. T. 306.

[5] Law of Diligence, pp. 265-7.

[6] Liquidator of the American Mortgage Co. of Scotland *v.* Sidway, 1907, 14 S. L. T. 924.

tionem of two[1] or three[2] months has been held not to be unreasonable delay, and in an early case[3] two years elapsed between the arrestment and service of the summons without objection. This latter interval seems to be rather long, especially if there is no good explanation of the delay. A specious suggestion was made by Lord Kincairney[4] that six months should be the limit in respect that an arrestment may be loosed on caution *judicio sisti*, and that by the ordinary form of such a bond of caution the obligation of the cautioner is limited to six months. The Court, however, has never been called upon to fix a limit, and the test which the Court is likely to impose will be whether the pursuer has in the circumstances followed up his arrestments within a reasonable time.[5]

(r) *Multiplepoindings.*—Arrestments *ad fundandam jurisdictionem* are not necessary in multiplepoindings.[6] A foreigner may, therefore, be cited as a claimant without jurisdiction being founded against him. This jurisdiction is not personal, but is a jurisdiction *in rem*, being in respect of the fund *in medio*, which is *in manibus curiæ*. The jurisdiction thus created against a foreign claimant does not give a creditor of the latter the right to sue him in another action in Scotland; the jurisdiction applies only to the particular multiplepoinding.[7]

(s) *Arrestment in Execution of Decree.*—Execution upon a decree obtained when the debtor was a domiciled Scotsman may proceed after the latter has lost his Scottish domicile without the necessity of an arrestment *ad fundandam jurisdictionem;* and if there has been a valid arrestment of subjects upon a decree, no further arrestment *ad fundandam jurisdictionem* is necessary to found an action of furthcoming where the common debtor has since lost his Scottish domicile.[8] It is not necessary that there should be arrestments *ad fundandam jurisdictionem* to entitle a creditor who holds a judgment of the High Court of Justice in England to register the same in Scotland under sec. 2 of

[1] Jacobo *v.* Scott, 1895, 2 S. L. T. 455.

[2] Craig *v.* Brunsgaard, Kjosterud & Co., 1896, 23 R. 500.

[3] White *v.* Spottiswood, 1846, 8 D. 952, referred to in Craig, *supra*, at p. 502, in the argument for the pursuer.

[4] Craig *v.* Brunsgaard, Kjosterud & Co., 1896, 23 R. 500, at p. 502.

[5] Lord M'Laren in Craig, *supra*, at p. 503.

[6] Mansfield, Ramsay & Co., etc. *v.* Smith, Wright, and Gray, 1795, Mor. 2594; Cameron *v.* Chapman, 1838, 16 S. 907; Miller *v.* Ure, 1838, 16 S. 1204; Crockart *v.* Dundee and Arbroath Rly. Co., 1852, 15 D. 202.

[7] Smyth *v.* Ninian, 1826, 5 S. 8 (N. E. 7); Mansfield, Ramsay & Co., etc. *v.* Smith, Wright, and Gray, 1795, Mor. 2594; Bell *v.* Stewart, 1852, 14 D. 837. The statement by Lord Curriehill in Thompson *v.* Whitehead, 1862, 24 D. 331, at p. 354, as to the import of the case of Mansfield, Ramsay & Co., *supra*, is incorrect.

[8] Burns *v.* Monro, 1844, 6 D. 1352.

the Judgments Extension Act, 1868, to do diligence thereon;[1] and an arrestment having been used upon an extract registered certificate of the Court of Queen's Bench, it was held that the common debtor, who was a domiciled Englishman, could be validly cited in an action of furthcoming without the use of arrestments *ad fundandam jurisdictionem*.[2]

(t) *Arrestment of Ship.*—A foreigner may be made subject to the jurisdiction of the Court of Session by the arrestment of a ship lying in territorial waters of which he is the owner. "The arrestment of a vessel differs from ordinary arrestment in being a real diligence directed against the vessel itself, and, unlike the personal diligence of arrestment, directed against a custodier or debtor in a sum of money. Its effect, as the term 'arrest' itself implies, is to fix the vessel in the place in which she is found, and if there is any danger of her being removed from that place, the power to dismantle may be exercised."[3] The method by which the arrestment is effected is by affixing the schedule to the main or only mast, and chalking above it the Royal initials—G. R.[4] The arrestment must be effected when the vessel is in a harbour or anchored in a roadstead,[5] and not when she has commenced her voyage.[6] A vessel may, however, be arrested on the stocks whilst she is being built, in which case the schedule is affixed to the sternpost.[7] If a vessel has been validly arrested *ad fundandam jurisdictionem*, and the captain has thereafter set sail, a creditor desiring to execute arrestments on the dependence has no right to capture the vessel forcibly and bring her back and execute such arrestments, but must limit his remedy to an application to the Court if the vessel is still within territorial waters for a warrant to take possession.[8] Where the master of a ship broke an arrestment on the dependence and took the ship out of territorial waters, the defender was only permitted to insist upon his defence on finding caution or consignation.[9] As it is of no

[1] English's Coasting and Shipping Co., Ltd. *v.* British Finance Co., Ltd., 1886, 14 R. 220.

[2] Valentine *v.* Grangemouth Coal Co., 1897, 35 S. L. R. 12.

[3] Lord Shand in Carlberg, etc. *v.* Borjesson, etc., 1877, 5 R. 188; affd. 5 R. (H. L.) 215.

[4] Graham Stewart, Law of Diligence, p. 41.

[5] Kennedy *v.* M'Kinnon, 1821, 1 S. 210 (N. E.) 198; Petersen *v.* M'Lean, 1868, 6 M. 218.

[6] Carlberg, etc. *v.* Borjesson, etc., 1877, 5 R. 188; affd. 5 R. (H. L.) 215.

[7] Balfour *v.* Stein and Others, 1808, Mor. App. to Part i. "Arrestment," No. 5; Mill *v.* Hoar, 18th December 1812, F. C.

[8] Lord Shand in Carlberg *v.* Borjesson, etc., 1877, 5 R. 188, at p. 195; affd. 5 R. (H. L.) 215; Turner *v.* Galway, 1882, 19 S. L. R. 892.

[9] Meron and Another *v.* Umland and Others, 1886, 3 S. L. T. 286.

consequence whether property in a ship arrested *ad fundandam jurisdictionem* belongs wholly to the defender or belongs to him in common with other parties, an arrestment of a ship of which the defender is a joint-owner is quite effectual.[1] An arrestment against an owner of a ship who was named and others not named was held to be good to found jurisdiction against them all.[2] In an action raised in respect of a collision between a British and a foreign ship, the names of the owners of the latter could not be ascertained. The foreign vessel was arrested *ad fundandam jurisdictionem* by the British owners, who raised an action against the master of the foreign ship as representing the owners, and the jurisdiction was held to be competently founded.[3]

Simple possession of a ship, without ownership, is not sufficient. Thus, where the owners wished delivery of a ship from the mortgagees in possession, and arrested the ship to found jurisdiction, the arrestment was held to be ineffectual.[4]

(u) *Arrestments by Attorney and Mandatary.*—It has been held that where a foreigner granted a full and comprehensive power of attorney, in which power was specially given to demand, sue for, and prosecute a claim against the defender, it was within the power of the attorney to appoint a mandatary in Scotland, and to cause arrestments to be used in the name of the principal, the attorney, and the mandatary in order to arrest a vessel in Scotland *ad fundandam jurisdictionem* and thereafter to raise proceedings against the owner in the Scottish Courts.[5]

(v) *Debt Due under Statute.*—There is no distinction to be drawn between a debt due under a statute and one arising at common law. Thus, where a statutory body are empowered by their Act to make certain charges and recover the same, they are entitled to found jurisdiction by arresting a ship belonging to the defenders in the same manner as if the debt had arisen at common law.[6]

(w) *Execution by Messenger-at-Arms.*—Execution of arrestments *ad fundandam jurisdictionem* can only be carried out by a messenger-at-arms, except warrant is granted by the Inner House, in the exercise of their *nobile officium*, to allow service by a sheriff officer.[7]

[1] Gibson *v.* Smith, 1849, 11 D. 1024.

[2] Leaburn *v.* Basset, etc., 1865, 1 S. L. R. 88.

[3] Morison and Milne *v.* Massa, 1866, 5 M. 130.

[4] Jones *v.* Samuel, 1862, 24 D. 319. See also Schultz *v.* Robinson and Niven, 1861, 24 D. 120.

[5] Knight *v.* Freeto, 1863, 2 M. 386.

[6] The Tyne Improvement Commissioners *v.* Aktieselkabet Aalborg Dampskibsselskab, 1905, 12 S. L. T. 693.

[7] Kennedy, Petr., 1862, 24 D. 1131; Schweitzer, Petr., 1868, 7 M. 24; North of Scotland Bank, Ltd., Petrs., 1891, 18 R. 460; R. & C. Robertson, Petrs., 1893, 20 R.

(x) *Forms.*—The following are forms of (1) Bill for Letters of Arrestment; (2) Letters of Arrestment *ad fundandam juridictionem* to arrest moveables; and (3) Initial Writ in Sheriff Court:—

(1) "My Lords of Council and Session.—Unto your Lordships humbly shows your servitor, *A.* [*designation*], complainer, that *B.* [*copy here statement of the reasons for asking for the letters, as in the letters below, down to* (*X.*)].

"Herefore the complainer beseeches your Lordships for letters of arrestment *jurisdictionis fundandæ causa* at his instance in the premises in common form.

"According to Justice, etc.

"*J. S.'s* Bill."

[*The bill does not require to be signed by a W.S.*]

(2) "George, etc.—Whereas it is humbly meant and shewn to us by our lovite, *A.*, complainer, that *B.* is indebted to the complainer in the sum of £ , being [*state nature of debt*]; That the said *B.* is a foreigner and does not reside in Scotland, but he has debts and effects belonging and addebted to him in the hands of several persons in this country, which he intends to uplift and withdraw therefrom to the prejudice of the complainer (*X.*); Therefore it is necessary that the complainer have these our letters of arrestment *jurisdictionis fundandæ causa* in manner and to the effect underwritten, as is alleged.—Our Will is Herefore, and we charge you that on sight hereof ye pass, and in our name and authority lawfully fence and arrest, All and Sundry goods and gear, debts, and sums of money, and all other moveable effects belonging or addebted to the said *B.*, wherever or in whose hands soever the same can be found, to remain under sure fence and arrestment *jurisdictionis fundandæ causa;* According to Justice, as ye shall answer to us hereupon, which to do we commit to you full power by these our letters, delivering them by you duly executed and endorsed again to the bearer.—Given under our Signet at Edinburgh, the day of in the year of our reign, 19 .

"*Ex Deliberatione Dominorum Concilii.*"

[*Signature of W.S.*].

(3) Sheriffdom of at .

A. B. [*designation*], Pursuer;

against

C. D. [*designation*], Defender.

The demand of the pursuer is—

For warrant to arrest defender's moveable property within the jurisdiction *jurisdictionis fundandæ causa.*

Therefore the pursuer craves the Court—

To grant warrant to arrest *jurisdictionis fundandæ causa,* authorising the arrestment of goods, debts, money [*if warrant to arrest such is required, add* "and all ships and shares of ships, barques, boats, and other maritime subjects"], and all other moveable effects belonging or addebted to the defender,

712; Buchanan *v.* The British Natural Premium Provident Association, Ltd., 1903, 11 S. L. T. 465. See also Whyte, Ridsdale & Co., Petrs., 1912, 2 S. L. T. 73.

wherever or in whose hands soever the same can be found, all to remain under sure fence and arrestment *jurisdictionis fundandæ causa.*

CONDESCENDENCE.

1. The pursuer is in . The defender is in .

2. The defender is due pursuer £100 for goods supplied conform to account herewith produced [*or, as the case may be*].

3. The defender is a foreigner not subject to the jurisdiction of the Scottish Courts, but has goods, gear, debts, and sums of money [*if warrant to that effect has been asked, say* "ships, barques, boats, and other maritime subjects"] and other moveable effects within the jurisdiction of the Sheriff of .

4. The pursuer is about to raise an action in the Court of Session for said sum of £100 due him by the defender, and before doing so finds it necessary to found jurisdiction by arrestment to that effect.

PLEA IN LAW.

The defender being indebted to the pursuer and being a foreigner not subject to the jurisdiction of the Scottish Courts, the pursuer is entitled to obtain a warrant to render the defender subject to said jurisdiction by arrestment *jurisdictionis fundandæ causa.*

(7) *Arrest of the Defender's Person.*—(a) *Meditatione Fugæ Warrant—its Requisites and Procedure.*—The writ by which the person of a defender is arrested for the purpose of founding jurisdiction against him is called a *meditatio fugæ* warrant. The application for the warrant is by initial writ when made to the Sheriff.[1] It may, however, be made to any other civil magistrate, in which case, if the debtor is outwith the territory of the civil magistrate, the warrant which the latter grants will require to be endorsed by the magistrate within whose territory the debtor is to be apprehended. Where a Sheriff grants the warrant no endorsation is necessary.[2] The nature and extent of the claim or debt should be specifically set forth, and also a statement that the pursuer has been credibly informed, and in his conscience believes, that the debtor is presently *in meditatione fugæ* and about to leave Scotland, whereby the pursuer's right will be defeated. The purpose of the debtor in meditating flight need not be set forth.[3] The prayer is for warrant to apprehend the debtor and thereafter to commit him to prison until caution be found *judicio sisti* in an action by the pursuer. Caution *judicatum solvi* should not be asked.[4] If the debtor is a foreigner with-

[1] M'Dermott *v.* Ramsay, 1876, 4 R. 217.
[2] 1 & 2 Vict. cap. 119, sec. 25.
[3] Jackson *v.* Smellie, 1865, 4 M. 72.
[4] Kidd *v.* Hyde, 1882, 9 R. 803, per Lord Rutherfurd Clark, p. 804.

out a domicile in this country, there should also be a prayer for the Court to fix a domicile where citation may be made. It is not usual to ask for expenses.[1] The rest of the procedure which takes place before inferior magistrates is to be found set forth in Mr. Graham Stewart's admirable work on the Law of Diligence, pp. 693-703. If the warrant is refused, the creditor may appeal to the Sheriff or to the Court of Session in the usual way.[2] If the application was made to a magistrate, the appeal will be to the Court of Session.[3] If the warrant is granted, the debtor has the same right of appeal; but his speediest remedy is by note of suspension and liberation.[4] Pending appeal, the Sheriff-Substitute may regulate the rights of parties in the meanwhile, in terms of sec. 42 of 6 Geo. IV. cap. 120.[5] In one case[6] the warrant was granted; but the Sheriff-Substitute, "in respect of the magnitude and nicety of the case," superseded the execution of it for a few days that the debtor, if so advised, might apply to the Court of Session, and in the meantime authorised the officers of Court to keep the debtor in safe custody. In another case[7] the debtor was allowed to find caution for ten days, and thereafter, if within that time an appeal was presented, until the appeal was advised; and in respect that caution had been found, the warrant was refused.

(b) *Cases where Competent.*—The number of cases in which a *meditatio fugæ* warrant is now competent is very limited. The Debtors (Scotland) Act, 1880,[8] provided that, with certain exceptions, no person should be liable to imprisonment for any civil debt. The exceptions were:—"1. Taxes, fines, or penalties due to Her Majesty, and rates and assessments lawfully imposed or to be imposed: 2. Sums decerned for aliment." It also provided that "nothing contained in this Act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatione fugæ*, or under any decree or obligation *ad factum præstandum*."[8] By the Civil Imprisonment (Scotland) Act, 1882,[9] sec. 3, it was enacted that "From and after the commencement of this Act no person shall, except as hereinafter provided, be apprehended or imprisoned on account of his failure to pay any sum or sums decerned for aliment." Power, how-

[1] Graham Stewart, Law of Diligence, p. 694.
[2] Adam *v.* Crowe, 1887, 14 R. 800.
[3] Graham Stewart, Law of Diligence, p. 700 (note 9).
[4] Goudie *v.* East Lothian Bank, 1822, 2 S. 56 (N. E. 48).
[5] Haldan *v.* Struthers, 1826, 4 S. 380 (N. E. 383).
[6] Scudamore *v.* Lechmere, 1797, Mor. 8559.
[7] Tasker *v.* Mercer, 1801, Mor. App. "Meditatio Fugæ," No. 1.
[8] 43 & 44 Vict. cap. 34, sec. 4.
[9] 45 & 46 Vict. cap. 42.

ever, was given[1] to the Sheriff to imprison any person who *wilfully* failed to pay such aliment, together with the expenses of process. Now *meditatio fugæ* warrants are merely ancillary and not independent diligences,[2] and it has been held that they are only competent in actions whose decrees can be enforced by imprisonment.[3] As imprisonment does not follow directly upon failure to pay a sum of aliment decerned for, it has now been held that, a *meditatio fugæ* warrant being merely an ancillary diligence, imprisonment under such a warrant of a defender in an action for an alimentary debt is incompetent.[4] *Meditatio fugæ* warrants are, therefore, only competent in cases of actions for taxes, fines or penalties due to the Crown, rates and assessments lawfully imposed or to be imposed, and actions *ad factum præstandum*. With regard to taxes, it is clear that a *meditatio fugæ* warrant may be issued if the General Commissioner or Land Tax Commissioners suspect, before poinding and distraining have been resorted to, that a taxpayer is about to leave the country because there might be no goods or effects found sufficient for payment of the taxes, in which case a warrant for the taxpayer's incarceration could be issued.[5] In the same way, penalties are sometimes recoverable by subpœna or ordinary summons,[6] and in default of payment imprisonment may follow.[7] With regard to rates and assessments imposed by County Councils and Town Councils, these may still be recovered by ordinary action,[8] failing payment of which imprisonment may follow. Poor rates are recoverable in the same way as taxes.[9]

There only remains actions *ad facta præstanda* where the compulsitor of imprisonment still obtains.[10] It is not every obligation to perform that is considered an obligation *ad factum præstandum*, on which imprisonment can follow. The decree must order the performance of some specified act,[11] as, to deliver a specific thing,[12] to consign money,[13]

[1] 45 & 46 Vict. cap. 42, sec. 4.

[2] Kidd *v.* Hyde, 1882, 9 R. 803.

[3] Hart *v.* Anderson's Trs., 1890, 18 R. 169.

[4] Glenday *v.* Johnston, 1905, 8 F. 24.

[5] Taxes Management Act, 1880 (43 & 44 Vict. cap. 19), sec. 97 (8).

[6] Court of Exchequer Act, 1856 (19 & 20 Vict. cap. 56).

[7] Ibid., sec. 34.

[8] Local Government (Scotland) Act, 1889 (52 & 53 Vict. cap. 50), sec. 62 (5); Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. cap. 55), sec. 353; Burgh Police (Scotland) Act, 1903 (3 Edw. VII. cap. 33), sec. 46.

[9] Poor Law (Scotland) Amendment Act, 1845 (8 & 9 Vict. cap. 83), sec. 88.

[10] Bell's Comm. (5th ed.) i. 335.

[11] Hendry *v.* Marshall, 1878, 5 R. 687.

[12] Sibbald *v.* Alvas, 1678, Mor. 6074; Chisholm *v.* Fraser, 1825, 3 S. 630 (N. E. 442). See also Stewart *v.* M'Dougall, 1908, S. C. 315; Rudman *v.* Jay & Co., 1908, S. C. 552.

[13] Mackenzie *v.* Balerno Paper Mill Co., 1883, 10 R. 1147.

to execute a deed,[1] or for an apprentice to return to his service,[2] when the Court will decern for specific performance, which may be enforced by imprisonment. In such cases *meditatio fugæ* warrants, being ancillary to such decrees, are quite competent.

II. Actions Involving Status.—(1) *Divorce.*—According to the older authorities, whenever the offending spouse committed adultery in Scotland and was personally summoned therein, the Court sustained its jurisdiction to try an action of divorce. Residence by the husband for forty days previous to the service of the summons also gave jurisdiction to try an action against him [3] as well as an action by him against his wife, if the latter had personal service of the action.[4] These rules were ultimately abandoned, and were succeeded by the doctrine of "matrimonial domicile." This was a domicile of a less permanent character than domicile of succession, but was considered sufficient to found jurisdiction. It was adumbrated about the year 1852 in the case of *Shields*,[5] and definitely formulated by Lord President Inglis in 1862 in the case of *Jack*.[6] From this latter date the doctrine of "matrimonial domicile" was accepted in every Scottish divorce case until the case of *Pitt*,[7] when the House of Lords rejected it. Notwithstanding this, however, the case of *Jack* was considered a binding judgment in the Outer House, and was followed without question until challenged by Lords Deas and Shand in the case of *Stavert*.[8] Lord Trayner in the subsequent case of *Low* [9] expressed a similar opinion to the last-named Judges, and to this opinion he adhered in the later case of *Dombrowitzki*.[10] Shortly before the decision of the Second Division in the last-mentioned case, the doctrine of "matrimonial domicile" had been subjected—apparently unknown to the Division—to a close examination in a case heard before the Privy Council,[11] when all the Scottish authorities came under review. The result of the latter case was that the doctrine of "matrimonial domicile" was rejected, and it was finally decided

[1] Taylor *v.* Macdonald, 1854, 16 D. 378.

[2] M'Dermott *v.* Ramsay, 1876, 4 R. 217.

[3] Levett *v.* Levett, 21st December 1816, F. C.

[4] Forrester *v.* Watson, 1844, 6 D. 1358; Shaw *v.* Shaw, 1851, 13 D. 819; Christian *v.* Christian, 1851, 13 D. 1149.

[5] Shields *v.* Shields, 1852, 15 D. 142.

[6] Jack *v.* Jack, 1862, 24 D. 467.

[7] Pitt *v.* Pitt, 1862, 1 M. 106; revd. 2 M. (H. L.) 28.

[8] Stavert *v.* Stavert, 1882, 9 R. 519.

[9] Low *v.* Low, 1891, 19 R. 115.

[10] Dombrowitzki *v.* Dombrowitzki, 1895, 22 R. 906.

[11] Le Mesurier *v.* Le Mesurier, [1895] A. C. 517. See also Forbes *v.* Forbes, 1910, 2 S. L. T. 425; Main *v.* Main, 1912, 1 S. L. T. 493; Corbidge *v.* Somerville, 1914, 1 S. L. T. 304.

that the only domicile for purposes of divorce was domicile of succession at the date of the service of the action. The rule thus laid down is now accepted as the fixed rule in Scottish Courts.

Notwithstanding this decision, however, it seems to be the law that after a cause of action has arisen a husband is not entitled, by changing his domicile, to subject his wife to the Courts of a foreign country. Thus, the Scottish Courts are open to a wife when her husband disappears abroad and deserts her.[1] The cause of action must, however, arise before the new domicile is set up.[2] This rule extends even to the case of an action to enforce rights arising out of the divorce.[3] It has also been held that where a wife is the offending party, a husband who is a foreigner may come to Scotland and acquire a domicile and obtain a decree of divorce against his wife for a cause not recognised in his domicile of origin.[4] The acquired domicile must, however, be real, and must be acquired *animo et facto*, and it will be no objection that the pursuer has come to Scotland for the purpose of obtaining decree of divorce.[5]

In determining jurisdiction in cases of divorce, the place where the marriage was celebrated and the place where adultery was committed are immaterial.[6]

In a recent case where the husband (defender) was born and married in Scotland, but the parties did not reside in Scotland after marriage, and the desertion did not take place from a Scottish home, it was held there was no jurisdiction.[7]

Where a defending husband successfully pleads "no jurisdiction," the Court has still jurisdiction to award expenses.[8]

The Conjugal Rights Act, 1861,[9] does not confer jurisdiction on the Court of Session against a co-defender who is not otherwise within the jurisdiction of the Court.[10]

[1] Redding *v.* Redding, 1888, 15 R. 1102. See also Jack *v.* Jack, 1862, 24 D. 467, per Lords Neaves and Mackenzie.

[2] Manderson *v.* Sutherland, 1899, 1 F. 621, per Lord Moncreiff, p. 629; Stewart *v.* Stewart, 1905, 13 S. L. T. 668.

[3] Cathcart *v.* Cathcart, 1902, 12 S. L. T. 182.

[4] Carswell *v.* Carswell, 1881, 8 R. 901.

[5] Stavert *v.* Stavert, 1882, 9 R. 519, per Lord President Inglis, p. 527; Steel *v.* Steel, 1888, 15 R. 896. See also Marchioness of Huntly *v.* Gaskell, 1905, 8 F. (H. L.) 4; Dyson *v.* Dyson, 1909, 2 S. L. T. 404; Forbes *v.* Forbes, 1910, 2 S. L. T. 425; Main *v.* Main, 1912, 1 S. L. T. 493.

[6] Warrender *v.* Warrender, 1834, 12 S. 847 and 885; affd. 2 S. & M'L. 154; Tulloh *v.* Tulloh, 1861, 23 D. 639.

[7] Robertson *v.* Robertson, 1915, 2 S. L. T. 96.

[8] Stavert *v.* Stavert, 1882, 9 R. 519; Linder *v.* Linder, 1902, 4 F. 465. See also Barkworth *v.* Barkworth, 1913, S. C. 759.

[9] 24 & 25 Vict. cap. 86, sec. 7.

[10] Fraser *v.* Fraser and Hibbert, 1870, 8 M. 400.

Jurisdiction in actions of divorce cannot be prorogated.[1]

It is the practice of the Court in undefended actions of divorce to satisfy itself as to its jurisdiction,[2] though in a defended case[3] it was the opinion of Lord Young that the Court was under no such obligation when the case was defended and no objection was taken by the defender.

(2) *Separation and Aliment.*—As a decree of separation and aliment does not permanently affect the *status* of the parties, it is obvious that different considerations come into play in such an action from the considerations in an action of divorce. As Lord Fraser has said:[4] "It would be a very hard state of the law if a wife, who is resident with her husband in Scotland, could obtain no more secure protection from cruelty at the hands of her husband than by an application to the police; and this would be the result if the rule were established that jurisdiction in actions of separation only exists in the *forum* of the husband's domicile." He, accordingly, thinks it only reasonable that such a decree should be able to be pronounced by the Courts of the country where the parties have their matrimonial domicile.

There are only a couple of Scottish cases on this subject. In the first case[5] the Second Division by a majority held that as the defender was a domiciled Scotsman the Court of Session had jurisdiction to decide the case. In a strong dissent, Lord Young expressed the view that as the cruelty took place in England where the parties resided, the English Courts alone had jurisdiction. It may be observed in this case that the majority did not explicitly state that the Scottish Court was the only Court which had jurisdiction. In the other action[6] Lord Kincairney (Ordinary) held that the conclusion for separation was out of place, as the pursuer had not seen her husband for nearly twenty years, and that the case was merely one for aliment. A proof was allowed, and the result was that his Lordship held that the defender was domiciled in South Africa and that the Court of Session had no jurisdiction. This judgment is directly in favour of the contention that the Court of the permanent domicile of the husband alone has jurisdiction. There are thus three possible views:—first, that of Lord Young, that the Court of the place where cruelty takes place alone has jurisdic-

[1] Ringer *v.* Churchill, 1840, 2 D. 307, per Lord Moncreiff, p. 327; Fraser, Husband and Wife, ii. 1294.

[2] Redding *v.* Redding, 1888, 15 R. 1102; Main *v.* Main, 1912, 1 S. L. T. 493.

[3] Watts *v.* Watts, 1885, 12 R. 894, at p. 899.

[4] Fraser, Husband and Wife, ii. 1294, 1295.

[5] Hood *v.* Hood, 1897, 24 R. 973.

[6] Linder *v.* Linder, 1904, 11 S. L. T. 777.

tion; second, that of Lord Kincairney, that the Court of the permanent domicile of the husband alone has jurisdiction; and third, the view, which is not excluded by the judgment of the Second Division, and which is suggested by Lord Fraser, that there may be concurrent jurisdiction in the Courts of the permanent domicile of the husband and of the place where the cause of action arose. The last view is supported by some remarks of Lord Watson in the case of *Le Mesurier*.[1] There is, however, no authoritative decision upon the point, and it is to be regretted that the case of *Hood*[2] was allowed to be determined by a majority of the Second Division, and was not referred, as Lord Young suggested, to a larger Court for decision.

(3) *Declarator of Marriage.*—This is an action to have it declared that a valid contract of marriage has been entered into between the pursuer and the defender. It may be at the instance of either a man or a woman. If the *locus contractus* is Scotland, the Court of Session has jurisdiction to determine whether the contract is a valid one, provided that the defender has been found in Scotland and personally cited.[3] The Court of Session has also jurisdiction to try a declarator at the instance of a woman, who may or may not have been a domiciled Scotswoman previous to the alleged marriage, against a domiciled Scotsman, and it makes no difference whether the alleged marriage was contracted in Scotland or abroad. In the same way a domiciled Scotsman may competently raise an action in the Court of Session against a woman, who may or may not have been a domiciled Scotswoman prior to the alleged marriage.[4]

With regard to prorogation, this point has never been the subject of decision, though in one case[5] it seems as if the Court must have held that the parties had done so quite competently.

Wherever the declarator is tried, the law of the domicile of the parties must be applied as regards capacity to marry; the law of the *locus contractus* as regards the form of ceremony.

(4) *Declarator of Putting to Silence.*—This is an action of declarator to the effect that the pursuer and the defender are not married to each

[1] Le Mesurier *v.* Le Mesurier, [1895] A. C. 517, at pp. 526, 527, and 531.

[2] Hood *v.* Hood, 1897, 24 R. 973, at p. 976.

[3] Fraser, Husband and Wife, ii. 1271, 1272; Key *v.* Burnet, 1780, Arniston Collection of Session Papers, Advocates' Library, vol. cxxx. No. 8; Wylie *v.* Laye, 1834, 12 S. 927; A. B. *v.* C. D., 1888, 25 S. L. R. 736.

[4] Fraser, Husband and Wife, ii. 1271; Reid *v.* Reid, 29th December 1905 (Lord Dundas). This case is mentioned in Duncan and Dykes, Principles of Civil Jurisdiction, p. 188.

[5] Longworth *v.* Yelverton, 1862, 1 M. 161; 2 M. (H. L.) 49; 1868, 7 M. 70.

other. It is a consistorial action.[1] As in this process the validity of the marriage may be tried without any counter action of declarator of marriage,[2] it seems reasonable to suppose that the same rules of jurisdiction apply to the former as to the latter.

(5) *Declarator of Nullity of Marriage.* — In England the Court sustains its jurisdiction in actions of nullity where the marriage is celebrated in England.[3] In like manner the Court of Session assumes jurisdiction where the marriage is contracted in Scotland.[4] In two Scottish cases the Court of Session tried actions of nullity where the marriages were not contracted in Scotland. In the first case,[5] which was at the instance of the wife, all that the report says is that the parties were married in 1877 in India, and remained there until December 1878, when they came to Scotland. They lived in Scotland till June 1879, when they separated. There is reason to believe, however, that the husband was a domiciled Scotsman, as he is designed as a shipbroker in Glasgow and as he raised an action of divorce against his wife in the Scottish Courts. In the second case[6] it appears that the defender—the wife—returned alone from India, where the parties were married, to Scotland, where she was at the time of the action. The action was not defended, and the domicile of the husband is not stated. The action seems, therefore, to have been raised against the defender in the Court of Session as being the Court of her residence at the date of the action. There seems every reason, therefore, to suppose that the Court of Session has jurisdiction to entertain actions of declarator of nullity of marriage not only when Scotland is the permanent domicile of the husband, but also where the marriage has been contracted in Scotland, and where the defender's residence is at the time of the action in Scotland.

(6) *Declarator of Legitimacy*—(i.) *Action by a Person for Declarator of his Own Legitimacy.*—The only reported case[7] on the question of jurisdiction is where a child raised an action against her deceased father's trustee, and against his widow and his sister, all of whom resided in England, for declarator of legitimacy and payment of legitim, or, alternatively, for payment of aliment. Her father had been a domiciled Englishman and her mother was a Scotswoman. The pursuer

[1] A. B. *v.* C. D., 1901, 8 S. L. T. 406; Williams *v.* Forsythe, 1909, 2 S. L. T. 252.
[2] Fraser, Husband and Wife, ii. 1245; J. H. *v.* Mr. R., 1844, 16 Jurist, 576.
[3] Simonin *v.* Mallac, 1860, 2 Sw. & Tr. 67; Sottomayor *v.* De Barros, 1877, 2 P. D. 81; 3 P. D. 1; Linke *v.* Van Aerde, 1894, 10 T. L. R. 426.
[4] Wilson *v.* Horn, 1904, 41 S. L. R. 312; Miller *v.* Deakin, 1912, 1 S. L. T. 253.
[5] A. B. *v.* C. B., 1884, 11 R. 1060; 12 R. (H. L.) 36.
[6] A. B. *v.* C. D., 1900, 38 S. L. R. 559.
[7] Morley *v.* Jackson, 1888, 16 R. 78.

used arrestments *ad fundandam jurisdictionem* against the trustee alone. The action was dismissed against the widow and sister *simpliciter*, and also against the trustee in respect that such arrestments were of no effect in actions involving *status*.[1] The question of the domicile of the pursuer was never discussed. Had, however, the pursuer been domiciled in Scotland, it is reasonable to suppose that the Court would have sustained its jurisdiction, as the action would have been one by a domiciled Scottish pursuer seeking declarator of her own *status*, the rest of the action being a personal claim for money, jurisdiction to try which in the Court of Session had been secured by arrestments *ad fundandam jurisdictionem*.

(ii.) *Action by a Person for Declarator of his Ancestor's Legitimacy.*—In this kind of action there must be some material interest in the pursuer before he will be allowed to proceed.[2] In one case[3] the pursuer was an Englishman and the defender a domiciled Scotsman, although an Irish peer, and the question at issue was whether a common ancestor of the parties was a domiciled Englishman or a domiciled Scotsman. The pursuer's interest was to claim a Scottish baronetcy. There was no objection to the jurisdiction, as presumably the defender was a Scotsman, and the real interest at issue was a Scottish baronetcy.

III. INTERDICTS.—The Court of Session has jurisdiction in cases of interdict—

(1) Where the respondent is resident, or has property in, Scotland. Property includes a claim in a multiplepoinding[4] or in a liquidation in Scotland.[5] The jurisdiction is effectual where wrongs are being done, or are about to be done, either in Scotland or abroad.[6]

(2) Where the respondent has brought actions in the Scottish Courts which are still pending.[7] With regard to the ability of the Court of Session to enforce their interdict in such cases, Lord President Inglis said: "So long as the respondents have important pecuniary interests in this country and are litigating in this Court, there will not be much difficulty in finding ways and means of enforcing our orders upon them."[8]

[1] Scruton *v.* Gray, 1772, Mor. 4822.
[2] Moncrieff *v.* Moncreiff, 1904, 6 F. 1021.
[3] Bosville *v.* Lord Macdonald, 1910, S. C. 597.
[4] Dawson's Trs. *v.* Macleans, 1860, 22 D. 685.
[5] California Redwood Co. *v.* Merchant Banking Co., London, 1886, 13 R. 1202.
[6] Lindsay *v.* Paterson, 1840, 2 D. 1373; Young *v.* Barclay, 1846, 8 D. 774; Dawson's Trs. *v.* Macleans, 1860, 22 D. 685.
[7] Liquidators of the Pacific Coast Mining Co., Ltd. *v.* Walker, etc., 1886, 13 R. 816.
[8] Ibid., at p. 818.

(3) Where the wrong about to be done, or in process of being done, is in Scotland.[1] This applies where both parties are foreigners and where no arrestments have been used to found jurisdiction, and where no personal service has been made upon the respondent.[2] If, however, the main issue is not whether the wrong being done, or about to be done, has its *locus* in Scotland, but whether the respondent has a right to do the thing he is doing, or about to do, anywhere, the Court is not likely to sustain its jurisdiction, if the parties are both foreigners, but will remit the case to its appropriate *forum*.[3]

(4) Where the respondent has prorogated jurisdiction.[4] When there is no property belonging to the respondent in Scotland, and he is not found within the territory, the Court will not interdict him from doing something outwith Scotland.[5]

IV. Real Actions.—A real action is an action disposing of the thing itself and not merely the right of any party thereto.

(1) *Immoveable Property.*—If the immoveable property is situated in Scotland the Scottish Courts alone have jurisdiction.[6] Moreover, the Court of Session has power to compel a party over whom it has jurisdiction in a personal action to perform an act with regard to the disposal of immoveable property situated abroad.[7]

(2) *Moveable Property.*—An action *in rem* with regard to moveable property must be taken in the Court within whose territory the moveable subject lies.[8] This is to be seen in multiplepoindings where a fund *in medio* is brought into Court and a judgment *in rem* is pronounced, which is effectual against Scottish claimants and foreign claimants alike.[9]

The exclusive jurisdiction of the *forum rei sitæ* does not, however, meet with universal acceptance by international jurists, though the English Courts are likely to treat such a judgment as binding upon them.[10]

[1] Waygood *v.* Bennie, 1885, 12 R. 651 ; Campbell *v.* Arnett, 1893, 1 S. L. T. 159.
[2] Toni Tyres, Ltd. *v.* The Palmer Tyre, Ltd., 1905, 7 F. 477.
[3] Lord Low in Toni Tyres, Ltd. *v.* The Palmer Tyre, Ltd., *supra*, at p. 484.
[4] Gill *v.* Cutler, 1895, 23 R. 371.
[5] Liquidators of the California Redwood Co., Ltd. *v.* Walker, etc., 1886, 13 R. 810.
[6] Erskine's Inst. i. 2. 17. See also British South Africa Co. *v.* Companhia de Moçambique, [1893] A. C. 602.
[7] Ruthven *v.* Ruthven, 1905, 43 S. L. R. 11.
[8] Jones *v.* Samuel, 1862, 24 D. 319, per Lord Justice-Clerk Inglis, p. 322 ; Bannatyne *v.* Newendorff, 1841, 3 D. 429, per Lord Moncreiff, p. 433.
[9] Miller *v.* Ure, 1838, 16 S. 1204 ; Crockart *v.* Dundee and Arbroath Rly. Co., 1852, 15 D. 202.
[10] Castrique *v.* Imrie, 1869, L. R. E. & I. App. 414.

V. Declarators and Reductions.—(1) *Declarators.*—(i.) *Declarator Involving Status.*—These have already been dealt with at p. 57 *et seq.*

(ii.) *Declarator Affecting Heritage.*—If the action is declaratory of a real right in Scottish heritable property, exclusive jurisdiction lies in the *forum rei sitæ*,[1] *i.e.* the Scottish Courts have exclusive jurisdiction with regard to heritage that lies within Scotland. If, however, the action is merely declaratory of the existence of a personal obligation on the part of the owner of heritage to do something in connection with the heritage, such as, to execute a conveyance of lands, etc., jurisdiction is founded according to the rules which regulate actions of declarator affecting personal rights, which are treated of in the next paragraph.

(iii.) *Declarator Affecting Personal Rights.*—Jurisdiction against defenders in these declarators is founded in the same manner as in ordinary personal actions, with one exception, *i.e.* jurisdiction founded on arrestment *ad fundandam jurisdictionem.* In one case[2] Lord President M'Neill made it clear that the Court gave no decision regarding the competency of trying the declaratory portion of an action where jurisdiction was only founded on arrestments *ad fundandam jurisdictionem.* In several cases[3] *obiter dicta* are to be found against jurisdiction being founded in cases of declarator simply by means of arrestment, and these views have been given effect to by Lord Kincairney in a comparatively recent case.[4] It may therefore be accepted as a rule of our law that arrestment to found jurisdiction does not apply to cases of declarator.

(2) *Reductions.*—A reduction is a declarator of right *negative*,[5] and the rules of jurisdiction affecting actions of declarator apply in the same manner to reductions, although there has been no decided case where, in an action of reduction, the Court has refused to sustain its jurisdiction founded solely on arrestments.[6]

In reductions by a Scottish Court of its own decrees the defender must be personally subject to the jurisdiction.[7]

In a reduction of a will the fact that the testator at his death was

[1] Erskine's Inst. i. 2. 17 ; Love *v.* Love, 1907, S. C. 728.

[2] Lindsay *v.* London and North-Western Rly. Co., 1855, 18 D. 62.

[3] Jones *v.* Samuel, 1862, 24 D. 319, per Lord Mackenzie (Ordinary), p. 322 ; Longworth *v.* Hope, 1865, 3 M. 1049, per Lord President M'Neill, p. 1053 ; Trowsdale's Tr. *v.* Forcett Rly. Co., 1870, 9 M. 88, at p. 95.

[4] Williams *v.* The Royal College of Veterinary Surgeons, 1897, 5 S. L. T. 208.

[5] Stair's Inst. iv. 20. 2.

[6] Jones *v.* Samuel, 1862, 24 D. 319, per Lord Mackenzie (Ordinary) and Lord Justice-Clerk Inglis, p. 322 ; Shaw *v.* Dow and Dobie, 1869, 7 M. 449.

[7] Longworth *v.* Yelverton, 1868, 7 M. 70.

a domiciled Scotsman is not alone sufficient to found jurisdiction,[1] nor that the defender has merely a claim on a trust, part of which is heritage in Scotland and held by trustees, of which he is not one.[2]

VI. Successions and Trusts.—(1) *Administration.*—While it is the law of the domicile that regulates the succession to the moveable property of a deceased person,[3] it is the Court of the place where the moveable property is situated that controls the administration of it. Accordingly, in the case of a foreigner dying and leaving moveable property in Scotland, his executors, whether executors-nominate or executors-at-law, require to come to the Scottish Courts for confirmation, so as to give them a title to uplift that portion of the moveable estate situated in this country, and to the Scottish Courts the executors require to account.[4]

It is not the law of the domicile of the deceased, however, that regulates succession to the heritable estate, but the law which obtains where the heritage is situated—*lex rei sitæ.*[5] It is only the Scottish Courts that can give an effective title to Scottish heritage. Though the Court of Session, however, has jurisdiction with regard to heritage in Scotland belonging to a foreign trust, it will not aid the foreign trust to carry out an administrative act where the discretion as to its expediency should have been exercised by the Court which has jurisdiction over the trust.[6] If, however, the authority of the foreign Court has been given to the administrative act, and the aid of the Court of Session is invoked to carry it out, the Court of Session will most likely add its authority.[7]

(2) *Actions against Trustees and Executors.*—Jurisdiction in these cases is constituted by the fact that the trust is a Scottish trust. As Lord M'Laren said: "Where a trust is constituted in Scotland and is to be executed in Scotland, the supreme Court of this division of the United Kingdom has jurisdiction over the whole subject-matter of the trust, including in that expression not only the interpretation of the trust, but the duty of making provision for its continuance,

[1] Morrison *v.* Vallance's Trs., 1906, 14 S. L. T. 372.

[2] Gemmell *v.* Emery and Others, 1905, 13 S. L. T. 490.

[3] Purvis' Trs. *v.* Purvis' Exrs., 1861, 23 D. 812; Enohin *v.* Wylie, 1862, 10 H. L. C. 1; Smith *v.* Smiths, 1891, 18 R. 1036. See also Reid *v.* Reid and Others, 1887, 24 S. L. R. 281.

[4] Melville *v.* Preston, 1838, 16 S. 457; revd. 1841, 2 Rob. App. 88; Goetze *v.* Aders, etc., 1874, 2 R. 150, per Lord President Inglis, p. 153; Orr Ewing's Trs. *v.* Orr Ewing, 1885, 13 R. (H. L.) 1; Wilson and Others, Petrs., 1895, 2 S. L. T. 455 and 567.

[5] Erskine's Inst. iii. 8. 10.

[6] Carruther's Trs., Petrs., 1896, 24 R. 238.

[7] Allan's Trs., Petrs., 1897, 24 R. 718.

and the power, in cases of negligent administration, of calling the trustees or trustee to account."[1] Even though the trust is an English trust, if the trust is the owner of Scottish heritage, the trustees, even if resident in England, are subject to the jurisdiction of the Court of Session.[2] If the trust was originally Scottish, but at the date of the action had no property in Scotland, the jurisdiction of the Court of Session may yet be sustained, even though none of the trustees are resident in Scotland.[3]

Jurisdiction may also be founded by the residence of the trustees within the territory. Thus, the Court of Session has been held to have jurisdiction in an action against an English trust where the trustees were resident in Scotland.[4] The Court of Session is also a proper *forum* where the trustees are resident in Scotland and the executors have taken out confirmation in Scotland, and where an administrative order has been pronounced by the High Court of Justice in England placing the administration of the estate, wherever situated, under the control of the High Court of England.[5]

Where an executry estate was situated in Scotland, and the majority of the executors were resident there, the Court sustained their jurisdiction on the ground that the executors, as a body, had confirmed and recovered funds in Scotland.[6] Where, however, an Englishman had been decerned in Scotland executor-dative to a deceased Englishman, but had not given up an inventory nor been confirmed executor, and who had no property in Scotland, and against whom jurisdiction had not been founded in ordinary form, it was held that he was not subject to the jurisdiction of the Scottish Courts.[7] The mere fact that a testator is a domiciled Scotsman is not alone sufficient to found jurisdiction either in a reduction of his will[8] or in an accounting or declarator[9] directed against his trustees.

[1] Lord M'Laren in Kennedy, etc. *v.* Kennedy, etc., 1884, 12 R. 275, at p. 282; approved of in Robertson's Tr. *v.* Nicholson, 1888, 15 R. 914; and Ashburton *v.* Escombe, 1892, 20 R. 187.

[2] Mackay *v.* Mackay, 1897, 4 S. L. T. 337. See also Ferrie, etc. *v.* Woodward, etc., 1831, 9 S. 854; Charles *v.* Charles' Trs., 1868, 6 M. 772.

[3] M'Gennis *v.* Rooney, 1891, 18 R. 817. See also MacKirdys *v.* Keith, 1882, 19 S. L. R. 768.

[4] Ferguson, etc. *v.* Douglas, Heron & Co., 1796, 3 Pat. App. 503, at p. 510; Peters *v.* Martin, 1825, 4 S. 107 (N. E. 108); Orr Ewing's Trs. *v.* Orr Ewing, 1885, 13 R. (H. L.) 1, at p. 3.

[5] Brown *v.* Maxwell's Exrs., 1883, 10 R. 1235.

[6] Mags. of Wick *v.* Forbes, 1849, 12 D. 299.

[7] Robson *v.* Walsham, 1867, 6 M. 4. See also Morison *v.* Ker, 1790, Mor. 4601; Munro *v.* Graham, 1839, 1 D. 1151.

[8] Morrison *v.* Vallance's Trs., 1906, 14 S. L. T. 372.

[9] Douglas *v.* Douglas' Trs., 1906, 13 S. L. T. 749.

Arrestments to found jurisdiction will not be effectual against an executor resident in a foreign country where the office is to be executed,[1] except where the executor is sued for a specific debt;[2] but they will be good in an action against an executor to a foreign will who has also confirmed in Scotland in order to obtain a title to uplift executry funds situated in Scotland, the action having reference to these funds.[3]

Jurisdiction once established against trustees transmits against their representatives.[4]

VII. Bankruptcy Proceedings. — (1) *Sequestration.* — The test of jurisdiction in bankruptcy in the case of either a living debtor (not being a company registered under the Companies Acts[5] or a railway company[6]) or a deceased debtor is that the living debtor at the date of the petition for sequestration, and the deceased debtor at his death, should have been subject to the jurisdiction of the Supreme Courts of Scotland.[7]

Jurisdiction in bankruptcy must be treated in the light of statute. There is no question of *status* involved in the proceeding; jurisdiction means ordinary civil jurisdiction, but it must be of a universal character. Accordingly jurisdiction founded on the arrestment of moveable property within Scotland of a foreign debtor, jurisdiction *ex reconventione,* or jurisdiction *ratione contractus,* is not sufficient.[8] The grounds of universal jurisdiction in Scotland are "residence" for forty days in Scotland, and the possession of heritable property in Scotland, and it is on these grounds alone that jurisdiction in sequestration is founded.[9] Mere domicile in the sense of domicile of succession will not found jurisdiction.[10]

[1] Brown's Trs. *v.* Palmer, 1830, 9 S. 224.

[2] Campbell *v.* Rucker, 1809, Hume, 258.

[3] M'Morine *v.* Cowie, 1845, 7 D. 270; Carron Co. *v.* Stainton, 1857, 19 D. 318, per Lord Mackenzie, p. 320.

[4] Rintoul *v.* Garroway, 1898, 5 S. L. T. 306.

[5] Standard Property Investment Co., Ltd. *v.* Dunblane Hydropathic Co., Ltd., 1884, 12 R. 328.

[6] Haldane *v.* Girvan and Portpatrick Rly. Co., 1881, 8 R. 669; Haldane *v.* Rushton, 1881, 9 R. 253.

[7] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. cap. 20), sec. 11.

[8] Joel *v.* Gill, 1859, 21 D. 929, per Lord Justice-Clerk Inglis, pp. 937-939. See also Croil, Petr., 1863, 1 M. 509, per Lord Barcaple (Ordinary); Goetze *v.* Aders, etc., 1874, 2 R. 150, Lord Shand, p. 151.

[9] Joel *v.* Gill, 1859, 21 D. 929; Croil, Petr., 1863, 1 M. 509.

[10] Obers *v.* Paton's Trs., 1897, 24 R. 719, per Lord President Robertson, p. 732, and Lord M'Laren, p. 733. *Cp.* The Phosphate Sewage Co., Ltd. *v.* Molleson, 1878, 5 R. 1125, per Lord President Inglis, where "domicile" is used in the sense of "residence" or "trading domicile."

As a bankrupt may have more than one domicile, the Court of the country in which he is first made bankrupt alone has jurisdiction to distribute the bankrupt estate.[1]

Creditors who claim in a Scottish sequestration render themselves subject *ex reconventione* to the jurisdiction of the Court of Session in matters connected with the sequestration.[2]

In a recent case[3] the Court made some observations on the jurisdiction and functions of the Scottish Court in giving effect to the English Bankruptcy Act of 1883.

(2) *Winding Up Companies.*—The Court of Session has jurisdiction to wind up companies registered in Scotland.[4] If a company is an "unregistered company,"[5] for the purpose of determining the Court having jurisdiction in winding up, the "unregistered company" shall be deemed to be registered in that part of the United Kingdom where its principal place of business is situate; or if it has a principal place of business situate in more than one part of the United Kingdom, then in each part of the United Kingdom where it has a principal place of business; and the principal place of business situate in that part of the United Kingdom in which proceedings are being instituted shall, for all purposes of the winding up, be deemed to be the registered office of the company.[6] The Court of Session in Scotland is the Court having jurisdiction to wind up "unregistered" companies,[6] and also to wind up a railway company under the Abandonment of Railways Acts, 1850 and 1869, and the amending Acts, if the railway was authorised to be made in Scotland.[6]

VIII. Guardianship.—There is always jurisdiction in the Courts of the ward's domicile of succession to make an appointment of a guardian to the person or property of the ward. Thus, the Court of Session has jurisdiction to make an appointment of a guardian to a pupil or *incapax* who has his domicile in Scotland. There is also jurisdiction in the Court where the ward is resident for the time being to make such an appointment. The Court of Session has thus jurisdiction to make an appointment to a foreign pupil or *incapax* resident for the time being in Scotland.[7] In the latter case, however, if the foreign ward has already

[1] Phosphate Sewage Co., Ltd. *v.* Molleson, 1878, 5 R. 1125, per Lord President Inglis, p. 1138; Orr Ewing *v.* Orr Ewing's Trs., 1884, 11 R. 600, at pp. 635, 636. See also Goetze *v.* Aders, etc., 1874, 2 R. 150.

[2] Barr *v.* Smith and Chamberlain, 1879, 7 R. 247.

[3] Salaman *v.* Tod, 1911, S. C. 1214.

[4] Companies (Consolidation) Act, 1908 (8 Edw. VII. cap. 69), secs. 135, 136.

[5] Ibid., sec. 267. [6] Ibid., sec. 268.

[7] Reid *v.* Reid, 1887, 24 S. L. R. 281; Marchetti *v.* Marchetti, 1901, 3 F. 888.

a guardian appointed by the Court of his domicile of succession, the Court of Session will defer to such an appointment, except in the case of the ward being possessed of Scottish heritage, in which case the Court of Session will exercise its jurisdiction and appoint a guardian to manage the heritable estate.[1]

Where the custody of children of a marriage has been fixed by the decree of a competent foreign Court in the case of foreigners resident in this country, the Court of Session has no jurisdiction to hear a petition for custody or access by one of the parents contrary to the said decree.[2]

IX. Prorogation of Jurisdiction.—A person may submit himself, in competent cases, to the jurisdiction of a Court which otherwise has no authority over him. The requisites are that there must be consent of the party, and the Judge must have such jurisdiction as may be a proper or habile subject of prorogation.[3] Thus, a Judge after he has resigned office cannot, by consent of parties, pronounce a valid judgment.[4] This does not apply if he is in possession of the office, and holden and reputed a Judge.[5] A judgment pronounced by a Judge who is related to one of the parties is null, and consent of parties cannot make it valid.[6] Jurisdiction cannot be prorogated where a cause is not regularly depending before the Judge,[7] nor where the Judge is acting *extra territorium*.[8] Further, it cannot be prorogated where another Court has exclusive jurisdiction.[9] Jurisdiction conferred by statute, or which requires certain statutory forms to be followed to make it operative, must be strictly observed, and the fact that parties have made no objection to their omission will not supply the defect.[10]

After a cause has been competently brought before a Judge, effective consent of the parties concerned may be given to a departure from the

[1] Buchan *v.* Harvey, 1839, 2 D. 275; Johnstone *v.* Beattie, 1843, 10 Cl. & F. 42; Lamb, Petr., 1858, 20 D. 1323; Stuart *v.* Stuart, 1861, 4 Macq. 1; Sawyer *v.* Sloan, 1875, 3 R. 271; Fraser, Parent and Child, p. 734 *et seq.*

[2] Westergaard *v.* Westergaard, 1914, S. C. 977.

[3] Erskine's Inst. i. 2. 27-30.

[4] Innes *v.* Duke of Gordon, 1827, 6 S. 279, at pp. 294, 295.

[5] Livingstone *v.* Presbytery of Hamilton, 1846, 8 D. 898; M'Arthur *v.* Linton, 1864, 2 M. 659, at p. 661.

[6] Erskine's Inst. i. 2. 31; Statutes, 1594, cap. 22 (record edition), cap. 212 (12mo edition); 1681, cap. 79 (record edition), cap. 13 (12mo edition); Ommanney *v.* Smith, 1851, 13 D. 678. See also Moubray's Trs. *v.* Moubray, 1883, 10 R. 460.

[7] Kirk *v.* Hotchkis, etc., 1832, 10 S. 655.

[8] Erskine's Inst. i. 2. 29; Forrest *v.* Harvey, 1845, 4 Bell's App. 197.

[9] Erskine's Inst. i. 2. 30; Kennedy *v.* Kennedy, 1611, Mor. 7307; A. *v.* B., 1618, Mor. 7407.

[10] Cumming *v.* Munro, 1833, 12 S. 61; Forrest *v.* Harvey, 1841, 4 D. 97; 1845, 4 Bell's App. 197.

statutory requirements, in which case the Judge is constituted an arbiter, and review is excluded.[1]

A foreigner may, both as a pursuer and a defender, prorogate the jurisdiction of the Court of Session in matters competent for its decision.[2] It is not necessary that a defender should expressly prorogate jurisdiction. Lodging defences without the plea of "no jurisdiction" is sufficient.[3] A defender may, however, expressly prorogate jurisdiction either by a minute, a bond *de judicio sisti*, a bail bond, or some similar separate writing.[4]

It is *pars judicis*, if not satisfied, to refuse to sustain jurisdiction.[5]

It is incompetent to prorogate jurisdiction in actions of divorce.[6] As regards declarator of marriage there is no decision upon the point, though in one case[7] it would appear as if the parties had done so quite competently.

It is quite competent to prorogate jurisdiction in cases of interdict.[8]

X. Reconvention.—(a) *Principle and Definition.*—The only attempt which has been made to examine the principles upon which jurisdiction *ex reconventione* in Scotland is founded[9] was made by Lord President Inglis (then Lord Justice-Clerk) in the case of *Thompson* v. *Whitehead*.[10] In his judgment in that case his Lordship, after an exhaustive review of the Roman doctrine of reconvention, arrived at the opinion that reconvention is not, in any proper sense, a source or foundation of jurisdiction, but is a more unrestricted application of the principle

[1] Craig *v.* Duffus, 1849, 6 Bell's App. 308; Dudgeon and Martin *v.* Thomson and Patrick, 1854, 1 Macq. 714; Dykes *v.* Merry and Cuninghame, 1869, 7 M. 603; White *v.* Duke of Buccleuch, 1866, 1 L. R. Sc. App. 70.

[2] Thompson *v.* Whitehead, 1862, 24 D. 331, per Lord Deas, p. 355; Bank of Scotland *v.* Gudin, 1886, 14 R. 213.

[3] Erskine's Inst. i. 2. 27; Service *v.* Chalmers, 1627, Mor. 7305; White *v.* Spottiswoode, 1846, 8 D. 952; A. *v.* B., 1873, 10 S. L. R. 290; Dundee Provident Property Investment Co. *v.* Macdonald, 1884, 11 R. 537; Wilson *v.* Robertson, 1884, 11 R. 893; Assets Co., Ltd. *v.* Falla's Tr., 1894, 22 R. 178; Gill *v.* Cutler, 1895, 23 R. 371.

[4] Longmuir *v.* Longmuir, 1850, 12 D. 926; Lord Macdonald, 1864, 2 M. 1194; Irvine *v.* Hart & Son, 1869, 7 M. 723; International Exhibition, 1890 *v.* Bapty, 1891, 18 R. 843; Elderslie Steamship Co., Ltd. *v.* Burrell & Son, 1895, 22 R. 389; Gill *v.* Cutler, 1895, 23 R. 371.

[5] Redding *v.* Redding, 1888, 15 R. 1102; Main *v.* Main, 1912, 1 S. L. T. 493.

[6] Ringer *v.* Churchill, 1840, 2 D. 307, per Lord Moncreiff, p. 327; Fraser, Husband and Wife, ii. 1294.

[7] Longworth *v.* Yelverton, 1862, 1 M. 161; 2 M. (H. L.) 49; 1868, 7 M. 70.

[8] Gill *v.* Cutler, 1895, 23 R. 371.

[9] Hurst, Nelson & Co., Ltd. *v.* Spenser Whatley, Ltd., 1912, S. C. 1041, per Lord President Dunedin, p. 1049.

[10] Thompson *v.* Whitehead, 1862, 24 D. 331.

of equity, which is the foundation of the law of compensation. The proposition that reconvention is a species of prorogated jurisdiction he regarded as logically unsound, and concluded in the following words:—"It appears to me, on a review of the cases, that the law of Scotland, like the law of Rome, permits reconvention out of favour to a defender, that he may not be condemned to pay without his having at the same time an opportunity of enforcing his demand against the pursuer; that, like the law of Rome, it restricts the defender's privilege to those cases where the subject-matter of the two claims is of the same nature, where they can conveniently be tried at the same time and in the same Court, and can be brought to a conclusion by one judgment (as in conjoined actions), or by two separate but contemporaneous, or nearly contemporaneous, judgments; that, subject to these restrictions and conditions, the law of Scotland, like the law of Rome, will admit reconvention, not only where the two claims arise *in eodem negotio*, but also where they arise *ex diversis causis*, provided that they be claims which can fairly be set against one another, without violating some other rule of pleading or principle of equity; that the law of Scotland, like the law of Rome, will never allow reconvention to operate so as to give a Judge jurisdiction over a subject-matter to which he is not otherwise competent, or indeed so as directly to confer or create jurisdiction in any case; and that, in all matters of detail, the right of reconvention will fall to be limited, or enlarged, by a reference to the broad principle of equity on which it is based, in its bearings on the circumstances of each particular case."

It will be observed that jurisdiction *ex reconventione* is restricted to cases where the two actions can be the subject of one judgment or of separate but contemporaneous, or nearly contemporaneous, judgments. Where, therefore, the judgment in the *actio conventionis* has been extracted, there can be no subsequent jurisdiction *ex reconventione*.[1] It was held in one case[2] that jurisdiction *ex reconventione* was effectual where the *actio reconventionis* was raised before the *actio conventionis* was out of Court. The circumstances of the case were that there had been judgment in favour of foreign pursuers in the *actio conventionis*, with expenses, and while the account of expenses was still before the Auditor for taxation an action was raised by the defender in the *actio conventionis*, and the *actio reconventionis* was held to be in sufficient time.

[1] Longworth *v.* Yelverton, 1868, 7 M. 70. See also M'Ewan's Trs. *v.* Robertson, 1852, 15 D. 265 (footnote).

[2] Allan *v.* Wormser, Harris & Co., 1894, 21 R. 866. See also Baillie *v.* Hume, 1852, 15 D. 267 (footnote).

This judgment, at least so far as it held that so long as the original case was technically in Court jurisdiction *ex reconventione* must be upheld as a matter of right, was, however, disapproved of in a recent case[1] by a majority of a Court of seven Judges, who were further of opinion that as the *actiones conventiones*—which were conjoined counter actions—were in such a position that the Inner House could not alter the judgments on the merits, jurisdiction *ex reconventione* in a subsequent action could not be upheld.

(b) *Actio Conventionis.*—An *actio conventionis* must be an independent proceeding in which the foreign pursuers voluntarily submit themselves to jurisdiction. Thus, in a small debt case arrestments were used, and a petition for their recall was presented. The debt was paid, but while the petition for the recall was still in dependence, an action was raised against the petitioners for the expenses of obtaining and executing the warrants of arrestment, and the Court held that the petition was not an independent proceeding, but that, on the contrary, the petitioners were obliged to apply to the Sheriff. The Court, accordingly, held that there had been no *actio conventionis.*[2] In like manner, it was held that a foreign pursuer who brought a note of suspension to interdict a Scotsman from doing diligence on a bill accepted by the complainer was not subject to jurisdiction *ex reconventione* in an action in the Court of Session by the holder of the bill for its amount.[3] A claim by a foreigner in a sequestration, however, is an *actio conventionis*[4] where the trustee sues the foreigner to have an illegal preference set aside. Where an action was raised in the Court of Session by foreigners against a Scottish company prior to its liquidation, and was still pending when the liquidators of the company raised an action to restrain the foreigners from proceeding in a foreign Court against the company in liquidation, jurisdiction was sustained *ex reconventione.*[5] A claim in a multiplepoinding by a foreigner is an *actio conventionis*, but only where the pursuer in the *actio reconventionis* is also a claimant.[6]

(c) *Actions must be Between the Same Parties, Acting in the Same Capacities.*—An *actio reconventionis* must be between the same parties, acting in the same capacities, as in the *actio conventionis.*[7] If, however,

[1] Hurst, Nelson & Co., Ltd. *v.* Spenser Whatley, Ltd., 1912, S. C. 1041.

[2] Goodwin and Hogarth *v.* Purfield, 1871, 10 M. 214.

[3] Davis *v.* Cadman, 1897, 24 R. 297.

[4] Ord *v.* Barton, 1847, 9 D. 541 ; Barr *v.* Smith and Chamberlain, 1879, 7 R. 247.

[5] Liquidators of the Pacific Coast Mining Co., Ltd. *v.* Walker, etc., 1886, 13 R. 816.

[6] Bell *v.* Stewart, 1852, 14 D. 837.

[7] Ashton, Hodgson & Co. *v.* Mackrill, 1773, Mor. 4835 ; Houston *v.* Stirling,

a foreigner makes a claim in the sequestration of an individual who is a partner of a firm, and the claim is in respect of a partnership debt, the trustee on the sequestrated estates of the partnership may sue the foreigner, and jurisdiction will be sustained *ex reconventione*.[1]

Where an English firm raised an action in Scotland against a Scotsman, but before final judgment the firm was dissolved, one of the partners continuing the business under the original firm name, and no intimation of the dissolution was given to the defender by the remaining partner, who carried on the litigation as originally raised, an action by the defender against the firm by its original firm name was held good *ex reconventione* notwithstanding the dissolution of the firm.[2]

(d) *Both Parties Foreigners.*—Foreigners may found jurisdiction *ex reconventione*, as where one foreigner sues another foreigner against whom arrestments have been used *ad fundandam jurisdictionem*, the defender in this action may raise an action against the pursuer and found jurisdiction *ex reconventione*.[3]

(e) *Amount Unrestricted in Actio Reconventionis.*—An *actio reconventionis* need not be restricted to the amount sued for in the *actio conventionis*. It is true that some difficulty might be experienced in recovering the balance of a decree in the *actio reconventionis* in excess of the sum in the decree in the *actio conventionis*, but on principle there is no reason for the limitation.[4]

(f) *Actio Conventionis need not be Raised First.*—In order that there may be jurisdiction against a foreigner *ex reconventione*, it is not necessary that the foreigner should raise his action first; it is sufficient if the action by the foreigner is in dependence when the foreigner takes objection to the jurisdiction in the action against himself.[5]

(g) *Facts Inferring Jurisdiction.*—It is not necessary that the facts from which jurisdiction is to be inferred should be libelled on.[6]

(h) *Service of Actio Reconventionis.*—An *actio reconventionis* may be served upon the Scottish agent of the foreigner.[7]

(i) *In Eodem Negotio or Ejusdem Generis.*—The two claims must arise

1824, 2 S. 672 (N. E. 564); 1 W. & S. 199; Thompson *v.* Whitehead, 1862, 24 D. 331; Ponton's Exrs. *v.* Ponton, 1913, S. C. 598.

[1] Barr *v.* Smith and Chamberlain, 1879, 7 R. 247.

[2] Allan *v.* Wormser, Harris & Co., 1894, 21 R. 866.

[3] Ashton, Hodgson & Co. *v.* Mackrill, 1773, Mor. 4835.

[4] Thompson *v.* Whitehead, 1862, 24 D. 331, at p. 344; Ord *v.* Barton, 1847, 9 D. 541, per Lord Justice-Clerk Hope, p. 544.

[5] Morison and Milne *v.* Massa, 1866, 5 M. 130.

[6] Ord *v.* Barton, 1847, 9 D. 541; Bell *v.* Stewart, 1852, 14 D. 837, per Lord Rutherfurd (Ordinary), p. 838.

[7] Vans *v.* Sandilands, 1675, Mor. 4840; Dove Wilson, Sheriff Court Practice, 4th ed. p. 82.

in eodem negotio or *ejusdem generis*.[1] Thus, where a foreigner lodged a claim in a multiplepoinding, and the holders of the fund raised an action against the claimant to prevent him carrying on proceedings in a foreign Court with regard to the subject of the claim;[2] or where, after a collision between a British ship and a foreign ship, the owner of the latter raised an action of damages in the Scottish Courts and the owner of the British ship raised a counter action;[3] or where a foreign claimant in a sequestration was sued by the trustee regarding a preference which the claimant had received;[4] or where a foreigner raised an action and used arrestments, and the defender raised an action of damages for their oppressive use;[5] or where a foreigner raised an action for the illegal use of arrestments and for dismantling his ship, and the defender raised an action for damage done to his foreshore by the vessel;[6] or where a creditor poinded a portion of the bankrupt estate and another creditor sued the poinder;[7] or where the claims in both actions were pecuniary claims instantly payable,[8] the *actio reconventionis* was held to be *in eodem negotio*.

Again, if the claims are *ejusdem generis*, jurisdiction may be founded. Thus, where a foreigner raises an action for a liquid debt, the defender cannot reply with an action of damages for slander and assault and found jurisdiction *ex reconventione*.[9] Again, if both claims *ejusdem generis* are illiquid, or if they are both liquid, jurisdiction *ex reconventione* will be founded, but not where an action by a foreigner for a liquid debt is replied to by an action for an illiquid claim.[10] The reverse of the latter case has not yet come up for decision.

(j) *Actio Conventionis need not be in Court of Session*.—Where a foreigner brought an action in the Sheriff Court and the defender in that action raised a counter action in the Court of Session, it was held that the latter Court had jurisdiction.[11]

[1] Thompson *v.* Whitehead, 1862, 24 D. 331, per Lord Justice-Clerk Inglis, p. 344.

[2] Dawson's Trs. *v.* Macleans, 1860, 22 D. 685. Similarly with regard to liquidation, see Liquidators of the California Redwood Co. *v.* Walker, 1886, 13 R. 810; Liquidators of the Pacific Coast Mining Co. *v.* Walker, 1886, 13 R. 816; California Redwood Co. *v.* Merchants Banking Co., London, 1886, 13 R. 1202.

[3] Morison and Milne *v.* Massa, 1866, 5 M. 130.

[4] Ord *v.* Barton, 1847, 9 D. 541.

[5] Baillie *v.* Hume, 1852, 15 D. 267 (note).

[6] Duke of Hamilton *v.* M'Cracken, 1893, 1 S. L. T. 336.

[7] Black and Knox *v.* Ellis & Sons, 1805, Mor. App. *voce* Foreign, No. 7.

[8] Oliver and Boyd and Others *v.* J. Miller and Another, 1905, 12 S. L. T. 634. See also Thiem *v.* Tyler, 1893, 1 S. L. T. 189.

[9] Thompson *v.* Whitehead, 1862, 24 D. 331. See also Kinnison *v.* Stuart, 1903, 11 S. L. T. 184.

[10] Thompson *v.* Whitehead, 1862, 24 D. 331, at pp. 340 and 344.

[11] Burrell *v.* Gerbruder van Uden, 1914, 2 S. L. T. 394.

XI. Forum non Conveniens.—(a) *Forum non Competens Superseded.*—Although as a general rule a Judge is bound, if jurisdiction exists, to give a suitor the benefit of his decision,[1] cases may arise where "the Court may consider it more proper for the ends of justice that the parties should seek their remedy in another *forum*."[2] The plea which the defender states to that effect was originally in the words "*Forum non competens.*" The word "*competens*" is, however, an inappropriate expression, as the plea is not intended to mean that the Court is incompetent to try the cause, which would be better expressed by the plea of "no jurisdiction," but there being another competent tribunal before which it would be more expedient to try the cause, the latter is to be preferred.[3] The more correct plea, and the one now in use, is "*forum non conveniens.*"

(b) *Must be Another More Suitable Tribunal.*—The plea can never be sustained unless the defender satisfies the Court that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.[4] Where, therefore, the defender fails to prove this, the plea of *forum non conveniens* will fall to be repelled.[5] Mere balance of convenience or inconvenience to the parties will not move the Court to sustain the plea.[6]

(c) *Foreign Executors.*—When foreign executors are called to account in this country for an executry situated abroad,[7] there is a strong presumption in favour of the *forum* where the distribution should take place.[8] Where, however, the conclusion is not for an accounting, but for the purpose of operating payment of a particular

[1] Clements *v.* Macaulay, 1866, 4 M. 583, per Lord Justice-Clerk Inglis, p. 593.

[2] Longworth *v.* Hope, 1865, 3 M. 1049, per Lord President M'Neill, p. 1053.

[3] Longworth *v.* Hope, *supra*, per Lord Deas, p. 1058, and Lord Ardmillan, p. 1059; Martin *v.* Stopford-Blair's Exrs., 1879, 7 R. 329, per Lord President Inglis, p. 331.

[4] Sim *v.* Robinow, 1892, 19 R. 665, per Lord Kinnear, p. 668; M'Lauchlin *v.* London and North-Western Rly. Co., 1899, 7 S. L. T. 244, per Lord Stormonth-Darling, p. 245; Powell *v.* Mackenzie & Co., 1900, 8 S. L. T. 182.

[5] Boe *v.* Anderson, 1857, 20 D. 11; Lynch *v.* Stewart, 1871, 9 M. 860; Jas. Howden & Co., Ltd. *v.* Powell Duffryn Steam Coal Co., Ltd., 1912, 1 S. L. T. 114.

[6] Sim *v.* Robinow, 1892, 19 R. 665, per Lord Kinnear, p. 668; *cp.* Hine and Others *v.* MacDowall, 1897, 5 S. L. T. 12.

[7] Hill *v.* Grant, 1755, 1 Paton's App. 597; Brown's Trs. *v.* Palmer, 1830, 9 S. 224; Macmaster *v.* Macmaster, 1833, 11 S. 685; Martin *v.* Stopford-Blair's Exrs., 1879, 7 R. 329; *cp.* Morison *v.* Ker, 1790, Mor. 4601; Scott *v.* Elliot, 1797, Mor. 4845; both referred to by Lord Watson in Orr Ewing's Trs., 1885, 13 R. (H. L.) 1, at p. 29; M'Tavish *v.* Saltoun, 3rd February 1821, F. C.

[8] Clements *v.* Macaulay, 1866, 4 M. 583, per Lord Justice-Clerk Inglis, pp. 592, 593.

debt, the Court will uphold its jurisdiction.[1] The Court will also uphold its jurisdiction where the executors are domiciled in Scotland and confirmed there, although the estate, a portion of which is in Scotland, is being administered under direction of the Court of Chancery in England.[2] If there is any of the executry estate possessed and held in Scotland the plea will be repelled.[3]

(d) *Foreign Defender Willing to Account in Foreign Forum.*—Jurisdiction against foreign trustees, who can be called to account and who are willing to account in their proper foreign *forum*, will not be sustained by the Court of Session.[4] In some cases the Court sists procedure until it is ascertained whether a remedy may be had in the proper foreign *forum*.[5] In one case[6] it was held that as the *forum conveniens* of a Scots trust was in Scotland, the plea of *forum non conveniens* fell to be repelled, notwithstanding that all the trustees in a Scots trust had gone abroad.

(e) *Partnership.*—There is also a manifest expediency in trying all questions relating to partnership at the domicile of the partnership.[7] This, however, does not apply to joint adventure.[8]

(f) *Action Raised Abroad First.*—Where there is a concurrent jurisdiction in the Court of Session and a foreign Court, it is not usual if an action has been raised in the latter Court that the Court of Session will allow a similar action to proceed before it. Thus,[9] where an administrative suit had already commenced in England with reference to a deceased person, who stated in his will that he was a domiciled Englishman, the plea of *forum non conveniens* was sustained in a subsequent

[1] Campbell *v.* Rucker, 2nd March 1809, Hume, 258. See, however, Houston *v.* Stirling, 1824, 2 S. 672 (N. E. 564); 1 W. & S. 199.

[2] Brown *v.* Maxwell's Exrs., 1883, 10 R. 1235. See also Ferguson, etc. *v.* Douglas, Heron & Co., 1796, 3 Paton's App. 503; Gillon & Co. *v.* Dunlop and Collett, 1864, 2 M. 776.

[3] M'Morine *v.* Cowie, 1845, 7 D. 270; Martin *v.* Stopford-Blair's Exrs., 1879, 7 R. 329.

[4] Peters *v.* Martin, 1825, 4 S. 107 (N. E. 108); Macmaster *v.* Macmaster, 1833, 11 S. 685, per Lord Justice-Clerk Boyle, p. 688; Orr Ewing's Trs. *v.* Orr Ewing, 1885, 13 R. (H. L.) 1, per Lord Watson, p. 27.

[5] Macmaster *v.* Stewart, 1834, 12 S. 731; Munro *v.* Graham, 1839, 1 D. 1151; Tulloch *v.* Williams, 1846, 8 D. 657. This last case was described by Lord Kinnear in Sim *v.* Robinow, 1892, 19 R. 665, at p. 669, as exceptional. See also Wotherspoon *et al. v.* Connolly, 1871, 9 M. 510.

[6] M'Gennis *v.* Rooney, 1891, 18 R. 817.

[7] Clements *v.* Macaulay, 1866, 4 M. 583, per Lord Justice-Clerk Inglis, pp. 592, 593; Sim *v.* Robinow, 1892, 19 R. 665; Adamson's Exrs. *v.* Mactaggart, 1893, 20 R. 738.

[8] Clements *v.* Macaulay, 1866, 4 M. 583; Adamson's Exrs. *v.* Mactaggart, 1893, 20 R. 738.

[9] Ferguson *v.* Buchanan, 1890, 18 R. 119. See also Gemmell *v.* Emery, 1905, 13 S. L. T. 490. Where Scottish action is raised before English administration order is granted, see Low *v.* Low, 1893, 1 S. L. T. 43.

action in Scotland of declarator of domicile. In a similar Scottish action[1] the English proceedings had not got the length of the consideration of the question raised in the Scottish action when the service of the summons in the latter action was made, and the plea was repelled. In a recent case, where writs had been issued in the Admiralty Division of the High Court in England against the owners of a Scottish vessel at the instance of the owners of an English vessel with which the former had been in collision, and the owners of the Scottish vessel presented a petition in the Court of Session subsequently for limitation of liability, the plea of *forum non conveniens* was repelled.[2] Although the Court of Session will not usually allow Scottish actions to proceed where there have been prior proceedings in England, the Scottish action has sometimes been allowed to be used as a foundation for diligence against property situated in Scotland.[3] The decisions upon this point are, however, now of doubtful authority.[4]

(g) *Bankruptcy.*—In bankruptcy cases, if a person has already been made bankrupt by a foreign Court, the plea of *forum non conveniens* will be sustained when an application is subsequently made for sequestration in the Scottish Courts.[5] Where the sequestration of a company with a place of business in Scotland and England was validly awarded by a Scottish Court, and a claim of damages was made in the sequestration, and a bill was filed in the Court of Chancery in England subsequent to the Scottish award of sequestration with reference to this claim, the Scottish Court refused to sist the proceedings in the sequestration.[6]

(h) *Jurisdiction by Arrestment of Moveables.*—The plea of *forum non conveniens* is often made where jurisdiction is founded by arrestment of moveables in Scotland followed by arrestment on the dependence, and at one time there was a tendency to repel the plea on the ground that arrestment to found jurisdiction would otherwise be of little avail,[7] and that the arrestments on the dependence would be

[1] Huntly *v.* Brooks' Trs., 1901, 8 S. L. T. 399. See also Thomson *v.* North British and Mercantile Insurance Co., 1868, 6 M. 310.

[2] Hay *v.* Jackson & Co., 1911, S. C. 876.

[3] Munro *v.* Graham, 1839, 1 D. 1151; Wilmot *v.* Wilson, 1841, 3 D. 815; Hawkins *v.* Wedderburn, 1842, 4 D. 924; Fordyce *v.* Bridges, 1842, 4 D. 1334; Cochrane *v.* Paul, 1857, 20 D. 178.

[4] Atkinson and Wood *v.* Mackintosh, 1905, 7 F. 598.

[5] Goetze *v.* Aders, etc., 1874, 2 R. 150; Okell *v.* Foden, 1884, 11 R. 906.

[6] Phosphate Sewage Co. *v.* Molleson, 1876, 3 R. (H. L.) 77.

[7] Parken *v.* Royal Exchange Assurance Co., 1846, 8 D. 365, per Lord Justice-Clerk Hope, p. 371.

lost.[1] These considerations, however, did not always influence the Court, and in later cases the plea was sustained notwithstanding that arrestments had been used. In one case [2] an English railway company was sued by a Scottish widow for damages for the death of her husband who met his death in England through the fault of the company. In that case the plea was sustained, though in somewhat similar circumstances the opposite result was subsequently arrived at.[3] In another case [4] an Englishman sued another Englishman for goods purchased in England. This case is similar to the case of *Longworth* [5] in that the parties were both domiciled in England, yet in the case of *Longworth* the plea was repelled. In later cases the plea has been repelled [6] or sustained [7] according to circumstances. Where there is an illegitimate reason for raising the action in Scotland, such as that the contract founded upon is not enforceable in the country of the domicile of the parties, the plea will likely be sustained.[8] In a recent case, where the complainers—an English company—sought to interdict another English company from infringing a patent in Scotland, the Court repelled the plea.[9] It is evident, therefore, that the determination of the question of sustaining or repelling the plea of *forum non conveniens* varies with the circumstances of each particular case.[10]

[1] Longworth *v.* Hope, 1865, 3 M. 1049, per Lord President M'Neill, pp. 1053, 1054.

[2] Williamson *v.* North-Eastern Rly. Co., 1884, 11 R. 596; *cp.* Lane *v.* Foulds, 1903, 11 S. L. T. 118.

[3] M'Lauchlin *v.* London and North-Western Rly. Co., 1899, 7 S. L. T. 244.

[4] Atkinson and Wood *v.* Mackintosh, 1905, 7 F. 598.

[5] Longworth *v.* Hope, 1865, 3 M. 1049.

[6] James Howden & Co., Ltd. *v.* Powell Duffryn Steam Coal Co., Ltd., 1912, 1 S. L. T. 114.

[7] Powell *v.* Mackenzie & Co., 1900, 8 S. L. T. 182.

[8] Lane *v.* Foulds, 1903, 11 S. L. T. 118; Anderson, Tulloch & Co. *v.* J. C. & J. Field, Ltd., 1910, 1 S. L. T. 401.

[9] Toni Tyres, Ltd. *v.* The Palmer Tyre, Ltd., 1905, 7 F. 477.

[10] M'Lauchlin *v.* London and North-Western Rly. Co., 1899, 7 S. L. T. 244.

CHAPTER III

PRIVATIVE JURISDICTION

I. Actions Involving Status.—By the 33rd section of the Court of Session Act, 1830,[1] "all actions of declarator of marriage and of nullity of marriage, and all actions of declarator of legitimacy and of bastardy, and all actions of divorce, and all actions of separation *a mensa et thoro*, shall be competent to be brought and insisted on only before the Court of Session." Actions of adherence and all other consistorial actions, though not specially mentioned in the aforesaid Act, were subsequently placed in the same position.[2] By the Conjugal Rights (Scotland) Amendment Act, 1861,[3] the expression "consistorial action" is defined to include, besides the above-enumerated actions, the action of "putting to silence and actions of aliment between husband and wife instituted in the Court of Session."

In cases of aliment, however, jurisdiction was at an early period given to the Sheriff also,[4] but the Sheriff's jurisdiction in aliment cases between husband and wife was confined to cases of *interim* aliment where there was separation *de facto*,[5] or by agreement.[6] His powers were not limited to one single allowance merely, but the Sheriff could give, by repeated orders, what would practically amount to a permanent aliment.[7] If there was a question of *status* involved in the action for aliment, the Sheriff had no jurisdiction.[8] Where, however, there was an award of separation and aliment made by the Court of Session the Sheriff had jurisdiction to grant additional aliment, but only *ad interim*.[9] The Sheriff Courts (Scotland) Act, 1907,[10] however, made an inroad

[1] 11 Geo. IV. and 1 Will. IV. cap. 69.

[2] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 16.

[3] 24 & 25 Vict. cap. 86, sec. 19.

[4] 11 Geo. IV. and 1 Will. IV. cap. 69, sec. 32.

[5] Smith *v.* Smith, 1874, 1 R. 1010; M'Donald *v.* M'Donald, 1875, 2 R. 705, per Lord President Inglis, p. 706.

[6] Hood *v.* Hood, 1871, 9 M. 449.

[7] Smith *v.* Smith, 1874, 1 R. 1010, per Lord President Inglis, p. 1011.

[8] Benson *v.* Benson, 1854, 16 D. 555 (note); Rennie *v.* Rennie, 1863, 1 M. 389; Smith *v.* Smith, 1874, 1 R. 1010; M'Donald *v.* M'Donald, 1875, 2 R. 705, per Lord President Inglis, p. 706.

[9] Hay *v.* Hay, 1882, 9 R. 667.

[10] 7 Edw. VII. cap. 51.

upon the privative jurisdiction of the Court of Session in respect that actions of separation and aliment[1] were made competent in the Sheriff Court. With regard to actions for aliment, the same Act gave jurisdiction to the Sheriff,[2] but there was no authoritative decision as to its scope. On the one hand, it was held that actions of aliment as between husband and wife were only competent in the Sheriff Court as regards *interim* aliment, as formerly; whereas, on the other hand,[3] it was held that permanent aliment could be awarded. The Sheriff Courts (Scotland) Act, 1913,[4] however, seems to place the question beyond doubt, as the actions of aliment which are now competent in the Sheriff Court as between husband and wife are actions of separation and aliment, actions of adherence and aliment, and actions of *interim* aliment. In these actions the Sheriff Court has a concurrent jurisdiction with the Court of Session. In all other actions of a consistorial nature the Court of Session has exclusive jurisdiction.

Any person domiciled in Scotland, or claiming any heritable or moveable property situate in Scotland, may raise an action to have it declared that he is entitled to be deemed a natural-born British subject, and such actions can only be raised in the Court of Session.[5] Where in a case there are averments affecting *status* which may never arise, the Sheriff has jurisdiction.[6] In one case[7] it was held that the Sheriff could competently decide, for the purposes of the action, the incidental question whether two persons not parties to the action had been irregularly married.

II. Applications for Custody of Children. — Petitions for the permanent custody of children are not consistorial actions, but are an appeal to the *nobile officium* of the Court of Session.[8] They are, therefore, only competent in the Inner House, or to the Lord Ordinary on the Bills in vacation.[9]

Prior to the Sheriff Courts (Scotland) Act, 1907, the Sheriff had jurisdiction to regulate the *interim* possession of children where there was no question of title, or pending an application to the Court of

[1] 7 Edw. VII. cap. 51, sec. 5 (2), sec. 52, Second Schedule.

[2] Macdonald *v.* Macdonald, 1908, 24 Sh. Ct. Rep. 271; Low *v.* Low, 1908, 16 S. L. T. 352; Scott *v.* Scott, 1910, 27 Sh. Ct. Rep. 5.

[3] Samuel *v.* Samuel, 1909, 25 Sh. Ct. Rep. 99; Macfarlane *v.* Macfarlane, 1909, 26 Sh. Ct. Rep. 48.

[4] 2 & 3 Geo. V. cap. 28, First Schedule.

[5] The Legitimacy Declaration Act, 1858 (21 & 22 Vict. cap. 93), sec. 9.

[6] Wright *v.* Sharp, 1880, 7 R. 460.

[7] M'Donald *v.* Mackenzie, 1891, 18 R. 502.

[8] A. B. *v.* C. B., 1906, 8 F. 973, per Lord M'Laren, p. 974.

[9] Edgar *v.* Fisher's Trs., 1893, 21 R. 59.

Session.[1] Power has now been given by that Act[2] to the Sheriff to regulate the custody of children, and the Sheriff may on cause shown or *ex proprio motu* remit such an action to the Court of Session. Whether a Sheriff has power by said Act in a substantive action to make an order for the permanent custody of children has not yet been authoritatively decided.[3]

Ordinary applications made under the Guardianship of Infants Act, 1886,[4] may also be made to the Sheriff as well as to the Court of Session, but the latter alone has power to remove a testamentary guardian or a guardian appointed under said Act.[5]

Applications under the Custody of Children Act, 1891,[6] must be made to the Court of Session.[7]

The Conjugal Rights (Scotland) Amendment Act, 1861, which empowers the Lord Ordinary before whom an action of divorce is pending to make *interim* orders for the custody of the children of the marriage, does not deprive the Inner House of its jurisdiction to pronounce *interim* orders.[8]

III. Actions Concerning Heritable Right and Title.—*Adjudication.*—The Sheriff Courts (Scotland) Act, 1907, has so far encroached upon the privative jurisdiction of the Court of Session in actions affecting heritable right and title that the only actions now left in which the Court of Session has exclusive jurisdiction are (1) such adjudications as were previously incompetent in the Sheriff Court; and (2) actions of reduction.[9] (*For the latter see next section.*)

By the Act 1672, cap. 45 (record edition), cap. 19 (12mo edition), general and special adjudications were substituted for apprizings, and the Lords of Session were appointed sole judges of these, and as there has been no alteration either in the law or practice since that date, the Court of Session has exclusive jurisdiction with regard to them.

Adjudications in implement are in a different position, as they were not comprehended by the Act of 1672. All depends, therefore, upon

[1] Lang *v.* Lang, 1849, 11 D. 1217; Hood *v.* Hood, 1871, 9 M. 449; Brand *v.* Shaws, 1888, 15 R. 449.

[2] Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), sec. 5 (2), as amended by the Sheriff Courts (Scotland) Act, 1913.

[3] Macdonald *v.* Macdonald, 1908, 24 Sh. Ct. Rep. 271; Naysmith *v.* Naysmith, 1910, 26 Sh. Ct. Rep. 319; Yuill *v.* Taig, etc., 1911, 27 Sh. Ct. Rep. 195.

[4] 49 & 50 Vict. cap. 27.

[5] Ibid., sec. 6.

[6] 54 & 55 Vict. cap. 3.

[7] Gillan *v.* Parish Council of Barony Parish, Glasgow, 1898, 1 F. 183.

[8] M'Callum *v.* M'Callum, 1893, 20 R. 293.

[9] Sheriff Courts (Scotland) Act, 1907, sec. 5 (4).

the practice prior to 1672. Erskine[1] is of opinion that adjudications in implement before that date might have been pursued before the Sheriff, but states that this has never been fixed by our writers or decisions. In practice, however, it seems that such adjudications are never brought before the Sheriff.[2]

With regard to adjudications *contra hæreditatem jacentem*, it is certain that previous to the Act of 1672 they were led before the Sheriff, and, as that Act did not comprehend them, they continued to be led before him, and are still competently within his jurisdiction.

In actions raised in the Sheriff Court relating to heritable right and title[3] where the value of the subject in dispute exceeds £50 by the year, or £1000 in value, it is competent for either party at the closing of the record, or within six days thereafter, to require the cause to be remitted to the Court of Session.[4]

IV. Reductions.—(1) *Ordinary.*—Although reductions are still exclusively within the jurisdiction of the Court of Session,[5] when a deed was produced and founded on by any party in a process before a Sheriff, it was held from an early date[6] that the Sheriff had jurisdiction to decide upon the validity of the deed by way of exception. This common law jurisdiction was confirmed by statute in cases of bankruptcy,[7] and disputes between employers and workmen,[8] and later was made universal by the Sheriff Courts (Scotland) Acts, 1877[9] and 1907.[10] This power does not extend the Sheriff's jurisdiction to actions of reduction; the effect is merely to permit the Sheriff to determine the validity of a deed for the purposes of a particular action,[11] and in order to do so the party taking exception must be in a position to raise at once an action of reduction without the necessity of also having declaratory conclusions.[12] Nor does it extend to a document forming the basis of a party's alleged right of action or the basis of a defence against an attack

[1] Erskine's Inst. ii. 12. 53.

[2] Erskine's Inst. ii. 12. 53; Bell's Comm. (7th ed.), i. 751, 752; Ker *v.* Primrose, 1709, Mor. 46; Graham's Creditors *v.* Hyslop, 1753, Mor. 49.

[3] Anderson *v.* M'Gown, 1911, S. C. 441, per Lord Kinnear.

[4] Sheriff Courts (Scotland) Act, 1907, sec. 5 (second proviso (*a*)).

[5] Ibid., sec. 5 (4).

[6] Williamson *v.* Cushnie, 1630, Mor. 7483.

[7] Bankruptcy (Scotland) Act, 1856, sec. 10; Bankruptcy and Real Securities (Scotland) Act, 1857, sec. 9. See also Bankruptcy (Scotland) Act, 1913, sec. 8.

[8] Employers and Workmen Act, 1875 (38 & 39 Vict. cap. 90), secs. 3 and 14.

[9] 40 & 41 Vict. cap. 50, sec. 11.

[10] 7 Edw. VII. cap. 51, First Schedule, rule 50.

[11] Dickson *v.* Murray, 1866, 4 M. 797; Mackenzie *v.* Calder, 1868, 6 M. 833; Brown's Trs. *v.* Fraser, 1870, 8 M. 820; Nivison & Howat, 1883, 11 R. 182, per Lord Lee, pp. 189, 190; Scott *v.* Cook, 1886, 24 S. L. R. 34.

[12] Duke of Argyll *v.* Muir, 1910, S. C. 96.

on title.[1] A Sheriff may, *ope exceptionis*, partially reduce a deed. Thus, a Sheriff was held to be quite within his power when he reduced a heritable bond from £150 to £100 on evidence to that effect in an action of count and reckoning.[2]

Actions with purely rescissory conclusions, therefore, can only be pursued in the Court of Session, and if pursued in the Sheriff Court will be dismissed. If, however, an action in the Sheriff Court has rescissory conclusions and also another conclusion which is competent, the action will not be entirely dismissed, but only *quoad* the rescissory conclusions.[3] Where in the course of an otherwise competent Sheriff Court case it appears that one of the parties will require to reduce a deed if he is to succeed, the procedure is for the Sheriff to sist the cause in order that an action of reduction may be raised in the Court of Session.[4]

The right of the Sheriff to decide actions of reduction by way of exception is not confined to the Ordinary Court cases, but may be done in cases before the Small Debt Court.[5]

A decree of Court is not "a deed or writing" in the sense of section 11 of the Sheriff Courts (Scotland) Act, 1877, which can be set aside by way of exception.[6]

Where in a statute it is enacted that the Sheriff Court shall be the *forum* where all disputes are to be decided, and the action brought resolves itself into an action of reduction, it has been held that notwithstanding the fact that reductions are only competent in the Court of Session, the Sheriff has jurisdiction to try the particular reduction.[7] (See *Reduction, infra*, Part vii. Chap. v.)

(2) *Of Decrees.*—The Court of Session has exclusive power to reduce its own decrees,[8] or the decrees of inferior Courts,[9] even when the statute which institutes or governs the procedure of the inferior Court excludes all review. In this way the Court of Session may reduce the decree of any inferior Court which has acted in excess of its statutory power, has deviated from statutory procedure, or has in any way acted without due observance of the judicial administration of justice.[10] It

[1] Donald *v.* Donald, 1913, S. C. 274.
[2] Chalmers *v.* Roxburgh, 1825, 4 S. 12 (N. E. 13).
[3] Moroney & Co. and Others *v.* Muir & Sons, 1867, 6 M. 7.
[4] M'Laren *v.* Steele, 1857, 20 D. 48.
[5] Wilson *v.* Glasgow Tramways Co., 1878, 5 R. 981.
[6] Neil *v.* M'Nair, 1901, 3 F. (J.) 85; Leggat Bros. *v.* Gray, 1912, S. C. 230.
[7] Davie *v.* Colinton Friendly Society, 1870, 9 M. 96.
[8] Innes *v.* Dumbar, 1534, Mor. 7320.
[9] Murray *v.* Howieson, 1611, Mor. 7482; Procurator-Fiscal of Glasgow *v.* Cowan, 1677, Mor. 7486; Edingtons *v.* Astley, 1829, 8 S. 192; Calder *v.* Trotter, 1833, 11 S. 694.
[10] Brown *v.* Heritors of Kilbery, 1825, 3 S. 480 (N. E. 334); 1829, 3 W. & S. 441,

cannot, however, reduce the decrees of a sovereign Court, like the Court of Justiciary[1] or the Lands Valuation Appeal Court.[2]

The question whether the Court of Session has jurisdiction to reduce a judgment of the House of Lords on the ground that it was obtained by fraud has been raised but not decided.[3] (See *Reduction of Decrees*, Part vii. Chap. v. *infra*.)

V. Declarators.—(1) *Generally*.—Actions of declarator were originally peculiar to the Court of Session. The Sheriff Courts (Scotland) Act, 1877,[4] however, gave jurisdiction to the Sheriff in actions of declarator relating to questions of heritable right or title when the value of the subject in dispute did not exceed the sum of £50 by the year or £1000 value, and actions of declarator for the purpose of determining any question relating to the property in, or right of succession to, moveables, where the value of the subject in dispute did not exceed the sum of £1000. The Sheriff's jurisdiction has since that date been extended by the Sheriff Courts (Scotland) Act, 1907,[5] to all actions of declarator, with the exception of declarators of marriage or nullity of marriage and actions the direct or main object of which is to determine the personal *status* of individuals. If, however, an action of declarator is for determining a question relating to questions of heritable right or title of the value of £50 yearly or £1000 in value, or the right of succession to moveables exceeding £1000 in value, or relating to division of commonty, or division, or division and sale of common property of the value of £50 yearly or £1000 in value, either party may require the cause to be remitted to the Court of Session.[6]

(2) *Proving of the Tenor*.—This is an action declaratory of the contents of a deed or other writing which has been lost, destroyed, obliterated, or cancelled, and that the restored copy is to have the same effect as the original. It was an action which originally could only be brought in the Court of Session;[7] but by the Act 1707, cap. 10 (record edition), cap. 9 (12mo edition), the Court of Teinds was also given jurisdiction to declare the tenor of valuations and subvaluations.[8] The action

per Lord Chancellor Lyndhurst, p. 448; Walsh *v.* Pollokshaws Mags., 1905, 7 F. 1009; Caledonian Rly. Co. *v.* Glasgow Corporation, 1905, 7 F. 1020.

[1] Strachan *v.* Commissioners of Justiciary, 1684, Mor. 7415.

[2] Stirling & Sons *v.* Holm and Others, 1873, 11 M. 480.

[3] Shedden *v.* Patrick, 1850, 12 D. 694; 1852, 14 D. 721; 1854, 17 D. (H. L.) 18; Longworth *v.* Yelverton, 1878, 7 M. 70.

[4] 40 & 41 Vict. cap. 50, sec. 8.

[5] 7 Edw. VII. cap. 51, sec. 5 (1).

[6] Sheriff Courts (Scotland) Act, 1907, sec. 5 (second proviso (*a*), (*b*), (*c*)).

[7] Balnagown *v.* M'Kenzie, 1663, Mor. 15790; Smart *v.* Ewing, 1673, 3 Br. Supp. 149; Act 1672, Concerning the Session, sec. 5.

[8] Alexander *v.* Oswald, 1840, 3 D. 40; Lord Lynedoch *v.* Liston, 1841 3 D. 1078 Earl of Wemyss *v.* Duke of Buccleuch, 1883, 10 R. 1084.

when raised in the Court of Session was an Inner House action; but by the Act of Sederunt, 20th March 1907,[1] it can now be disposed of by the Lord Ordinary on the Procedure Roll or after proof, and is subject to the like review as if the action were an ordinary petitory action. It seems to be still only competent in the Court of Session.[2]

(3) *Declarator and for Payment of a Casualty.*—It has not yet been decided whether an action for *declarator and for payment of a casualty* is exclusively within the jurisdiction of the Court of Session.[3]

VI. Actions of Declarator of Irritancy and Removing.—These actions were formerly only competent in the Court of Session, but are now within the jurisdiction of the Sheriff.[4] Under the Sheriff Courts (Scotland) Act, 1853,[5] sec. 32, the Sheriff had jurisdiction to hear declarators of irritancy of feu-duties in subjects not exceeding in yearly value the sum of £25, and for removing. This section of the last-mentioned Act has been repealed by the Sheriff Courts Act of 1907, and the section has not been repeated, as it is unnecessary now that all actions of declarator of irritancy and removing have been made competent in the Sheriff Court.

VII. Division of Commonty and Division and Sale.—The former action was directed by the Act 1695, cap. 69 (record edition), cap. 38 (12mo edition), to be raised before the Lords of Session, and has been an action peculiar to the Court of Session until recently, when it was included in the jurisdiction of the Sheriff.[6]

Both actions are now competent either in the Sheriff Court or in the Court of Session, but if raised in the Sheriff Court and relate to a subject exceeding £50 by the year or £1000 in value, either party may require the cause to be remitted to the Court of Session.[7]

VIII. Suspensions. — Previous to the Sheriff Courts (Scotland) Act, 1838,[8] suspensions could only be raised in the Bill Chamber. By that Act suspensions were made competent in the Sheriff Court of charges for sums under £25 given on a decree of registration. The Sheriff Courts (Scotland) Act, 1907,[9] extends the Sheriff's

[1] C. A. S., C, iv. 5.

[2] Walker *v.* Nisbet, 1915, S. C. 639, per Lord Justice-Clerk Macdonald, p. 640, and Lord Salvesen, p. 642; *cp.* Stewart, 1914, 2 S. L. T. 22.

[3] Motherwell *v.* Manwell, 1903, 5 F. 619.

[4] Sheriff Courts (Scotland) Act, 1907, sec. 5 (4).

[5] 16 & 17 Vict. cap. 80.

[6] Sheriff Courts (Scotland) Act, 1907, sec. 5 (3). See also Sheriff Courts (Scotland) Act, 1877 (40 & 41 Vict. cap. 50), sec. 8 (3).

[7] Sheriff Courts (Scotland) Act, 1907, sec. 5 (3), and second proviso (*c*).

[8] 1 & 2 Vict. cap. 119, sec. 19.

[9] 7 Edw. VII. cap. 51, sec. 5 (5); Bryson *v.* Belhaven Engineering and Motors, Ltd., 1908, 15 S. L. T. 1043.

privative jurisdiction in suspensions to charges upon decrees of Court granted by the Sheriff, or upon decrees of registration where the debt, exclusive of interest, does not exceed £50. All other suspensions must be raised in the Bill Chamber.

Where a petition was presented to the Sheriff praying that the holders of a bill of exchange for £2500 be interdicted from assigning, endorsing, or otherwise disposing of it, or recording the protest, or raising diligence against the petitioner, it was held that the application was in effect a suspension and incompetent before the Sheriff.[1]

See Maclaren's Bill Chamber Practice.

IX. Trusts.—(1) *Ordinary Trusts.*—(a) *Statutory.*—The Court of Session has almost exclusive jurisdiction in applications under the Trusts Acts. The Court of Session may authorise trustees to do the following acts[2]:—

(1) To sell the trust estate, or part of it.

(2) To grant feus or long leases of the heritable estate, or part of it.

(3) To borrow money on the security of the trust estate, or any part of it.

(4) To excamb any part of the trust estate which is heritable.

(5) To advance part of the capital of the trust estate.[3]

(6) To apply the whole or part of the trust funds to the redemption of debt on trust heritable property.[4]

The Court of Session may also grant an application to it by a trustee who resigns, or by the representatives of a trustee who has died or resigned, for discharge.[5] It may also appoint new trustees;[6] grant powers to trustees to assume new trustees;[7] grant warrant to a beneficiary of a lapsed trust to complete a title;[8] or grant warrant to complete the title of a judicial factor to any trust property.[9] Applications may also be made for an order on the Accountant of Court to superintend the administration of a trust estate.[10]

The Court may make orders in cases of breach of trust where the

[1] Thom *v.* North British Bank, 1848, 10 D. 1254.
[2] Trusts (Scotland) Act, 1867 (30 & 31 Vict. cap. 97), sec. 3.
[3] Ibid., sec. 7.
[4] Ibid., sec. 8.
[5] Ibid., sec. 9.
[6] Ibid., sec. 12.
[7] Ibid., sec. 13.
[8] Ibid., sec. 14.
[9] Ibid., sec. 15.
[10] Judicial Factors (Scotland) Act, 1889 (52 & 53 Vict. cap. 39), sec. 18.

trustee has committed the same with the consent of a beneficiary.[1] It has also jurisdiction to remove trustees in cases of insanity, physical or mental incapacity, or by reason of continuous absence for a period of six months from the United Kingdom, except in the case of a *mortis causa* trust or a marriage-contract trust, in which cases the Sheriff Court has a concurrent jurisdiction.[2]

(b) *Nobile Officium.*—The Court of Session, in the exercise of its *nobile officium,* may remove trustees for any adequate cause,[3] and appoint new trustees,[4] or allow trustees to resign office [5] and appoint new trustees.[6] They may also sequestrate the trust estate, with or without the removal of trustees, and appoint a judicial factor.[7] Legacies of beneficiaries with interests adverse to the trustees have also been sequestrated and a judicial factor appointed.[8]

The Court has authorised English trustees who held real estate in Scotland, and who obtained an order from the High Court of Justice sanctioning their proposals, to grant leases of minerals and feus of Scottish heritages.[9]

The Court has also authorised advances to beneficiaries for maintenance and education out of trust funds which were directed to be accumulated, or not payable at the time, or in which the beneficiaries were not vested, or, if vested, were only vested as a class.[10]

The Court may also accelerate the payment of trust funds. Thus, where the distribution of a trust estate is directed to be made on the death of an annuitant, and it clearly appears that in postponing the time of division the testator had no other object in view than to secure payment of the annuity, the Court may, upon the discharge or renunciation of the annuitant's right, ordain an immediate division. It is essential, however, that the beneficiaries should have an indefeasible

[1] Trusts (Scotland) Amendment Act, 1891 (54 & 55 Vict. cap. 44), sec. 6.

[2] Ibid., sec. 8.

[3] Mitchell, etc., Petrs., 1864, 2 M. 1378; Stewart *v.* Chalmers, 1904, 7 F. 163; Cherry *v.* Patrick, 1910, S. C. 32; Wishart, etc., Petrs., 1910, 2 S. L. T. 229.

[4] Lamont *v.* Lamont, 1908, S. C. 1033.

[5] Alison, etc., Petrs., 1886, 23 S. L. R. 362; Orphoot, Petr., 1897, 24 R. 871.

[6] Simpson's Trs., Petrs., 1907, S. C. 87.

[7] Stewart *v.* Morrison, 1892, 19 R. 1009; Whyte *v.* Whyte's Trs., 1885, 22 S. L. R. 890.

[8] Maitland's Trs., 1903, 11 S. L. T. 78.

[9] Pender's Trs., 1907, S. C. 207.

[10] Duncan's Trs., 1877, 4 R. 1093; Websters *v.* Miller's Trs., 1887, 14 R. 501; Muir *v.* Muir's Trs., 1887, 15 R. 170; Ross' Trs., 1894, 21 R. 995; Clark's Trs., 1895, 22 R. 706; Martin and Other, Petrs., 1904, 6 F. 592; Robertson's Trs., Petrs., 1909, S. C. 236.

vested right.[1] The Court may also make provision for a *casus improvisus* in a trust deed.[2] It will not, however, confer a power which, by construction of the trust deed or by implication, the trustees were not meant to possess.[3]

(2) *Charitable Trusts.*—Besides its ordinary powers the Court of Session, in virtue of its equitable jurisdiction, has, and exercises, a wide discretion in all matters connected with charitable trusts.[4] It interprets charitable bequests in the most benignant manner consistent with the truster's intention, and where the general idea is indicated the Court will find the means of carrying out the details into execution.[5] Thus the words "I wish to found a hospital" were considered sufficient to constitute a valid bequest.[6]

(a) *Administration.* — As regards administration, the Court may allow the trust to be administered by a body which was not appointed by the truster, but which had satisfactorily managed its affairs for a very long period.[7] It will not, however, allow the misapplication of funds, no matter how long this has been going on.[8] It will not alter the purposes of the trust, or substitute one trust for another, though it may change the mode of administration in order that the benefit intended may be more effectually secured.[9] Thus where a charity included a church and a hospital for the maintenance of the poor, and the former had been compulsorily sold to a railway company, the Court

[1] Muirhead *v.* Muirhead, 1890, 17 R. (H. L.) 45, per Lord Watson, p. 48. See also Roberton *v.* Davidson, 1846, 9 D. 152 ; Rainsford *v.* Maxwell, 1852, 14 D. 450 ; Pretty *v.* Newbigging, 1854, 16 D. 667 ; Munro and Another *v.* MacArthur, 1878, 16 S. L. R. 126 ; Mackay's Trs., 1878, 16 S. L. R. 197 ; Finlay's Trs. *v.* Finlay, 1886, 13 R. 1052 ; Urquhart's Trs. *v.* Urquhart, 1886, 14 R. 112 ; Ross' Trs. *v.* Ross, 1894, 21 R. 927 ; M'Murdo's Trs. *v.* M'Murdo, 1897, 24 R. 458 ; Gavin's Trs. *v.* Johnston's Trs., 1901, 4 F. 278, per Lord Young, p. 285 ; M'Pherson's Trs. *v.* Hill, 1902, 4 F. 921.

[2] Lady Buchanan *v.* The Laird, 1629, Mor. 671 ; Hamilton *v.* Hamiltons, 1681, Mor. 672 ; Sholee *v.* Alison, 1684, Mor. 672 ; Aberdein's Trs. *v.* Aberdein, 1870, 8 M. 750 ; Dunlop *v.* M'Crae, 1884, 11 R. 1104 ; Kennedy's Trs. *v.* Warren, 1901, 3 F. 1087.

[3] Kinloch, etc., Petrs., 1859, 22 D. 174 ; Berwick, etc., Petrs., 1874, 2 R. 90 ; Noble's Trs., 1912, S. C. 1230 ; Scott's Hospital Trs., 1913, S. C. 289.

[4] Clephane *v.* Mags. of Edinburgh, 1869, L. R. 1 Sc. App. 417, per Lord Westbury, pp. 420, 421 ; Ross *v.* Governors of Heriot's Hospital, 1843, 5 D. 589, per Lord Cuninghame, p. 609.

[5] Mags. of Dundee *v.* Morris, 1858, 20 D. (H. L.) 9 ; 3 Macq. 134, per Lord Cranworth, p. 166 ; Bruce *v.* Presbytery of Deer, 1867, 5 M. (H. L.) 20 ; L. R. 1 Sc. App. 96 ; Murray and Another, Petrs., 1891, 29 S. L. R. 173.

[6] Mags. of Dundee *v.* Morris, 1858, 20 D. (H. L.) 9 ; 3 Macq. 134, per Lord Chancellor Chelmsford, p. 156.

[7] Baird *v.* Mags. of Dundee, 1863, 1 M. (H. L.) 6.

[8] Mags. of Dundee *v.* Presbytery of Dundee, 1861, 23 D. (H. L.) 14 ; Mags. of Edinburgh *v.* M'Laren, 1879, 8 R. (H. L.) 140.

[9] Clephane *v.* Mags. of Edinburgh, 1869, 7 M. (H. L.) 7. See also Mags. of Airdrie *v.* Smith, 1850, 12 D. 1222.

held that the proceeds of the sale need not be set aside for rebuilding upon the old model, but that a surplus might be applied for the poor.[1]

The Court, upon the death of trustees, will appoint new trustees,[2] but it will not add to, or diminish, their number at its own discretion,[3] or allow trustees of a different denomination to act,[4] or substitute an entirely different body of trustees.[5] The Court may also remove charitable trustees, sequestrate the estate, and appoint a judicial factor.[6]

The Court may allow the trustees certain discretionary powers not given by the original deed. Thus, where there had been a split among the churches intended to be benefited, the trustees were allowed to include the minority as well as the majority.[7]

In giving directions to trustees as to future management the Court, in one case,[8] allowed the past management to go without punishment, as it was *bonâ fide*, though mistaken.

Where there is a surplus revenue unappropriated in a charitable trust, the Court may allow the trustees either to increase the amounts paid to the recipients of the charity or to add to their number.[9] If, however, the gift is to the donee, the Court will not sanction the increase of the number at the donee's expense. Thus, where the income for a bursary had largely increased, it was held that the increase was to go to the bursar, and not to be taken for the purpose of founding new bursaries.[10]

The Court may interfere with the discretion of trustees and give an increase in the allowance made to beneficiaries under the deed, and also give a new allowance.[11]

(b) *Lapsed Trusts.*—Where a charitable trust lapses, an application for a judicial factor should not be made, but the managers should ask the Court to approve of a scheme to carry out a trust *ejusdem generis*,[12]

[1] Clephane *v.* Mags. of Edinburgh, 1864, 2 M. (H. L.) 7.

[2] Falconer, Petr., 1830, 9 S. 142; Morison and Others, Petrs., 1863, 1 M. 1009.

[3] Governors of Gordon's Hospital *v.* Ministers of Aberdeen, 1831, 9 S. 909.

[4] Bonar *v.* Society for Promoting Christian Knowledge, 1846, 8 D. 660; *cp.* Mailer's Trs. *v.* Allan, 1904, 7 F. 326.

[5] M'Lean and Others, Petrs., 1898, 1 F. 48. See also M'Grouther's Trs., Petrs., 1911, S. C. 315.

[6] Carmont *v.* Mitchell's Trs., 1883, 10 R. 829.

[7] "The Ferguson Bequest Fund" Case, 1879, 6 R. 486.

[8] Andrews, etc. *v.* Ewart's Trs., 1886, 13 R. (H. L.) 69.

[9] M'Leish's Trs. *v.* M'Leish, 1841, 3 D. 914; University of Aberdeen *v.* Irvine, 1869, 7 M. 1087.

[10] Ramsay *v.* Principal and Professors of St. Andrews, 1842, 4 D. 1366; Burnett *v.* Aberdeen College, 1846, 5 Bell's App. 409.

[11] Thomson *v.* Davidson's Trs., 1888, 15 R. 719; Ritchie *v.* Davidson's Trs., 1890, 17 R. 673.

[12] Forbes *v.* Dalziel, 1877, 5 R. 328. See also Clephane *v.* Mags. of Edinburgh, 1869, L. R. 1 S. C. App. 417, per Lord Westbury, p. 421.

and in doing so the Court is entitled to approve of a scheme which is not inconsistent with the main design of the founder, or is not in itself mischievous.[1] In one case[2] a multiplepoinding was raised, and the Lord Ordinary ordered a scheme to be lodged for the execution of the trust. The Court has, on the failure of a trust, authorised the application of the trust funds to another, but similar, charity;[3] to another, but closely allied, form of religion;[4] to outdoor in place of indoor relief;[5] to a Sunday school in place of an infant school;[6] to technical education instead of Bible reading.[7]

Where there is no holder for the time being of a position, such as the schoolmastership of an Established Church school, who is intended to be benefited, the Court will devise a scheme for carrying out temporarily a similar charitable purpose.[8] The Court may also grant a power of sale.[9] Thus[10] where it was obvious that a scheme was being superseded by a rival scheme, this power was given. It may also allow part of the funds of a lapsed trust to be paid over to officials and servants.[11]

On no account will the Court hand over the funds of a lapsed trust to any scheme which will involve the relief of the rates.[12]

When the Court is petitioned to approve of a scheme for the management of a lapsed trust, the procedure is to remit the preparation of a scheme to a reporter,[13] or to some of their own number.[14] An *ex parte* scheme will not be accepted.[13]

[1] Lord President Inglis in University of Aberdeen *v.* Irvine, 1869, 7 M. 1087, at p. 1092.

[2] Anderson's Trs. *v.* Gow, 1901, 9 S. L. T. 174.

[3] Glasgow Infirmary, Petrs., 1887, 14 R. 680; Glasgow Royal Infirmary *v.* Glasgow Mags., 1888, 15 R. 264; Davidson and Others (Tennant's Trs.), Petrs., 1893, 30 S. L. R. 233; Gibson and Other, Petrs., 1900, 2 F. 1195; Governors of Mitchell's Hospital, Petrs., 1902, 4 F. 582.

[4] Burnett *v.* St. Andrews Episcopal Church, Brechin, 1888, 15 R. 723.

[5] John Watt's Hospital, Leith, Governors of, Petrs., 1893, 20 R. 729.

[6] Prestonpans Kirk-Session *v.* Prestonpans School Board, 1891, 19 R. 193.

[7] Trs. of Gateside School, Petrs., 1905, 7 F. 634.

[8] Grant *v.* Macqueen, 1877, 4 R. 734; M'Dougall, Petr., 1878, 5 R. 1014.

[9] Downie, etc., Petrs., 1879, 6 R. 1013.

[10] Simpson *v.* Moffat Working Men's Institute Trs., 1892, 19 R. 389.

[11] Falkirk Industrial School *v.* Ferguson Bequest Fund, 1899, 1 F. 1175; Portobello Female School Trs., Petrs., 1900, 2 F. 418.

[12] Governors of Jonathan Anderson Trust, Petrs., 1896, 23 R. 592, per Lord President Robertson, p. 594; M'Lean and Others, Petrs., 1898, 1 F. 48; Portobello Female School Trs., 1900, 2 F. 418; Gerard Trs. *v.* Mags. of Monifieth, 1901, 3 F. 800, per Lord President Balfour, p. 803; Gateside School Trs., Petrs., 1903, 5 F. 424; *cp.* M'Culloch, etc. *v.* Kirk-Session and Heritors of Dalry, 1876, 3 R. 1182.

[13] Caird and Others, Petrs., 1873, 10 S. L. R. 546.

[14] Presbytery of Deer *v.* Bruce, 1868, 6 M. 940.

Where a testator has made his bequest subject to very precise conditions, which afterwards become incapable of fulfilment, the Court will not apply the principle of *cy près*, but the legacy will lapse into intestacy.[1]

A friendly society is not a proper charity in the sense that would entitle the Court to interfere.[2]

(c) *Alteration of Scheme.*—The Court has power to alter a scheme.[3] Thus, to suit the circumstances of a particular district, it altered the payment of apprentices' fees to a provision for bursaries.[4] The initiative must be with the governing body, and, in educational matters, the Court will only deal with proposals submitted with the consent of the Education Department.[5] This does not, however, preclude the Court from giving effect to amendments not sanctioned by the Education Department which do not constitute a completely new scheme.[6] Even with the consent of the Education Department the Court will not approve of an alienation of capital,[7] though it has altered a scheme so that an endowed school should be sold to a school board, and the whole funds, including the price of the school, handed over to the school board to be administered by them in providing bursaries for the children of the parish.[8]

(d) *Extension of Scheme.*—The Court may extend the benefits of a scheme.[9] Thus, on the petition of the governors of an educational trust, the benefits were extended to women.[10] Where, however, it is clear from the trust deed that men alone are to be benefited, the extension will not be given.[11] The Court has extended the benefit of a charitable trust for children between the ages of eight and fourteen so as to include children down to the age of five, when there were not found sufficient children of the higher age to exhaust the benefits of the trust;[12] and

[1] Marquess of Bute's Trs. *v.* Marquess of Bute, 1904, 7 F. 49. See also Young's Trs. *v.* Deacons of the Eight Incorporated Trades of Perth, 1893, 20 R. 778; Burgess' Trs. *v.* Crawford, 1912, S. C. 389.

[2] Smith *v.* Lord Advocate, 1899, 1 F. 741.

[3] Allan *v.* Stiell's Trs., 1876, 4 R. 162; Stewart's Trs., Petrs., 1909, S. C. 144.

[4] Burnet's Trs., Petrs., 1876, 4 R. 127.

[5] Governors of Heriot's Trust, Petrs., 1897, 25 R. 91.

[6] Governors of Stewart's Educational Trust, Petrs., 1898, 1 F. 1. See also School Board of Crieff, Petrs., 1897, 24 R. 1096.

[7] Governors of Philp's Trust, Petrs., 1893, 20 R. 900.

[8] Governors of Lady Burnett of Leys School, Petrs., 1911, S. C. 777.

[9] Guardian of Thomson's Mortification, Petr., 1908, S. C. 1078.

[10] Governors of Spence Bursary Trust, Petrs., 1897, 25 R. 11; Clark Bursary Fund Trs., Petrs., 1903, 5 F. 433; Blythe Scholarship Fund Trs. *v.* St. Andrews University, 1905, 7 F. 855.

[11] Grigor Medical Bursary Fund Trs., Petrs., 1903, 5 F. 1143; Arbroath Educational Trust, Petrs., 1909, S. C. 11; Duart Bursary Fund Trs., Petrs., 1911, S. C. 9.

[12] Carnegie Park Orphanage Trs., Petrs., 1892, 19 R. 605.

has also enlarged the field from which bursars might be chosen.[1] Moreover, the Court has granted power to trustees to adapt a scheme so as to meet changing university regulations.[2]

(e) *Correction of Abuses.*—The Court of Session has also jurisdiction over all charities in so far as to declare the powers of the administrators, to correct all abuses, and to enforce the will of the founder.[3] It has, therefore, power to see that the trust funds are properly administered,[4] that the conditions, or implied conditions, of the trust for the recipients of the charity are not abused,[5] and that they are properly enforced.[6]

(f) *Definition of "the Poor."*—It has now been decided that the expression "the poor" in a charitable bequest is not confined to "legal poor," *i.e.* those who receive relief from statutory authorities, but means necessitous persons whatsoever, even though the parties to whom the management of the trust has been given by the testator are the parish council.[7]

(3) *Procedure.*—All applications to the Court under the Trusts Acts are by petition to any Lord Ordinary, or to the Lord Ordinary on the Bills during vacation, and all such petitions, as regards procedure, disposal, and review, are subject to the same rules and regulations as are enacted with regard to petitions coming before the junior Lord Ordinary in virtue of the Court of Session Act, 1857 (20 & 21 Vict. cap. 56): Provided that when in the exercise of the powers pertaining to the Court of appointing trustees and regulating trusts it shall be necessary to settle a scheme for the administration of any charitable or other permanent endowment, the Lord Ordinary shall, after preparing such schemes, report to one of the Divisions of the Court, by whom the same shall be finally adjusted and settled; and in all cases where it shall be necessary to settle any such scheme, intimation shall be made to the Lord Advocate, who shall be entitled to appear and intervene for the

[1] Kirk-Session of Dunbar, Petrs., 1908, S. C. 852; *cp.* Mailler's Trs. *v.* Allan, 1904, 7 F. 326.

[2] Stewart's Trs., Petrs., 1909, S. C. 144.

[3] Lord Cuninghame in Ross *v.* Governors of Heriot's Hospital, 1843, 5 D. 589, at p. 609.

[4] Mags. of Dundee *v.* Presbytery of Dundee, 1861, 23 D. (H. L.) 14.

[5] M'Quaker *v.* Ballantrae Educational Trust Governors, 1891, 18 R. 521. See also Martins *v.* Macdougall's Trs., 1885, 13 R. 274; M'Donald *v.* M'Coll, 1890, 17 R. 951.

[6] Ramsay *v.* Brewster, 1859, 21 D. 1367; Piggott *v.* Fettes Trust, 1888, 16 R. 199; Blythe Scholarship Fund Trs. *v.* St. Andrews University, 1905, 7 F. 855.

[7] Kinloss Parish Council *v.* Morgan, 1908, S. C. 192. See also Liddle *v.* Kirk-Session of Bathgate, 1854, 16 D. 1075; White *v.* Kirk-Session of Kinglassie, 1867, 5 M. 869; Flockhart *v.* Kirk-Session of Aberdour, 1869, 8 M. 176; Paterson's Trs. *v.* Christie, 1899, 1 F. 508.

interests of the charity or any object of the trust or the public interest.[1] In all other cases the application must be made to the Inner House as an appeal to its *nobile officium*.

X. ENTAIL.—All applications under the Entail Acts must be made to the Court of Session, with the following exceptions:—

(1) Where any portion of an entailed estate has been sold in consideration of an annual feu-duty or ground-annual to a company by virtue of the Lands Clauses Consolidation (Scotland) Act, 1845, and the feu-duty or ground-annual is unpaid for thirty days after it has become payable, the person entitled to payment of such feu-duty or ground-annual may apply to the Sheriff Court of the county within which the lands are situated for recovery of the same.[2]

(2) Where an heir of entail in possession of an entailed estate is desirous of granting leases for the purpose of building for any number of years not exceeding ninety-nine years, or of feuing any part of his estate with certain reservations and exceptions, or, if the estate be held by burgage tenure, of disponing any part thereof, with the same reservations and exceptions, subject to a ground-annual, he shall make an application to the Sheriff of the county within which the entailed estate is situated, and the Sheriff may authorise such heir in possession or his successor at any time within ten years from the date of his deliverance to do so.[3]

(3) Any application under the Entail Amendment Act, 1875 (38 & 39 Vict. cap. 61), and the Entail Amendment Act, 1878 (41 & 42 Vict. cap. 28), for authority to borrow and charge for improvement expenditure, and any application for authority to grant leases under the Entail Acts may be made in the Sheriff Court, and the Sheriff may grant such authority and exercise all necessary powers for carrying out the provisions of said Acts in those particulars.[4]

(4) Where authority is asked to grant a feu or a lease of a portion of an entailed estate not exceeding two acres in extent for a scientific purpose, or other purpose of public utility, the application may be made in the Sheriff Court.[5]

(5) Application for the purpose of ascertaining the value of land to be excambed, not exceeding 300 acres lying together in one place or

[1] The Trusts (Scotland) Act, 1867 (30 & 31 Vict. cap. 97), sec. 16.
[2] Entail Amendment Act, 1853 (16 & 17 Vict. cap. 94), sec. 16.
[3] Entail Amendment (Scotland) Act, 1868 (31 & 32 Vict. cap. 84), secs. 3 and 4.
[4] Entail (Scotland) Act, 1882 (45 & 46 Vict. cap. 53), sec. 5.
[5] Ibid., sec. 6.

plot,[1] may be made to the Sheriff, who, upon a satisfactory report, may authorise the exchange.[2]

(6) Where the heir in possession has disappeared and a factor *loco tutoris* has been appointed, the latter may apply to the Sheriff for authority to feu, lease, borrow, and charge for improvement expenditure in the same manner as the heir in possession himself might have done.[3]

Petitions and applications under any of the various statutes now in force relative to entails brought before the Court of Session are dealt with by the junior Lord Ordinary[4] in the Bill Chamber.[5]

XI. Companies.—Under the Companies (Consolidation) Act, 1908, the Court of Session in Scotland alone has jurisdiction in respect of the various acts required to be done upon judicial authority. Thus, it is the Court of Session alone that confirms the alteration of a memorandum,[6] and the reduction[7] or reorganisation[8] of capital, which rectifies the register of members[9] and restores the name of the company to the register of companies.[10] It has also sole jurisdiction to wind up companies[11] registered in Scotland, and to exercise the extraordinary and ordinary powers set forth in the various sections of that Act. The Sheriffs of counties in Scotland, however, are the commissioners for the purpose of taking evidence in Scotland under the Act where a company is wound up in any part of the United Kingdom.[12]

In the Assurance Companies Act, 1909, the Court having jurisdiction with regard to an assurance company registered and having its head office in Scotland, is the Court of Session, except under the provisions relating to deposits.[13]

Under the Companies Clauses (Consolidation) Act, 1845, and the Companies Clauses Act, 1863, applications for a judicial factor where there are arrears of interest on mortgage[14] or debenture[15] must be made to the Court of Session.

The Court of Session is the only Court of Appeal against convictions for statutory offences by companies.[16]

[1] Entail Amendment (Scotland) Act, 1868, sec. 14.
[2] 10 Geo. III. cap. 51, secs. 32, 33.
[3] Entail (Scotland) Act, 1882, sec. 14.
[4] 20 & 21 Vict. cap. 56, sec. 4.
[5] 52 & 53 Vict. cap. 54, sec. 3.
[6] The Companies (Consolidation) Act, 1908 (8 Edw. VII. cap. 69), sec. 9.
[7] Ibid., sec. 47. [8] Ibid., sec. 45. [9] Ibid., secs. 32 and 163.
[10] Ibid., sec. 242 (6). [11] Ibid., sec. 135. [12] Ibid., secs. 226 and 227.
[13] The Assurance Companies Act, 1909 (9 Edw. VII. cap. 49), sec. 29.
[14] The Companies Clauses (Consolidation) Act, 1845 (8 & 9 Vict. cap. 17), sec. 57.
[15] The Companies Clauses Act, 1863 (26 & 27 Vict. cap. 118), sec. 26.
[16] North British Rly. Co. *v.* Dumbarton Harbour Board, 1900, 2 F. (J.) 28;

XII. Bankruptcy. — The Court of Session, through the Bill Chamber, has alone jurisdiction to entertain a petition for the recall of an award of sequestration.[1] The Court of Session has sole jurisdiction to remove a trustee,[2] to grant warrant for the arrest of a bankrupt when furth of Scotland,[3] to appoint a judicial factor on the estates of persons deceased,[4] and grant the latter his discharge.[5]

XIII. Special Case.—Where any parties interested, whether personally or in some fiduciary or official character, in the decision of a question of law, are agreed upon the facts and dispute only on the law applicable thereto, it is competent to them to present a special case to either of the Divisions of the Court of Session, which will give its opinion or judgment. Judgments pronounced are liable to be reviewed by the House of Lords unless, by consent of parties, review is excluded.[6]

XIV. Ranking and Sale.—This action must be brought in the Court of Session.[7] It is nearly obsolete.

XV. Cognition and Sale.—This action is for the purpose of authorising the sale of a ward's estate to meet the debts, and is in the same position as Ranking and Sale.[8]

XVI. Presumption of Life.—The Court of Session has exclusive jurisdiction where the value of the estate in Scotland, the right to which depends upon the death of the absent person, exceeds £500.[9]

XVII. Arbitration.—The Court of Session alone has jurisdiction to compel an arbiter to proceed.[10]

XVIII. Inhibition.—Letters of inhibition are only obtained in the Court of Session, through the Bill Chamber, and restriction or recall of the same can only be granted by the Court of Session, either by the Lord Ordinary before whom any action, on the dependence whereof letters of inhibition have been executed, has been enrolled as Judge therein,[11] or, if the case is a Sheriff Court case, by petition to the Inner

Simpson *v.* Corporation of Glasgow, 1902, 4 F. 611 ; Braid *v.* Swan & Sons, Ltd., 1903, 5 F. 579 ; Lauder *v.* Hurst, Nelson & Co., Ltd., 1904, 7 F. (J.) 65.

[1] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. cap. 20), secs. 2 and 30. See Maclaren's Bill Chamber Practice.

[2] Bankruptcy (Scotland) Act, 1913, sec. 71.

[3] Ibid., sec. 85. [4] Ibid., sec. 163.

[5] A. S., 25th November 1857 ; C.A.S., G, ii. 15 ; Alexander, Petr., 1862, 24 D. 1334.

[6] The Court of Session Act, 1868 (31 & 32 Vict. cap. 100), sec. 63.

[7] Act, 1681, cap. 83 (record edition), cap. 17 (12mo edition).

[8] White, Petr., 1855, 17 D. 599, per Lord Deas, p. 602 ; Frizell *v.* Thomson, 1860, 22 D. 1176, per Lord Justice-Clerk Inglis, p. 1177.

[9] Presumption of Life Limitation (Scotland) Act, 1891 (54 & 55 Vict. cap. 29).

[10] Forbes, etc. *v.* Underwood, 1886, 13 R. 465 ; *contra* Sinclair *v.* Fraser, 1884, 11 R. 1139.

[11] Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. cap. 101), sec. 158.

House of the Court of Session.[1] A petition to interdict the use of inhibition can only be presented in the Court of Session.[2]

XIX. Arrestment.—The restriction or recall of arrestments where a case has ceased to depend, or where a case is in dependence before the Inner House, must be made by way of petition to the Court to exercise its *nobile officium*.[3]

XX. Sequestration of Heritable Property.—Where there are disputes regarding heritable property, it is not uncommon for the Court of Session to exercise its *nobile officium* and sequestrate the property, appointing a judicial factor to collect the rents, etc. The Inner House alone has jurisdiction in these cases.[4]

XXI. Actions against Foreigners.—At one time the Court of Session had exclusive jurisdiction in actions against foreigners.[5] Thus, foreigners could not be brought within the jurisdiction of the Sheriff by arrestment of moveables within the sheriffdom,[6] nor could personal actions against foreigners be brought in the Sheriff Court in respect merely of the ownership of heritage within the county.[7] Gradually, however, the Sheriff Court was allowed to share in the jurisdiction against foreigners. In 1830,[8] and again in 1838,[9] the Sheriff was given jurisdiction in maritime causes against foreigners, provided the latter were amenable to the Sheriff on any legal ground. About the same time, foreign itinerants were allowed to be convened to the Sheriff Court of the place where they were personally found,[10] and later actions *in rem* were allowed to proceed against foreigners in the Sheriff Court of the place where the subject of the action was situated.[11] Then, again, foreigners could be sued in the Sheriff Court of the place where a con-

[1] Graham Stewart, Law of Diligence, p. 572.

[2] Beattie & Son *v.* Pratt, 1880, 7 R. 1171.

[3] Matthew *v.* Patullo, 1858, 21 D. 18; Latham *v.* Edinburgh and Glasgow Rly. Co., 1866, 4 M. 1084, at p. 1088; Greigs, Petrs., 1866, 4 M. 1103.

[4] Macalpine *v.* Macalpine, 10th July 1807, F. C.; Willet *v.* Ross, 1882, 1 S. 250 (N. E. 237); Cathcart *v.* Cathcart, 1831, 5 W. & S. 315; Patterson *v.* Waddell, 1837, 16 S. 79; Russell *v.* M'Inturner, 1847, 9 D. 989; Rintoul, Petr., 1862, 1 M. 214.

[5] Erskine's Inst. i. 2. 18.

[6] Burn *v.* Purvis, 1828, 7 S. 194; Harvey, Hall & Co. *v.* Black, 1831, 9 S. 785; White *v.* Spottiswoode, 1846, 8 D. 952.

[7] M'Bey *v.* Knight, 1879, 7 R. 255; Pollokshaws Commissioners *v.* M'Lean, 1899, 2 F. 96; Strachan *v.* Pharmaceutical Society, 1901, 8 S. L. T. 373; Maxwell *v.* Horwood's Trs., 1902, 4 F. 489.

[8] The Court of Session Act, 1830 (11 Geo. IV. and 1 Will. IV. cap. 69), sec. 22.

[9] The Sheriff Courts (Scotland) Act, 1838 (1 & 2 Vict. cap. 119), sec. 21.

[10] M'Niven *v.* M'Kinnon, 1834, 12 S. 453. See also Linn *v.* Casadinos, 1881, 8 R. 849.

[11] Bannatyne *v.* Newendorff, 1841, 3 D. 429. See also Wightman *v.* Wilson, 1858, 20 D. 779, per Lord Deas, p. 786; Scottish Central Rly. Co. *v.* Ferguson, Rennie & Co., 1863, 1 M. 750; Duncan *v.* Lodijensky, 1904, 6 F. 408.

tract which had been entered into was to be implemented,[1] or where they committed a delict or *quasi*-delict, provided they were personally cited there.[2] The Sheriff Courts (Scotland) Act, 1876,[3] further extended the jurisdiction of the Sheriff to cases of furthcoming and multiplepoinding where the arrestee in the former case and the holder of the fund in the latter case were amenable to his jurisdiction, notwithstanding that the common debtor was a foreigner; and in the following year it was enacted[4] that an action against a foreigner would be competent in a Sheriff Court if such action were competent against a Scotsman subject to the jurisdiction and that a ship or other vessel of the foreigner, or of which he was part owner or master, was arrested within the sheriffdom. Also, a foreigner who carried on business in Scotland was held to be subject to the jurisdiction of the Sheriff where his business was carried on.[5] In the same year that the last-mentioned decision was given the Sheriff Courts (Scotland) Act, 1907, vastly increased the jurisdiction of the Sheriff in actions against foreigners, and put the Sheriff Court practically on the same terms as the Court of Session. In regard to one point, however, the jurisdiction of the Court of Session is still exclusive in actions against foreigners, viz. where a foreigner resident abroad has merely heritage in Scotland, and is sued in an action not connected with the heritage. The reason is that by sec. 6 (*d*) of the Sheriff Courts (Scotland) Act, 1907, an action competent in the Sheriff Court may only be brought within the jurisdiction of the Sheriff where the defender is the owner or part owner of heritable property and the action relates to such property, or to his interest therein. In the case mentioned the action was not connected with the property. Again, by sec. 6 (*c*) arrestments to found jurisdiction in the Sheriff Court can only be used against a person who is not otherwise subject to the jurisdiction of the Courts of Scotland. In the case mentioned the foreigner had heritage in Scotland and was thus subject to the jurisdiction of the Court of Session. Such an action must, therefore, still be raised in the Court of Session even though the value of the cause falls below £50.[6]

XXII. Judicial Factors.—The Court of Session, in virtue of its *nobile officium*, has a very comprehensive power[7] to appoint factors for

[1] Pirie *v.* Warden, 1867, 5 M. 497.

[2] Kermick *v.* Watson, 1871, 9 M. 984.

[3] Sheriff Courts (Scotland) Act, 1876 (39 & 40 Vict. cap. 70), sec. 47.

[4] Sheriff Courts (Scotland) Act, 1877 (40 & 41 Vict. cap. 50), sec. 8 (4).

[5] Hughes *v.* J. & W. Stewart, 1907, S. C. 791.

[6] Pagan and Osborne *v.* Haig, 1910, S. C. 341. See also Allan *v.* Alexander's Trs., 1908, 16 S. L. T. 491.

[7] Dowie *v.* Hagart, 1894, 21 R. 1052, per Lord M'Laren, p. 1057.

the administration of all kinds of estates, and with this object has been in the practice of appointing judicial factors, factors *loco tutoris*,[1] factors *loco absentis*,[2] factors pending litigation,[3] *curators bonis* to a minor[4] or an *incapax*,[5] factors in differences, etc., in partnership matters[6] or joint adventures,[7] etc.; and though there are certain statutes[8] regulating the appointment of judicial factors, the administration of the factorial estate, the removal of factors, the grant of special powers to factors, and their exoneration and discharge, the *nobile officium* is not impaired. If, however, the *nobile officium* of the Court of Session is invoked, and there happens to be a statute which has a direct reference to the prayer of the petition, it is the duty of the Court to apply the statute.[9]

The Court of Session has exclusive jurisdiction in the matter of judicial factors, with the following *exceptions*:—The Sheriff has a statutory jurisdiction, but it is confined to making, recalling, etc., the appointment of judicial factors who are factors *loco tutoris* or *curators bonis* in estates the yearly value of which does not exceed £100.[10] At common law, also, the Sheriff has a limited jurisdiction to appoint a curator *ad litem* or a judicial factor where the temporary necessity for the appointment arises incidentally in a cause pending before him.[11] If, however, the application to the Sheriff is in substance a prayer for the appointment of a judicial factor, the application is not competent.[12] Where a factor appointed by the Sheriff has died, resigned, been removed, or become incapable, the application for a new factor must be made in the Sheriff Court where the original appointment was made.[13]

[1] Hutcheon and Others *v.* Alexander and Others, 1909, 46 S. L. R. 714; Allan, Petr., 1895, 3 S. L. T. 87.

[2] M'Caig, Petr., 1902, 10 S. L. T. 195; Dobson, Petr., 1903, 11 S. L. T. 44.

[3] Elliot *v.* Scott, 1843, 5 D. 1075; Speirs *v.* Speirs, 1877, 5 R. 75; Blackwood and Others *v.* Reith, 1905, 13 S. L. T. 629.

[4] Hutcheon and Others *v.* Alexander and Others, 1909, 46 S. L. R. 714.

[5] Buyers, Petr., 1910, 2 S. L. T. 201; Duff, Petr., 1910, 2 S. L. T. 202.

[6] Dixon *v.* Dixon, 1831, 10 S. 178; 4 Deas and Anderson, 446; Allan *v.* Gronmeyer, 1891, 18 R. 784; Smith *v.* Smith, 1892, 30 S. L. R. 59; Wallace *v.* Whitelaw, 1900, 2 F. 675; Scott, Petr., 1910, 2 S. L. T. 234.

[7] Dickie *v.* Mitchell, 1874, 1 R. 1030.

[8] Judicial Factors Act, 1849 (12 & 13 Vict. cap. 51); Court of Session Act, 1857 (20 & 21 Vict. cap. 56); Judicial Factors (Scotland) Act, 1880 (43 & 44 Vict. cap. 4); Judicial Factors Act, 1889 (52 & 53 Vict. cap. 39).

[9] Tod *v.* Marshall, 1895, 23 R. 36.

[10] Judicial Factors (Scotland) Act, 1880 (43 & 44 Vict. cap. 4); A. S., 14th January 1881; C. A. S., L, viii.

[11] Drysdale *v.* Lawson, 1842, 4 D. 1061.

[12] Rowe *v.* Rowe, 1872, 9 S. L. R. 492.

[13] Accountant of Court, Reporter, 1893, 20 R. 573.

It is doubtful whether an action can be raised in the Sheriff Court against a judicial factor appointed by the Court of Session.[1]

Where power is specially given in a statute to make application for the appointment of a judicial factor to conserve the interests of mortgagees, debenture holders, and the like, the application is invariably directed to be made to the Court of Session.[2]

Petitions and applications for the appointment of judicial factors, factors *loco tutoris* or *loco absentis*, or *curators bonis*, or by any such factors or curators for extraordinary or special powers, or for exoneration and discharge, are dealt with by the junior Lord Ordinary[3] in the Bill Chamber.[4] (See Maclaren's Bill Chamber Practice.)

XXIII. Law Agents.—The Court of Session has exclusive jurisdiction in the following:—

(1) Petition by an enrolled law agent to be admitted a notary public.[5]

(2) Petition by a notary public to be admitted a law agent.[6]

(3) Petition for removal of an enrolled law agent or notary public from the Roll.[7]

(4) Petition for re-admission to the Roll.[8]

XXIV. Statutory Authorities. — There is often inserted in statutes dealing with local government a provision for dealing with local authorities who have failed to do their statutory duty. The invariable method is by petition to the Court of Session to compel the authority in default to do its duty, or to make an order by default.[9]

[1] Hallpenny *v.* Howden, 1894, 21 R. 945.

[2] The Companies Clauses (Consolidation) Act, 1845 (8 & 9 Vict. cap. 17), sec. 57; The Companies Clauses Act, 1863 (26 & 27 Vict. cap. 118), sec. 26; Burghs Gas Supply (Scotland) Act, 1876 (39 & 40 Vict. cap. 49), sec. 32.

[3] 20 & 21 Vict. cap. 56, sec. 4.

[4] 52 & 53 Vict. cap. 54, sec. 3.

[5] Law Agents (Scotland) Act, 1873 (36 & 37 Vict. cap. 63), secs. 1 and 18.

[6] Law Agents (Scotland) Act Amendment Act, 1896 (59 & 60 Vict. cap. 49), sec. 3; A. B. and Others, Petrs., 1896, 34 S. L. R. 232.

[7] Society of Solicitors of Elgin *v.* Shepherd, 1881, 18 S. L. R. 303; Society of S.S.C. *v.* Clark, 1886, 13 R. 1170; Society of Law Agents *v.* Clark, 1886, 14 R. 161; Incorporated Society of Law Agents *v.* Laing, 1893, 21 R. 267; Aberdeen Society of Solicitors *v.* Sim, 1897, 24 R. 511; Glasgow Procurators *v.* Colquhoun, 1900, 2 F. 1192; Law Agents (Scotland) Act, 1873 (36 & 37 Vict. cap. 63), secs. 1, 14, 22.

[8] C. D. *v.* Incorporated Society of Law Agents in Scotland, 1905, 7 F. 936.

[9] Poor Law (Scotland) Amendment Act, 1845 (8 & 9 Vict. cap. 83), sec. 87; Public Health (Scotland) Act, 1897 (60 & 61 Vict. cap. 38), sec. 147; Housing, Town-Planning, etc., Act, 1909 (9 Edw. VII. cap. 44), secs. 53, 67; Board of Supervision *v.* Local Authority of Montrose, 1872, 11 M. 170; Board of Supervision *v.* Local Authority of Pittenweem, 1874, 1 R. 1124; Board of Supervision *v.* Local Authority

The performance of statutory duties may be made the subject of petition under the Court of Session Act, 1868.[1]

There is an opinion to the effect that the Court of Session and not the Sheriff Court is the proper Court to regulate the administration of the guardians of public property for the community.[2]

XXV. NOBILE OFFICIUM.—(a) *Definition.*—Generally speaking, this may be said to be the equitable power vested in the Court of Session to make provision for cases arising out of statutes, but for which no provision has been made in said statutes; or for unexpected, or exceptional, happenings, whether arising from statute or otherwise. (See also *Trusts, supra*, p. 87; and *Judicial Factors, supra*, p. 97.)

(b) *Statutory Casus Improvisus.*—Where a statute provides for a certain thing to be done, and omits to state the manner in which it is to be done, the Court may provide the means, or may not, depending upon whether the omission has been slight or serious. Thus, where it was provided by a statute[3] with reference to appeals coming before Quarter Sessions or Commissioners of Appeal that "it shall be lawful for them respectively to state the facts of any case on which such appeal shall be made specially for the opinion and direction of the Court of Exchequer," and this was held not to be one of the proceedings in Exchequer causes provided for by the Exchequer Court (Scotland) Act, 1856,[4] nor was it a cause under the same Act that could be dealt with by the Lord Ordinary in Exchequer causes, and was thus a *casus improvisus*, the Court made it competent before either of the Divisions sitting as a Court of Exchequer.[5]

On the other hand, the Court refused to allow a proof where the Act of Parliament was silent with regard to the means of ascertaining the value of certain lands,[6] and in a case[7] which arose through the Boundary Commissioners cutting off one part of a parish and attaching it to another parish, and then asking the Court what effect this act had upon the question of residential settlement, Lord President Inglis said: "That is exactly what the Legislature ought themselves

of Galashiels, 1874, 12 S. L. R. 111; Board of Supervision *v.* Local Authority of Lochmaben, 1893, 20 R. 434.

[1] The Court of Session Act, 1868 (31 & 32 Vict. cap. 100), sec. 91.

[2] Lord Young in Hunter *v.* School Board of Lochgilphead, 1886, 14 R. 135, at p. 140.

[3] 7 & 8 Geo. IV. cap. 53, sec. 84.

[4] 19 & 20 Vict. cap. 56.

[5] Perth Quarter Sessions, 1861, 24 D. 221.

[6] West Highland Rly. Co. *v.* Inverness County Council, 1904, 6 F. 1052.

[7] Parochial Board of Borthwick *v.* Parochial Board of Temple, 1891, 18 R. 1190.

to have settled, and what, in my opinion, nobody but the Legislature can settle. It cannot be a question of common law, for common law on the subject there is none. It is not a question of statute law, for the statutes on the subject are silent. The difficulty is a difficulty created by the Legislature, and the Legislature alone can remove it. I am therefore for dismissing the case," which was accordingly done. In a recent case[1] there are some observations upon a *casus improvisus* under sec. 8 of the Sheriff Courts (Scotland) Act, 1907.

In England there is observable a reluctance to make provision for omissions in Acts of Parliament.[2]

(c) *Procedure.*—All applications for the exercise of the *nobile officium* of the Court of Session must be made to the Inner House, except where made competent to the junior Lord Ordinary.[3] These latter are now brought in the Bill Chamber.[4] In vacation the Lord Ordinary on the Bills may exercise the *nobile officium* in urgent cases,[5] but not otherwise.[6]

(d) *Examples.*—In addition to the examples already given it may be useful to detail some further examples of the exercise of the *nobile officium* of the Court of Session, in view of the fact that the Court does not view with favour its indefinite extension, but is inclined to limit its exercise to cases in which the power has already been exercised, or to analogous cases.

The Court may dispense with service on the next of kin in cases where they are furth of Scotland.[7]

It may allow a person to change his name.[8]

It may reconstitute a lapsed board.[9]

It has granted warrant to convene a new statutory meeting[8] where the half-yearly meeting of a County Licensing Court was not attended by a quorum;[10] where creditors failed to elect a trustee at the statutory meeting;[11] where creditors at the statutory meeting resolved to abandon

[1] Duke of Argyll *v.* Muir, 1910, S. C. 96.

[2] Fuller *v.* Redman, 1859, 29 L. J. Ch. 324.

[3] Court of Session Act, 1857 (20 & 21 Vict. cap. 56), sec. 4.

[4] 52 & 53 Vict. cap. 54, sec. 3.

[5] Viscountess Hawarden *v.* Dunlop. 1861, 23 D. 923; Naismith, etc., Petrs., 1910, 47 S. L. R. 625; Buchanan, etc., Petrs., 1910, S. C. 685.

[6] Steuart *v.* Chalmers, 1864, 2 M. 1216; Greigs, Petrs., 1866, 4 M. 1103; Aberdeen University Court, Petrs., 1901, 4 F. 122.

[7] Buchan and Others, Petrs., 1873, 11 M. 662, and the cases therein reported by the Principal Clerk of Session.

[8] Forlong, Petr., 1880, 7 R. 910; Johnston, Petr., 1899, 2 F. 75; Robertson, Petr., 1899, 2 F. 127.

[9] Campbells, Petrs., 1883, 10 R. 819; Brodie, etc., Petrs., 1884, 21 S. L. R. 309.

[10] Buchanan, etc., Petrs., 1910, S. C. 685.

[11] Struthers, Petr., 1861, 23 D. 702.

proceedings and did not elect a trustee, and one of the creditors subsequently desired a trustee to be appointed.[1]

It also has made provision for the following cases:—Where no proceedings had followed on a sequestration and a petition for recall was presented;[2] where there was an error in the name of the bankrupt in the notice in the *Gazette* awarding sequestration;[3] where a trustee was unable to give the proper notice of a meeting;[4] where new funds had emerged in a sequestration after the trustee's discharge, but before the bankrupt's discharge;[5] where a bankrupt desired his discharge and his trustee never was confirmed.[6]

The Court has made the following *interim* appointments:—Keeper of the Great Seal;[7] Deputy-Keeper of the Great Seal;[8] Lyon King of Arms;[9] Keeper of the Privy Seal;[10] Depute-Keeper of the Signet;[11] Auditor of the Court of Session;[12] Sheriff-Clerk;[13] Clerk of the Peace;[14] Keeper of Sasines;[15] Town Clerk.[16]

The Court has reduced a sum specified as liquidate damages in case of failure to implement a contract as exorbitant and unconscionable.[17]

Authority has been given to a new town clerk to complete the registration of deeds and instruments which had been presented for registration during his predecessor's term of office.[18]

Access has been given to a deed after registration in order that a witness may complete his signature.[19]

Permission has been given for the restoration of public records which had been destroyed.[20]

[1] Steuart *v.* Chalmers, 1864, 2 M. 1216.
[2] Anderson, Petr., 1866, 4 M. 577.
[3] Fife, Petr., 1844, 6 D. 686.
[4] Myles, Petr., 1851, 14 D. 126.
[5] Thomson, Petr., 1863, 2 M. 325; Hutton, Petr., 1872, 10 M. 620.
[6] Aitken *v.* Robson, 1914, S. C. 224.
[7] Lord Advocate, Petr., 1885, 12 R. 925.
[8] Logan, Petr., 1890, 17 R. 757.
[9] Lord Advocate, Petr., 1866, 1 S. L. R. 193.
[10] Dundas and Brodie, Petrs., 1874, 1 R. 1198.
[11] Hope, Petr., 1878, 5 R. 762.
[12] Baxter, Petr., 1894, 31 S. L. R. 814.
[13] Speirs, Petr., 1842, 5 D. 388; Lord Advocate, Petr., 1880, 8 R. 13; Lord Advocate, Petr., 1882, 10 R. 53.
[14] Lord Advocate, Petr., 1890, 17 R. 293.
[15] Lord Advocate, Petr., 1860, 22 D. 555.
[16] Rothesay Mags. *v.* Carse, 1902, 4 F. 641.
[17] Forrest and Barr *v.* Henderson, etc., 1869, 8 M. 187.
[18] Cowper, Petr., 1885, 12 R. 415; Mags. of Elgin, Petrs., 1885, 12 R. 1136; Hepburn, Petr., 1905, 7 F. 484.
[19] Murray, etc., Petrs., 1904, 6 F. 840.
[20] Jeffreys, Petrs., 1827, 5 S. 334 (N. E. 310); Dundas, Petr., 1875, 3 R. 273; Stair Agnew, Petr., 1890, 28 S. L. R. 164.

A clerical error has been corrected in a note to the Court and the subsequent decree.[1]

A warrant has been granted to insert a new *Gazette* notice in a sequestration,[2] and to hold an insufficient notice sufficient.[3]

A warrant has been granted to serve arrestments, or to charge upon a decree by a sheriff-officer instead of by a messenger-at-arms.[4]

Appointments of returning officers have been made at municipal elections where there has been failure of those available for the office;[5] and special elections of town councillors have been ordered where it was impossible to get a quorum.[6]

Where the regular election has ceased owing to a burgh having adopted the General Police and Improvement Act of 1862, a Sheriff-Substitute has been ordained to convene a meeting of electors in order to elect commissioners.[7]

Road trustees have been granted authority to make up lists of roads and bridges after the period allowed by statute.[8]

An ancient corporation in a burgh has had certain resolutions with regard to the application of its funds approved.[9]

The Court has often granted warrant for the transmission of recorded deeds to be exhibited in trial either in this country or abroad, and the Court has sometimes insisted upon the deed being carried to the Court by the Depute-Clerk Register or other officer, or it has ordered caution to be found to return the deed within a specified time.[10]

[1] Liquidators of the Benhar Coal Co., Ltd., Petrs., 1891, 19 R. 108.

[2] Morrison, Petr., 1874, 1 R. 392; Von Rotberg, Petr., 1876, 4 R. 263; Somerville & Co., Petrs., 1905, 7 F. 651; Murray, Petr., 1906, 8 F. 957; Robertson, Petr., 1909, S. C. 444.

[3] Naismith and Another, Petrs., 1910, 47 S. L. R. 625.

[4] Kennedy, Petr., 1862, 24 D. 1131; Schweitzer, Petr., 1868, 7 M. 24; North of Scotland Bank, Ltd., Petrs., 1891, 18 R. 460; R. & C. Robertson, Petrs., 1893, 20 R. 712; Buchanan *v.* The British Natural Premium Provident Association, Ltd., 1903, 11 S. L. T. 465; Whyte, Ridsdale & Co., Petrs., 1912, 2 S. L. T. 73.

[5] Mags. of Dunfermline, Petrs., 1877, 5 R. 47; Mags. of Musselburgh, Petrs., 1881, 9 R. 78; Mags. of Peebles, Petrs., 1881, 9 R. 80; Mags. of Pollokshaws, Petrs., 1882, 20 S. L. R. 19; Police Commissioners of Kirriemuir, Petrs., 1884, 12 R. 103; Muirhead, Petr., 1886, 14 R. 18; Royal Burgh of Renfrew, Petr., 1897, 25 R. 18.

[6] Tait, Petr., 1905, 8 F. 170.

[7] Brander, etc., Petrs., 1890, 17 R. 1254.

[8] Banff County Road Trs., Petrs., 1881, 9 R. 20.

[9] United Incorporation of Masons and Wrights of Haddington, Petrs., 1881, 8 R. 1029.

[10] Cunningham, Petr., 1821, 1 S. 98 (N. E. 99); Gaywood, Petr., 1828, 6 S. 363; Annandale, Petr., 1828, 6 S. 657; Alison, etc., Petrs., 1829, 7 S. 552; Mansfield *v.* Stuart, 1840, 2 D. 1235; Duncan, etc., Petrs., 1842, 4 D. 1517; Malcolm, Petr., 1847, 19 Jur. 483; Dunlop *v.* Deputy-Clerk Register, 1861, 24 D. 107; Bayley, Petrs.,

Delivery of a registered deed has sometimes been ordered so that the Lord Advocate may investigate a case of forgery.[1]

Transmission of a deed for the purpose of having it duly stamped has sometimes been ordered.[2]

Warrants have been granted to record inventories after the expiry of the statutory period, under reservation of the competency.[3]

Authority has been granted to certify a copy of proceedings in a cause in the Court of Session for use in a foreign Court.[4]

Documents and models produced in a case in the Court of Session have been authorised to be transmitted to the English Courts for use in a similar action.[5]

A deed recorded in the Sheriff Court books has been authorised to be delivered for the purpose of exhibition to a witness resident in India.[6]

Delivery of documents in Chancery has been ordered for production in an English Court on caution being found for their return within a specified time.[7]

Documents forming part of an extracted process have been ordered to be exhibited by the Deputy-Keeper of the Records at an examination in Edinburgh,[8] and he has also been ordered to transmit an extracted process to the clerk of the process, where the decree was extracted *ad interim*, in order that the case may proceed in common form.[9]

In one case [10] trustees who represented the different public interests of a county, and who held as trust property for various county purposes a county hall, were allowed to transfer the hall to the county council, and were exonered and discharged. In another case a trustee was granted power to purchase trust property at a public sale.[11]

1862, 24 D. 1024; Jolly, Petr., 1864, 2 M. 1288; Macdonald, Petr., 1877, 5 R. 44; Kennedy, Petr., 1880, 7 R. 1129; Inglis, Petr., 1882, 9 R. 761; Earl of Euston, Petr., 1883, 11 R. 235; Leigh-Bennett, Petr., 1893, 20 R. 787; Mackenzie, Petr., 1902, 4 F. 559; Pheysey, Petr., 1906, 8 F. 801.

[1] King's Advocate, Petr., 1831, 9 S. 387; Lord Advocate, Petr., 1861, 33 Jur. 224; Lord Advocate, Petr., 1910, S. C. 728.

[2] Laidlaw, etc., Petrs., 1840, 15 Fac. 356; Gordon, Petr., 1871, 8 S. L. R. 445.

[3] Rae, Petr., 1830, 8 S. 839; Finlayson, Petr., 1838, 16 S. 1270; Anderson *v.* Bank of Scotland, 1838, 1 D. 268.

[4] Walter, etc., Petrs., 1889, 16 R. 926.

[5] United Telephone Co., Ltd. *v.* Maclean, 1882, 9 R. 710.

[6] Garrett and Another, Petrs., 1883, 20 S. L. R. 756.

[7] Bloxam *v.* Director of Chancery, 1825, 3 S. 428 (N. E. 300).

[8] Shedden, Petr., 1860, 24 D. 1446.

[9] Freen *v.* Beveridge, 1833, 11 S. 711.

[10] Earl of Rosebery and Others, Petrs., 1892, 29 S. L. R. 865.

[11] Coats' Trs., 1914, S. C. 723.

The Court of Session, however, cannot, in the exercise of its *nobile officium*, recall an interlocutor which has become final,[1] nor can it confer power upon trustees to borrow money upon the security of the trust estate where the trust deed does not by construction or implication empower them to do so.[2]

XXVI. Teind Causes.—By the Act, 21st February 1707, cap. 10 (record edition), cap. 9 (12mo edition), the powers of the various Commissions which had been appointed to deal with the plantation of kirks and valuation of teinds were transferred to the Court of Session, who since that date have continued to exercise the power thus conferred under the name of the Teind Court, or the Commission for Plantation of Kirks and Valuation of Teinds. Originally all the Judges of the Court of Session formed the Teind Court, but now[3] the Judges of the two Divisions of the Court of Session, along with the Lord Ordinary on Teinds, form the Court. Five Judges are a quorum, and the Lord Ordinary on Teinds should form one of the Court, except in case of indisposition or necessary absence.[4] The second junior Lord Ordinary officiates in Teind causes.[5]

As certain inconveniences had been experienced in proceedings of a judicial nature carried on before the Lords Commissioners for Plantation of Kirks and Valuation of Teinds, a division was made by the Judicature Act of 1825[6] into (*a*) judicial business, and (*b*) ministerial and discretionary business, and now all actions for the valuation or sale of teinds or actions of proving the tenor of the same,[7] all actions of suspension or reduction of localities,[8] and all actions of declarator or reduction connected with teinds which could be competently brought before the said Lords Commissioners are brought and decided by one or other of the Divisions of the Court of Session, who are held to be a quorum of said Commissioners; and all such causes are proceeded in, as nearly as possible, according to the forms prescribed for the preparation of causes in the Court of Session. The Lord Ordinary is given power to determine the cause, or to report the same to the

[1] Macgown *v.* Cramb, 1897, 24 R. 481.

[2] Kinloch and Others, Petrs., 1859, 22 D. 174. See also Berwick, etc., Petrs., 1874, 2 R. 90; Noble's Trs., 1912, S. C. 1230; Scott's Hospital Trs., 1913, S. C. 289.

[3] 2 & 3 Vict. cap. 36, sec. 8.

[4] 31 & 32 Vict. cap. 100, sec. 9.

[5] 1 & 2 Vict. cap. 118, sec. 2.

[6] The Judicature Act, 1825 (6 Geo. IV. cap. 120), sec. 54.

[7] Alexander *v.* Oswald, 1840, 3 D. 40; Lord Lynedoch *v.* Liston, 1841, 3 D. 1078; Earl of Wemyss *v.* Duke of Buccleuch, 1883, 10 R. 1084.

[8] Lord Elibank's Trs. *v.* Hope, 1891, 18 R. 445.

Inner House, or to be reviewed, as in causes before the Court of Session. The jurisdiction of the Lords Commissioners in assigning or modifying competent stipends, and in uniting or disjoining parishes, and generally whatever jurisdiction the Court of Teinds possessed of a ministerial and discretionary nature is in no wise altered, and is exercised by the whole Lords Commissioners, or a quorum thereof, in the same way as before; but all actions in relation to localling of modified or augmented stipends among heritors, and other causes which might be remitted to a Lord Ordinary, are conducted as nearly as possible according to the forms of the Court of Session, and the interlocutors of the Lord Ordinary are subject to review. As a matter of practice, after an augmentation has been awarded by the Teind Court, a remit is always made to the Lord Ordinary on Teinds to prepare a locality.

The Court of Teinds and the Court of Session are not two separate and distinct Courts each with a peculiar and exclusive jurisdiction, and the Court of Session, when sitting as the Court of Teinds, is entitled to exercise its whole original jurisdiction. Thus, where a summons was raised in the Teind Court concluding, in the first place, for declarator that two parishes had never been legally united, and that the cure of each should be served by a separate minister; and second, that upon such declarator being pronounced a constant local stipend should be modified to each of the ministers out of the teinds of their own parish, the Court held that, although some of the conclusions might be appropriate to the judicial branch and others to the discretionary branch of the Teind Court, the action was competently laid in the Teind Court.[1]

An action of reduction of a locality by a heritor and repetition of the proportion of stipend that he had been obliged to pay was held incompetent in the Teind Court.[2]

XXVII. Exchequer Causes.—(a) *Generally.*—In 1856[3] the whole jurisdiction of the Court of Exchequer was transferred to the Court of Session, which is now the Court of Exchequer in Scotland.[4] The jurisdiction of the Court of Exchequer was both judicial and ministerial.[5] On its judicial side it comprised all questions of custom or excise, and all other revenues, debts, duties, and profits appertaining

[1] Presbytery of Stirling *v.* Heritors of Larbert and Dunipace, 1900, 2 F. 562.

[2] Lawson *v.* Lindsay, 1822, Shaw's Teind Cases, 32; Herries, Maxwell, and Others *v.* Jardine, 1827, Shaw's Teind Cases, 143.

[3] Court of Exchequer (Scotland) Act, 1856 (19 & 20 Vict. cap. 56).

[4] Ibid., sec. 1; Perth Quarter Sessions, 1861, 24 D. 221.

[5] 6 Anne, cap. 53 (usually printed cap. 26, sec. 6).

to the Crown by virtue of the Royal prerogative, by attainder, or by any other right or means whatsoever, and all the remedies for recovering the same; also all forfeitures and penalties incurred by virtue of any law relating to customs or excise, or by virtue of any penal or other laws whatsoever; and all fines, issues, forfeitures, or penalties arising to the Crown, and all prosecutions for the same. Its ministerial jurisdiction consisted mainly of the power to transfer lands held from the Crown, and the appointment of tutors-dative.[1]

(b) *Procedure.*—By the Court of Exchequer (Scotland) Act, 1856, one of the Lords Ordinary is appointed Lord Ordinary in Exchequer causes, who may act in vacation as well as in session, and in his absence may be represented by any other Lord Ordinary. All proceedings in Exchequer causes under the Act, unless otherwise expressly provided, are brought in the first instance before such Lord Ordinary.[2]

Proceedings may commence either by subpœna or by summons. If the former method is adopted, on the expiry of the *induciæ* of the subpœna the latter may be called in the Court of Session, and thereafter enrolled in the same manner as an ordinary summons. Thereafter the information must be lodged in process and a copy served upon the defender, unless previously made. If the defender admits the truth of the information, or so much thereof as is insisted in, the Lord Ordinary gives decree in terms of the information, or the part insisted in. If the defender appears and does not admit its truth, the Lord Ordinary appoints a day for hearing parties on the information, or, if this is unnecessary, may appoint a day for trying the matters in issue, which may be done by jury trial[3] without any adjustment of separate issues or issue beyond the information itself, or by proof. If the cause is tried by a jury, there may be a common jury, or a special jury if the latter is applied for, and the Lord Ordinary in Exchequer causes presides unless at the latter's request one of the Divisions appoints another Lord Ordinary in his place.

If the cause is commenced by summons, the ordinary procedure of the Court of Session is adopted.

The Lord Advocate in pleading before the Court or a jury has the privilege of being heard last.

There is a right of appeal to the Inner House and to the House of Lords.

[1] 6 Anne, cap. 26.

[2] Balfour and Another, Petrs., 1909, S. C. 358.

[3] Lord Advocate *v.* Thomson, 1897, 24 R. 543; Lord Advocate *v.* Sawers, 1898, 35 S. L. R. 482.

(c) *Precedence.*—Exchequer causes have precedence both in the Inner and the Outer House. Certified copies of the interlocutors are equivalent to extracts except for the purpose of doing diligence. In extracts the minute-book is dispensed with, and they have precedence in the Extractor's office.

(d) *Exclusive Jurisdiction.*—In some cases the Court of Exchequer has exclusive jurisdiction. Thus, an action of declarator of immunity from taxes imposed by British statutes is only competent in the Court of Exchequer.[1] So also in actions relating to smuggled goods,[2] and seizures of ships under the Foreign Enlistment Act.[3] A petition for authority to uplift money consigned in terms of the Defence Act of 1842, or to uplift a parliamentary deposit, is only competent in the Court of Exchequer;[4] and where a party has been incarcerated in virtue of an Exchequer process for non-payment of a duty or tax, the only Court having jurisdiction to consider any question touching either the justice or amount of said duty or tax, the right of the party to aliment during confinement, or the mode competent for his liberation is the Court of Exchequer.[5] Accordingly, a bill of suspension and liberation in such a case presented in the Court of Session was refused on the ground that the Court of Exchequer was the proper Court.[6] Complaints of burgesses under the Royal Burghs (Scotland) Act, 1822, are presented to the Court of Exchequer.[7]

(e) *Concurrent Jurisdiction.*—In other cases the Court of Exchequer has only a concurrent jurisdiction with other Courts. Thus, where a Receiver-General of Land Tax died indebted to the Crown, an action of constitution was raised in the Court of Session with the view of leading an adjudication against the deceased's land estate, and the Court held that the Court of Session had jurisdiction notwithstanding that there was an action already pending in the Court of Exchequer for payment.[8] In a case[9] where the Postmaster-General sued the cautioners of a deputy-postmaster for recovery of arrears founded on a bond of caution, it was held that, as the action was not strictly a question of revenue

[1] Duke of Queensberry *v.* Officers of State, 15th December 1807, F. C.

[2] Ramsay *v.* Adderton, 1747, Mor. 7590.

[3] Lord Advocate *v.* Fleming, 1864, 2 M. 1032.

[4] Sir M. H. Shaw-Stewart, Petr., 1905, 42 S. L. R. 599; Mason, Petr., 1899, 7 S. L. T. 25; Balfour, etc., Petrs., 1909, S. C. 358.

[5] Pool *v.* Irving, etc., 1831, 10 S. 152.

[6] Brough *v.* Stewart, 1850, 13 D. 408.

[7] 3 Geo. IV. cap. 91; Eadie *v.* Glasgow Corporation, 1908, S. C. 207.

[8] Earl of Galloway *v.* Commissioners of His Majesty's Treasury, 1800 4 Pat App. 165.

[9] Postmaster-General *v.* William Kerr and Others, 8th July 1813, F. C.

and was more of a suit for a civil debt, it was unnecessary to bring the action in the Exchequer Court, and in a similar kind of case [1] the same result was arrived at. For the same reason it was held that an action by a Warden to the Mint against the Master of the Mint in Scotland to compel him to expend upon the Warden's lodgings part of the money allowed for keeping the Mint buildings in repair was competent in the Court of Session.[2] In a later case,[3] while an action for repetition of the price of an Admiralty contract was held to be competent in the Court of Exchequer, opinions were expressed that it was possible the Court of Session also had jurisdiction. Notwithstanding this seeming right to raise actions relating to revenue in Courts other than that of Exchequer, the Crown possesses the power, as part of the Royal prerogative, of insisting upon any such case being stopped in order that the question may be raised in the Court of Exchequer.[4] If the right is not exercised the action raised in the other Court may competently proceed where begun.[5]

Again, all duties, penalties, and forfeitures incurred or imposed by the Customs Acts, and the liability to forfeiture of any goods seized under the authority thereof, may be sued for and recovered before one or more Justice or Justices, as well as before the Court of Session.[6] With regard to excise, every fine or penalty imposed as an excise fine or penalty, and every penalty recoverable as an excise penalty may be sued for and determined before two or more Justices of the Peace,[7] as well as before the Court of Exchequer.[8]

(f) *Jurisdiction Excluded.*—Where a question arises regarding a government officer, not in his official but in his private capacity, the jurisdiction of the Court of Exchequer is excluded.[9] It is also expressly excluded where the validity or invalidity and preference of the title of the Crown to any honours, manors, lands, tenements, or hereditaments, or to casualties belonging to the Crown is at issue, all of which are expressly reserved for the decision of the Court of Session.[10]

[1] Kinloch *v.* M'Intosh, 1822, 1 S. 491 (N. E. 457).

[2] Craigie *v.* Hepburn and Alves, 22nd December 1809, F. C.

[3] Lord Advocate *v.* Hogarth, 1859, 21 D. 213.

[4] The Crown *v.* Beattie, 1856, 18 D. 378; Mill *v.* Steven, 1822, 20 D. 455; Sharpe *v.* M'Leod, 1861, 23 D. 1015.

[5] Sharpe *v.* M'Leod, *supra*, per Lord Curriehill, p. 1030, and Lord Deas, p. 1031.

[6] Customs Consolidation Act, 1876 (39 & 40 Vict. cap. 36), secs. 218 and 247.

[7] Excise Management Act, 1827 (7 & 8 Geo. IV. cap. 53), sec. 65; Customs and Inland Revenue Act, 1888 (51 & 52 Vict. cap. 8), sec. 8.

[8] Inland Revenue Regulation Act, 1890 (53 & 54 Vict. cap. 21), secs. 22, 39.

[9] The Crown *v.* Beattie, 1856, 18 D. 378.

[10] 6 Anne, cap. 26, sec. 22.

(g) *Present-Day Ministerial Jurisdiction.*—The *ministerial* jurisdiction of the Court of Exchequer has now been considerably circumscribed, the office of Presenter of Signatures being abolished, and all the duties discharged by the Sheriff of Chancery.[1] The appointment of tutors-dative is now made by the Court of Session acting as the Court of Exchequer. The application is made by summary petition to either of the Divisions of the Court, and the procedure is, as near as may be, the same as other summary petitions to said Court.[2] The petition must be intimated to the Lord Advocate.[3]

(h) *Court of Review.*—The Court of Exchequer is also a Court of Review. Thus, an appeal in prosecutions before the Justices of the Peace under the Customs Acts lies to the Court of Exchequer both on conviction and on the relevancy when the case is dismissed,[4] not to the Justiciary Court.[5] There is no appeal on the merits, only upon such grounds as would warrant the issue of a writ of *certiorari*.[6] The Justices at General Quarter Sessions may also state the facts of any excise case specially for the opinion and direction of the Court of Exchequer,[7] but only prior to a decision in the lower Court.[8] An appeal by stated case may be made in cases of income tax and inhabited house duty when questions of law arise.[9]

There is also an appeal to the Court of Exchequer under the Stamp Act of 1891 [10] by any person who is dissatisfied with the assessment of the Commissioners as to whether any executed instrument is chargeable with duty, and, if so, with regard to the amount of duty with which the instrument has been charged. The method of appeal is by stated case to either of the Divisions of the Court of Session sitting as the Court of Exchequer, and the appeal must be taken within twenty-one days after the date of the assessment.[11] No other questions than those raised in the stated case will be allowed to be discussed.[12] An appeal to the

[1] The Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. cap. 94), sec. 57.

[2] Court of Exchequer (Scotland) Act, 1856 (19 & 20 Vict. cap. 56), sec. 19.

[3] Wilson, Petr., 1857, 19 D. 286.

[4] Court of Exchequer (Scotland) Act, 1856, sec. 17; Mitchell *v.* Fournier and Others, 1900, 8 S. L. T. 191.

[5] Alexander *v.* Lindsay, 1867, 40 Jur. 21; Soky *v.* Wilcox, 1867, 5 Irvine, 495 (note).

[6] Dodsworth *v.* Rijnbergen, 1886, 14 R. 238, per Lord Fraser (Ordinary).

[7] 7 & 8 Geo. IV. cap. 53, sec. 84.

[8] Steele *v.* M'Intosh Bros., 1879, 7 R. 192.

[9] Taxes Management Act, 1880 (43 & 44 Vict. cap. 19), sec. 59.

[10] 54 & 55 Vict. cap. 39.

[11] Ibid., secs. 13 and 122 (2).

[12] Maxwell *v.* Commissioners of Inland Revenue, 1866, 4 M. 1121.

House of Lords on a question of stamp duty from the Court of Exchequer is competent.[1]

XXVIII. Parliamentary Election Petitions.—By the Parliamentary Elections Act, 1868,[2] the jurisdiction in questions as to controverted elections of Scottish members of the Imperial Parliament was transferred from the British House of Commons to the Court of Session, and is exercised by four Judges of such Court, not being members of the House of Lords, annually selected to be placed on the rota for the trial of election petitions during the year. The trial of every election petition or the hearing of an application for the withdrawal of an election petition is conducted before two Judges.[3]

XXIX. Army Act, 1881.—Any action against any person for any act done in pursuance of, or execution or intended execution of, this Act, or in respect of any alleged act or default in the execution of this Act, and also every action against a member or minister of a court-martial in respect of a sentence of such Court, or of anything done by virtue or in pursuance of such sentence, must be brought in the Court of Session in Scotland, which has jurisdiction to try the same wherever the matter complained of occurred.[4]

XXX. Appellate Jurisdiction.—(1) *Generally.*—(a) *General Right of Appeal.*—There is a general rule that the right of appeal from an inferior to a superior Court cannot be taken away except by express words,[5] and accordingly the Court of Session can set aside, suspend, or otherwise review the sentences of all inferior Courts in civil causes, unless where that power is denied to it by special statute.[6]

It has been held that the right of appeal to the Court of Session is not taken away where in a statute Justices of the Peace are authorised "to hear and finally determine and adjudge" or "finally to hear and determine," or that their judgment is not "removeable by *certiorari* into any Court whatsoever."[7]

Where provision is made by Act of Parliament for recourse to

[1] Court of Exchequer (Scotland) Act, 1856 (19 & 20 Vict. cap. 56), sec. 20; Commissioners of Inland Revenue *v.* Glasgow and South-Western Rly. Co., 1887, 14 R. (H. L.) 33; Commissioners of Inland Revenue *v.* Tod, 1898, 25 R. (H. L.) 29.

[2] 31 & 32 Vict. cap. 125, sec. 58.

[3] Parliamentary Elections and Corrupt Practices Act, 1879 (42 & 43 Vict. cap. 75), sec. 2.

[4] 44 & 45 Vict. cap. 58, sec. 170.

[5] Marr & Sons *v.* Lindsay, 1881, 8 R. 784, per Lord President Inglis, p. 785; Dewar *v.* John Dewar & Sons, Ltd., 1899, 2 F. 249.

[6] Erskine's Inst. i. 3. 20.

[7] Buchanan *v.* Towart, 1754, Mor. 7347; Guthrie and Others *v.* Cowan, 10th December 1807, F. C.; Anderson & Co. *v.* Campbell and Others, 28th February 1811, F. C.

certain tribunals whose judgments upon the questions referred to them are stated to be final, and the question so decided involves a common law jurisdiction, or is not covered by the terms of such Act of Parliament, the Court of Session may review such judgment. Thus, where the Crofters Commission decided as a substantive fact that a man was a crofter;[1] where a Sheriff, who was appealed to under the Building Societies Act, 1874, gave a common law decision;[2] where a dispute referred to a committee of a society under the rules of a provident society was whether the pursuer was a member of the society or not;[3] or where a reduction was brought of certain decisions of a returning officer in a school board election,[4] the Court of Session was held entitled to review the decisions, notwithstanding that the statutes under which the questions were supposed to be decided expressly denied a right of appeal.

Where a parish council offers to take a pauper into the poorhouse, that offer is not final under the Poor Law Act of 1845, but may be reviewed by the Local Government Board and the Court of Session.[5]

The fact that a respondent has obtained a diligence for the recovery of documents after an order allowing proof has been pronounced is no bar to his insisting upon an appeal against such an order.[6]

(b) *Express Exclusion.*—It is clear, however, that where the decision of any matter is left to the Sheriff or Justices, and that their judgment "shall be final and conclusive, and shall not be subject to review by advocation or suspension, or by reduction, or by any process of law whatever, any law or usage to the contrary notwithstanding,"[7] there is no appeal, and an action of interdict or reduction regarding such a matter cannot competently be raised in the Court of Session.[8] In the same way, where the expressions used in the statutes are that the judgments of the Sheriff-Depute "shall be final and conclusive and not subject to the review of any Court or Courts whatever, any law or custom to the contrary notwithstanding;"[9] or that "every order,

[1] Dalgleish *v.* Livingston, 1895, 22 R. 646; Sitwell *v.* Macleod, 1899, 1 F. 950.

[2] Galashiels Provident Building Society *v.* Newlands, 1893, 20 R. 821.

[3] Symington's Exr. *v.* Galashiels Co-operative Store Co., Ltd., 1894, 21 R. 371.

[4] Kerr *v.* Hood, 1907, S. C. 895.

[5] Cuthill *v.* Inverkeilor Parish Council, 1910, S. C. 206.

[6] John Watson, Ltd. *v.* Caledonian Rly. Co., 1910, S. C. 1066.

[7] 4 Geo. IV. cap. 49, sec. 112; Merry *v.* Dallas and Henderson, 1828, 7 S. 90. See also Simpson *v.* Harley, 1830, 8 S. 977; Neilson *v.* Thompson, 1832, 10 S. 466; Leith Police Commissioners *v.* Campbell, 1866, 5 M. 247.

[8] Wilson *v.* Leith Walk Trs., 1831, 9 S. 725; Lundie *v.* Mags. of Falkirk, 1890, 18 R. 60, per Lord President Inglis, p. 65.

[9] Edinburgh Water Co. *v.* Malcolm, 1840, 2 D. 329; affd. 1842, 1 Bell's App. 153.

adjudication, or award of any Justice or Justices under this Act shall be final and conclusive to all intents and purposes, and shall not be removed or removeable into any Court of law;"[1] or that "the decision of the County Court shall not be subject to any appeal," and that "in Scotland the Sheriff within his county shall have the same jurisdiction as is hereby given to the Judge of a County Court;"[2] or that the Sheriff may make an order "which shall be final and conclusive;"[3] or "the Sheriff (whose decision shall be final),"[4] review in any manner of way by the Court of Session is excluded.

Where an appeal is taken to the Court of Session which involves not only the privative jurisdiction of an inferior Court, but also its common law jurisdiction, the Court can entertain it.[5]

(c) *Exclusion not Expressly Stated.*—In certain circumstances the right of appeal may be excluded, although the exclusion is not expressly stated in the statute. In the words of Lord President Inglis:[6] "If the jurisdiction exercised by the Sheriff is a jurisdiction specially given to him by statute, and in which the Court has not previously had jurisdiction, it may be much more easily implied that the Sheriff's jurisdiction is not only privative, but final and not subject to review." Thus, where a difference arose respecting accommodation works which a railway company was bound to make, and the statute stated that "the same shall be determined by the Sheriff or two Justices," the Court held that there was no appeal to the Court of Session against a determination of the Sheriff-Substitute, in respect that the Sheriff Court was evidently not invoked by the Legislature to exercise its well-known and recognised jurisdiction and its ordinary rules and forms of procedure.[7]

In like manner, where the Sheriff has, in terms of a statute, merely to grant a decree conform,[8] or to exercise his discretion in granting or refusing a warrant to imprison under the Civil Imprisonment (Scot-

[1] Lindsay *v.* Orr, 1831, 9 S. 426; Lang *v.* Craig, 1833, 11 S. 424.

[2] Johnston, etc. *v.* Brodie, etc., 1862, 24 D. 973; Davie, etc. *v.* Colinton Friendly Society, 1870, 9 M. 96.

[3] First Edinburgh Starr-Bowkett Building Society *v.* Munro, 1883, 11 R. 5; Brand *v.* Arbroath Police Commissioners, 1890, 17 R. 790.

[4] Bone *v.* Sorn School Board, 1886, 13 R. 768; Milne & Co. *v.* Aberdeen District Committee, 1899, 2 F. 220.

[5] Caledonian Rly. Co. *v.* Glasgow and Redburn Road Trs., 1849, 12 D. 399; Galashiels Provident Building Society *v.* Newlands, 1893, 20 R. 821. See also Edinburgh and Glasgow Rly. Co. *v.* Earl of Hopetoun, 1840, 2 D. 1255; Stirling Parish Council *v.* Dunblane Parish Council, 1912, S. C. 316.

[6] Marr & Sons *v.* Lindsay, 1881, 8 R. 784, at p. 785.

[7] Main *v.* Lanarkshire and Dumbartonshire Rly. Co., 1893, 21 R. 323.

[8] Duke of Argyll *v.* Cameron, 1888, 16 R. 139.

land) Act, 1882,[1] or to fix compensation to a school teacher under sec. 86 of the Local Government (Scotland) Act, 1889,[2] or to do any act in an administrative capacity,[3] there is no appeal to the Court of Session.

The same considerations apply where, by statute, appeal is allowed to a Lord Ordinary. Thus, where by the Ecclesiastical Buildings and Glebes Act, 1868,[4] provision is made for an appeal from the presbytery to the Sheriff, and from the latter to the Lord Ordinary on Teind Causes, and an appeal had been dismissed by the Sheriff, whose judgment was affirmed by the Lord Ordinary on Teind Causes, the latter's judgment was held to be final;[5] and in a recent case,[6] where a patentee presented a petition to a Lord Ordinary under sec. 18 of the Patents and Designs Act, 1907,[7] praying for the extension of his patent, it was held that as by that Act a patentee was for the first time authorised to present a petition to "the Court" for that purpose, and as in Scotland "the Court" was "any Lord Ordinary of the Court of Session," the latter's judgment was final.

(d) *Implied Exclusion.*—Although there are no words in a statute expressly excluding review by the Court of Session, if another statutory method of review is provided for, there is an implied exclusion of review by the Court of Session. Thus, where in the Small Debt Act, 1837,[8] and the Public Houses Amendment Act, 1862,[9] an appeal is given to the Circuit Court of Justiciary, or where there are no Circuit Courts to the High Court of Justiciary at Edinburgh, review by the Court of Session is excluded. So also a bill of suspension and liberation, where a person is imprisoned on an Exchequer warrant, cannot competently be brought in the Court of Session, the Court of Exchequer being the Court provided for that purpose;[10] nor can a suspension or reduction of an order by road trustees, where review by the Sheriff is provided for;[11] nor an action of declarator against the Board of Trade

[1] 45 & 46 Vict. cap. 42; Strain *v.* Strain, 1886, 13 R. 1029.

[2] M'Gilp *v.* Kilchoman School Board, 1891, 18 R. 714.

[3] Dubs *v.* Police Commissioners of Crosshill, 1876, 3 R. 758; Glasgow Mags. *v.* Glasgow District Subway Co., 1893, 21 R. 52. See also Mackenzie *v.* Inverness and Ross-shire Rly. Co., 1861, 24 D. 251.

[4] 31 & 32 Vict. cap. 96, secs. 14 and 20.

[5] Earl of Camperdown *v.* Presbytery of Auchterarder, 1902, 5 F. 61.

[6] Lawrence *v.* Comptroller-General of Patents, 1910, S. C. 683.

[7] 7 Edw. VII. cap. 29.

[8] 1 Vict. cap. 41, sec. 31; Lowden's Trs. *v.* Patullo, 1846, 9 D. 281; Crosbie *v.* M'Ewan, 1861, 23 D. 333.

[9] 25 & 26 Vict. cap. 35, sec. 33; M'Arthur *v.* Linton, 1864, 2 M. 659.

[10] Pool *v.* Irving, 1831, 10 S. 152; Brough *v.* Stewart, 1850, 13 D. 408.

[11] Aberdeenshire Trs. *v.* Knowles, 1811, Hume's Dec. 262.

that it is acting *ultra vires* when an appeal to the Court of Survey is given.[1]

Where a statutory jurisdiction is conferred and a means of review is provided for other than the Court of Session, and the opportunity of review thus given is not taken advantage of, there can be no review of any kind by the Court of Session.[2] Thus, where the decision of a presbytery could have been, but was not, appealed to the General Assembly, it was held incompetent to suspend or interdict the presbytery's decision in the Court of Session.[3]

If a means of review is provided for, and, when the appeal is brought, the appellant does not insist upon his appeal, he cannot thereafter have the cause reviewed by the Court of Session.[4]

(e) *Exclusion does not Extend to Proceedings after Decree.*—Even where the Court of Session has no jurisdiction to review the proceedings of an inferior Court, this only applies to proceedings to the date of the decree, but not to subsequent proceedings. Thus, it has been held competent by suspension and also by reduction to test the validity of a charge given on a debts recovery decree where review was excluded,[5] and also the legality of a poinding,[6] an imprisonment,[7] a warrant to open doors,[8] and an alteration on an extract decree,[9] following upon a small debt decree, where review is excluded. Accordingly, actions of damages for any irregularity in diligence following upon decrees which are not subject to review are quite competent.[10]

(f) *Statutory Authority Acting within its Powers.*—Where a statutory authority acts within the provisions of the Act of Parliament there is no appeal to the Court of Session. Thus, where a District or General

[1] Denny and Brothers *v.* Board of Trade, 1880, 7 R. 1019.

[2] Campbell *v.* Mill, 1823, 2 S. 440 (N. E. 392); Craigie *v.* Mill, 1826, 4 S. 447 (N. E. 453); affd. 2 W. & S. 642; Alexander *v.* Seymour, 1828, 7 S. 117; Campbell *v.* Strathern, 1848, 10 D. 655; Crawford *v.* Lennox, 1852, 14 D. 1029; Finlay *v.* Royal Liver Friendly Society, 1901, 4 F. 34.

[3] Lang *v.* Presbytery of Irvine, 1864, 2 M. 823; Wight *v.* Presbytery of Dunkeld, 1870, 8 M. 921, per Lord Justice-Clerk Moncreiff, p. 925.

[4] Manchester and County Bank, Ltd. *v.* Moore, 1909, S. C. 246.

[5] Samuel *v.* Mackenzie and Bell, 1876, 4 R. 187.

[6] Munro *v.* Dick, 1839, 1 D. 1075; Learmont *v.* Darlington, 1849, 11 D. 884; Le Conte *v.* Douglas and Richardson, 1880, 8 R. 175.

[7] Shiell *v.* Mossman, 1871, 10 M. 58.

[8] Scott *v.* Lethem, 1844, 6 D. 1221.

[9] Murchie *v.* Fairbairn, 1863, 1 M. 800.

[10] Gray *v.* Smart, 1892, 19 R. 692; *cp.* Crombie *v.* M'Ewan, 1861, 23 D. 333; Samuel *v.* Mackenzie and Bell, 1876, 4 R. 187; Maclean *v.* Mackenzie, 1895, 3 S. L. T. 142; Pollock *v.* Bremner, 1897, 5 S. L. T. 145.

Lunacy Board,[1] a bench of licensing magistrates,[2] a local authority under the Contagious Diseases (Animals) Act, 1878,[3] the Board of Education,[4] a Sheriff and jury under the Lands Clauses Consolidation (Scotland) Act, 1845, or the Railways Clauses Consolidation (Scotland) Act, 1845,[5] Commissioners of Police,[6] a corporation,[7] or a friendly society[8] do not exceed the powers committed to them by the Legislature, there is no review by the Court of Session. In a recent case where an Act of Parliament gave Insurance Commissioners the power to fix the rates of contributions "payable in respect of an employed contributor by the employer and the contributory respectively," and the commissioners fixed such rates, the Court of Session refused to review their decision, as there were no averments of *ultra vires* or that the Commissioners had acted illegally.[9] A similar decision was arrived at with regard to an order of the Railway Commissioners.[10]

(g) *Where Inferior Courts Exceed their Powers.*—The Court of Session has jurisdiction to consider and set aside any acts done by inferior Courts in excess of their statutory jurisdiction, even where appeal to the Court of Session is expressly excluded, or where another method of review has been provided.[11] Thus, where Commissioners of Police could only adopt the General Police Act of 1862 by a special

[1] Wallace *v.* Glasgow District Board of Lunacy, 1882, 10 R. 245.

[2] Millar *v.* Campbell, 1849, 11 D. 355; Lundie *v.* Mags. of Falkirk, 1890, 18 R. 60; Cameron *v.* Mags. of Glasgow, 1903, 5 F. 490; Walsh *v.* Mags. of Pollokshaws 1905, 7 F. 1009.

[3] Calder *v.* Linlithgow Local Authority, 1890, 18 R. 48.

[4] Lord Advocate *v.* Stow School Board, 1876, 3 R. 469; Renfrew Burgh School Board *v.* Renfrew Parish School Board, 1877, 5 R. 142; *cp.* Macfarlane *v.* Mochrum School Board and Others, 1875, 3 R. 88; Kerr *v.* Hood, 1907, S. C. 895.

[5] Carmichael *v.* Caledonian Rly. Co., 1868, 6 M. 671 at p. 684; revd. 1870, 8 M. (H. L.) 119.

[6] Smeaton *v.* Commissioners of Police of St. Andrews, 1865, 3 M. 816.

[7] Caledonian Rly. Co. *v.* Glasgow Corporation, 1905, 7 F. 1020, per Lord President Dunedin, p. 1027.

[8] Crichton *v.* Trs. of Dalry Myrtle Lodge of Free Gardeners' Friendly Society, 1904, 6 F. 398.

[9] Don Bros., Buist & Co., Ltd. *v.* Scottish Insurance Commissioners, 1913, S. C. 607.

[10] John Watson, Ltd. *v.* Caledonian Rly. Co., 1910, S. C. 1066.

[11] Maitland *v.* Douglas, 1861, 24 D. 193, per Lord Justice-Clerk Inglis, p. 201; Lord Advocate *v.* Police Commissioners of Perth, 1869, 8 M. 244; Adamson *v.* Edinburgh Street Tramways Co., 1872, 10 M. 533; Macfarlane *v.* Mochrum School Board and Others, 1875, 3 R. 88, per Lord President Inglis, p. 98; Caledonian Rly. Co. *v.* Glasgow Corporation, 1905, 7 F. 1020, per Lord President Dunedin, p. 1027. See also Shand *v.* Henderson, 1814, 2 Dow's App. 519; Guthrie *v.* Miller, 1827, 5 S. 711 (N. E. 663); Campbell *v.* Young, 1835, 13 S. 535; Pryde *v.* Kirk-Session of Ceres, 1843, 5 D. 552; Leith Police Commissioners *v.* Campbell, 1866, 5 M. 247; Caledonian Rly. Co. *v.* Greenock and Wemyss Bay Rly. Co., 1878, 5 R. 995; Skerret *v.* Oliver, 1896, 23 R. 468, per Lord M'Laren, p. 492.

order at a special meeting to be duly advertised, and no notice of advertisement was given;[1]

Where a Justice ordered instant imprisonment while the statute allowed fourteen days within which to pay the fine;[2]

Where the Crofters Commission declared a person to be a crofter in general terms;[3]

Where road trustees who had a right to suppress byroads of no importance to the public shut up an important public cross-road;[4]

Where a competent quorum of road trustees was not present at a meeting which gave authority;[5]

Where proof was not taken in writing as provided for by statute;[6]

Where a parochial schoolmaster was removed without a proper libel being served upon him;[7]

Where a Dean of Guild called upon the proprietor of lands bordering upon a public navigable and tidal river, along the bank of which the public had acquired a right of footpath by prescription, to erect a fence between the footpath and the river;[8] or gave effect to an objection taken *ex proprio motu*;[9]

Where an action for filiation,[10] or for expenses alone,[11] was entertained by Justices;

Where licensing magistrates, or magistrates sitting on offences under the licensing statutes, went beyond the terms of their Act of Parliament;[12]

Where the Sheriff or juries under Road Acts or the Lands Clauses and Railways Clauses Acts have given or withheld damages contrary to these Acts or the Acts calling in their aid;[13]

[1] Stirling, etc. *v.* Hutcheon, etc., 1874, 1 R. 935. See also Anderson *v.* Widnell, 1868, 7 M. 81.

[2] M'Donald *v.* Dobbie, 1864, 2 M. 407.

[3] Sitwell *v.* Macleod, 1899, 1 F. 950.

[4] Countess of Loudon and Others *v.* Trs. on the High Roads in Ayrshire, 1793, Mor. 7398.

[5] Calder *v.* Learmonth, 1831, 9 S. 343; Grant *v.* Gordon, 1833, 12 S. 167.

[6] Brown *v.* Heritors of Kilbery, 1825, 3 S. 480 (N. E. 334); affd. 3 W. & S. 441.

[7] Ross *v.* Findlater, 1826, 4 S. 514 (N. E. 522); Mathieson *v.* Dunsmure, 1829, 8 S. 252.

[8] Kerr, Anderson & Co. *v.* Lang, 1877, 4 R. 779; *cp.* Allan *v.* Whyte, 1890, 18 R. 332; Walker *v.* Lang, 1891, 18 R. 928.

[9] Mags. of Edinburgh *v.* Beatson, 1895, 23 R. 44.

[10] Lindsay *v.* Barr, 1826, 4 S. 748 (N. E. 756).

[11] Miller *v.* M'Callum, 1840, 3 D. 65.

[12] Phillips *v.* Steel, 1847, 9 D. 318; Crosbie *v.* M'Minn, 1866, 4 M. 803; Ashley *v.* Mags. of Rothesay, 1873, 11 M. 708; Black *v.* Tennent, 1899, 1 F. 423.

[13] Fraser *v.* Burnett, 1806, Hume's Dec. 256; Young *v.* Milne, 28th June 1814, F. C.; Caledonian Rly. Co. *v.* Ogilvy, 1853, 11 D. 410; revd. 2 Macq. 229;

Where burgh magistrates granted a warrant for the ejectment of a husband from a house which his wife, who was living apart from him, claimed, but which he disputed;[1]

Where Justices, who had only jurisdiction to grant a decree for wages against shipowners when a seaman died during a voyage, granted decree for wages where the seaman died after a wreck;[2]

Where the Lyon King of Arms determined a question of precedence;[3] in all these cases the Court of Session set the proceedings aside.

(h) *Where Inferior Courts have no Regard to the Judicial Administration of Justice.*—Notwithstanding the exclusion of review the Court of Session has jurisdiction to consider and set right proceedings which have been conducted in inferior Courts without due regard to the judicial administration of justice.[4] Thus, where an arbiter has disregarded the first principles of duty and is grossly corrupt;[5] where an arbiter has proceeded in the absence of one of the parties,[6] or has refused or omitted to hear parties;[7] where a Sheriff as an arbitrator under the Workmen's Compensation Act granted decree by default instead of making investigation and granting proper compensation;[8] where a Dean of Guild Court has refused to hear parties;[9] where a Judge who has not heard parties,[10] or has only heard part of the evidence,[11] has given a judgment; where a Judge has visited the *locus* and relied upon his own senses to contradict the evidence given;[12] where a Sheriff-Clerk-Depute in that character signed a small debt summons raised at his instance as an individual;[13] and where a Clerk of Peace has acted for

City of Glasgow Union Rly. Co. *v.* Hunter, 1869, 7 M. 408; revd. 1870, 2 L. R. Sc. App. 78; Glasgow District Subway Co. *v.* Esselmont, 1895, 22 R. 658.

[1] Wales *v.* Wales, 1888, 16 R. 164.

[2] Stephens *v.* Duncan, 1862, 1 M. 146.

[3] Royal College of Surgeons of Edinburgh *v.* Royal College of Physicians of Edinburgh, 1911, S. C. 1054.

[4] Walsh *v.* Mags. of Pollokshaws, 1905, 7 F. 1009, per Lord President Dunedin, p. 1018. See also Davie *v.* Colinton Friendly Society, 1870, 9 M. 96, per Lord President Inglis, p. 104.

[6] Mowbray *v.* Dickson, 1848, 10 D. 1102; Mitchell *v.* Cable, 1848, 10 D. 1297; Walker and Others *v.* Crawford, 1902, 10 S. L. T. 484.

[6] Heggie & Co. *v.* Stark, 1825, 3 S. 488 (N. E. 339).

[7] Glennie *v.* M'Phail, 1825, 3 S. 574 (N. E. 395); M'Phersons *v.* Ross, 1831, 9 S. 797; Langmuir *v.* Sloan, 1840, 2 D. 877.

[8] United Collieries, Ltd. *v.* Gavin, 1899, 2 F. 60.

[9] Somerville *v.* Directors of Edinburgh Assembly Rooms, 1899, 1 F. 1091.

[10] M'Ghee *v.* Moncur, 1899, 1 F. 594.

[11] Goodall *v.* Bilsland and Others; Cassidy *v.* Bilsland and Others, 1909, S. C. 1152.

[12] Hattie *v.* Leitch, 1889, 16 R. 1128.

[13] Sellar *v.* Duff, 11th February 1809, F. C.; Campbell *v.* M'Cowan, 1824, 3 S. 246 (N. E. 173); Macfarlanes *v.* A. B., 1827, 5 S. 537 (N. E. 504); Manson *v.* Smith, 1871, 9 M. 492.

one of the parties to a cause,[1] the proceedings have been set aside by the Court of Session.

(i) *Where Inferior Courts Fail, or Refuse, to do their Duty.*—Inferior Judges, commissioners, or statutory authorities may be compelled by the Court of Session as the Supreme Court, and by it alone, to do their duty.[2] Thus, a Sheriff has had a case remitted back to him where he has not made sufficient inquiry in a petition for the extension of the boundaries of a burgh;[3] where he has failed to exercise his proper jurisdiction in an action by a landlord against a farmer for arrears of rent, which arrears had been determined by the Crofters Commission;[4] where he had refused to make an appointment of a *curator bonis* to a minor;[5] and where he had refused to state a case under the Workmen's Compensation Act.[6]

The Court has compelled the Lord Lyon King of Arms to give effect to a private Act of Parliament regarding the bearing of arms and supporters;[7] and in a recent case[8] where the Lord Lyon declared jurisdiction, without hearing parties, upon a question of precedence between two medical bodies on ceremonial occasions, the Court remitted the case back to him in order that the question of jurisdiction should be properly considered by him and give his decision accordingly.

The Court has compelled a presbytery to investigate charges against a schoolmaster.[9]

It has interposed in a case where neither the heritors of a parish nor the Commissioners of Supply would execute an Act of Parliament.[10] It has also compelled Commissioners of Supply to split superiorities, and interfered in the case of a road board refusing to act.[11]

[1] Smith and Tasker *v.* Robertson, 1827, 5 S. 848 (N. E. 788).

[2] Pryde *v.* Heritors and Kirk-Session of Ceres, 1843, 5 D. 552, per Lord Cockburn, p. 559; Lord Advocate *v.* Commissioners of Supply for County of Edinburgh, 1861, 23 D. 933; Forbes *v.* Underwood, 1886, 13 R. 465, per Lord President Inglis, pp. 467, 468.

[3] Lindsay *v.* Leith Mags., 1897, 24 R. 867. See also White *v.* Rutherglen Mags., 1897, 24 R. 446.

[4] Dalgleish *v.* Leitch, 1889, 2 White, 302.

[5] Penny *v.* Scott, 1894, 22 R. 5.

[6] Pumpherston Oil Co., Ltd. *v.* Cavaney, 1903, 5 F. 663; Rankine *v.* Alloa Coal Co., Ltd., 1903, 5 F. 1164.

[7] Cuninghame *v.* Cunyngham, 1849, 11 D. 1139.

[8] Royal College of Surgeons, Edinburgh *v.* Royal College of Physicians, Edinburgh, 1911, S. C. 1054.

[9] Heritors of Corstorphine *v.* Ramsay, 10th March 1812, F. C.

[10] Moderator of Presbytery of Caithness *v.* Heritors of Parish of Reay, 1773, Mor. 7449.

[11] Heritors of Corstorphine *v.* Ramsay, 10th March 1812, F. C., per Lord President Hope.

The Court of Session is the only Court having authority to compel an arbiter to proceed.[1]

In some recent statutes there are special provisions authorising the Court of Session to compel statutory authorities who have failed to do their duty.[2]

The performance of statutory duties may be made the subject of petition under the Court of Session Act, 1868.[3]

(j) *Appeal on Questions of Law.*—Appeal to the Court of Session, though excluded on matters of fact, is sometimes allowed upon questions of law. Thus, by the Workmen's Compensation Act, 1906;[4] the Sheriff Courts (Scotland) Act, 1907;[5] the Railway and Canal Traffic Act, 1888;[6] the Taxes Management Act, 1880;[7] the Burgh Police (Scotland) Act, 1892, and the Burgh Police (Scotland) Act, 1903;[8] the Excise Acts;[9] special cases,[10] etc., provision is made for the opinion of the Court of Session being obtained on questions of law. (See Part ix. Chaps. vii. and viii., *infra.*)

(2) *Lands Valuation Appeal Court.*—Any three Judges of the Court of Session, who from time to time shall be named for that purpose by Act of Sederunt, form the Lands Valuation Appeal Court and dispose of appeals from County and Burgh Valuation Courts.[11] The appeal is by stated case, and the Court does not sit as a Court of Review, with authority to consider the evidence led before the lower Court and to determine whether it has drawn the right inferences from the evidence. The duty of the Court is to determine whether, upon the facts found proved by the lower Court, a proper conclusion has been drawn as to the value of the subjects.[12]

[1] Forbes *v.* Underwood, 1886, 13 R. 465; *contra* Sinclair *v.* Fraser, 1884, 11 R. 1139.

[2] Poor Law (Scotland) Amendment Act, 1845 (8 & 9 Vict. cap. 83), sec. 87; Public Health (Scotland) Act, 1897 (60 & 61 Vict. cap. 38), sec. 147; Housing, Town-Planning, etc., Act, 1909 (9 Edw. VII. cap. 44), secs. 53, 67.

[3] 31 & 32 Vict. cap. 100, sec. 91.

[4] 6 Edw. VII. cap. 58, Second Schedule, 17 (*b*).

[5] 7 Edw. VII. cap. 51, sec. 8; Cranston *v.* Mallow and Lien, 1911, S. C. 1133.

[6] 51 & 52 Vict. cap. 25, sec. 17; North-Eastern Rly. Co. *v.* North British Rly. Co., 1897, 25 R. 333; Mags. of Glasgow *v.* Lord Advocate, 1900, 2 F. 506.

[7] 43 & 44 Vict. cap. 19, sec. 59.

[8] 55 & 56 Vict. cap. 55, secs. 143, 339; 3 Edw. VII. cap. 33, sec. 104 (2); Burgh of Cumnock *v.* Murdoch, 1910, S. C. 571.

[9] 7 & 8 Geo. IV. cap. 53, sec. 84.

[10] Court of Session Act, 1868 (31 & 32 Vict. cap. 100), sec. 63.

[11] Valuation of Lands (Scotland) Amendment Act, 1879 (42 & 43 Vict. cap. 42), sec. 7; Local Government (Scotland) Act, 1908 (8 Edw. VII. cap. 62), sec. 7.

[12] M'Jannet *v.* Assessor for Stirling, 1882, 10 R. 32 (No. 22); Rule *v.* Lord Abinger, 1883, 10 R. 502, 506. See also Bank of Scotland, 1873, 11 M. 991 (No. 101).

The Appeal Court is a supreme Court of exclusive jurisdiction, and its decisions in any appeal are final and not subject to review,[1] except when sitting as the "Valuation Appeal Court," under the Finance (1909-10) Act, 1910.[2]

An appeal on the question whether the appellant has been properly entered in the roll as the proprietor of the subjects described is incompetent.[3]

(3) *Registration Appeal Court.* — The Registration Appeal Court consists of three Judges of the Court of Session, to be named from time to time by Act of Sederunt, being one Judge from each Division of the Inner House, and one from the Lords Ordinary.[4] The procedure is by special case, and the decision of the Court of Appeal is final and not subject to review by any Court, or in any manner whatsoever.[5]

It has been decided that the Court has no jurisdiction to entertain an appeal from a judgment of the Sheriff in adjusting the list of voters for a municipal election,[6] but in a recent case[7] there is an opinion *per curiam* that the Court has jurisdiction to entertain an appeal with regard to a claim to the parish council franchise, and it was observed that *Wood* v. *Laing* was decided prior to the passing of the Town Councils Act of 1900.

(4) *Lyon Court and Dean of Guild Court.*—The Court of Session may review the judgments of the Lord Lyon King of Arms.[8] It may review the judgment of the Dean of Guild, even when awarding a penalty;[9] and it is the only Court of Appeal against convictions against companies for statutory offences.[10]

(5) *Brieves of Service and Cognition.* — A brieve of service and cognition to terce may be removed to the Court of Session by appeal

[1] Stirling & Sons *v.* Holm and Others, 1873, 11 M. 480.

[2] 10 Edw. VII. cap. 8, sec. 42 (1).

[3] British Linen Co. *v.* Assessor for Aberdeen, 1906, 8 F. 508.

[4] The Representation of the People (Scotland) Act, 1868 (31 & 32 Vict. cap. 48), sec. 23.

[5] Ibid., sec. 22.

[6] Wood *v.* Laing, 1897, 24 R. 382.

[7] MacLellan *v.* Nish, 1911, S. C. 510.

[8] Macdonell *v.* Macdonald, 1826, 4 S. 371 (N. E. 374); Cuninghame *v.* Cunyngham, 1849, 11 D. 1139; Hunter *v.* Weston, 1882, 9 R. 492; Royal College of Surgeons, Edinburgh *v.* Royal College of Physicians, Edinburgh, 1911, S. C. 1054.

[9] Downie *v.* Fraser, 1901, 3 F. 1044; Somerville *v.* Dick, 1902, 4 F. 965; Somerville *v.* The New Edinburgh Billposting Co., 1911, 48 S. L. R. 477.

[10] North British Rly. Co. *v.* Dumbarton Harbour Board, 1900, 2 F. (J.) 28; Simpson *v.* Corporation of Glasgow, 1902, 4 F. 611; Braid *v.* Swan & Sons, Ltd. 1903, 5 F. 579; Lauder *v.* Hurst, Nelson & Co., Ltd., 1904, 7 F. (J.) 65.

at any time before trial before the Sheriff.[1] It has not yet been settled, however, whether an appeal to the Court of Session after a verdict of an inquest could have the effect of setting aside the verdict or suspending its legal consequences.[1]

[1] Craik *v.* Penny, 1891, 19 R. 339.

CHAPTER IV

CONCURRENT JURISDICTION

I. Sheriff Court.—Since the passing of the Sheriff Courts (Scotland) Act, 1907,[1] the Sheriff Court has a largely increased concurrent jurisdiction with the Court of Session.

(1) *Ordinary Actions.*—In all ordinary personal or petitory actions above £50 in value, exclusive of interest and expenses,[2] the Sheriff Court has a concurrent jurisdiction with the Court of Session, except in the case of an action against a foreigner where the only ground of jurisdiction against him is that he is owner or part owner, tenant or joint-tenant, whether individually or as a trustee, of heritable property in Scotland, and where the action does not relate to such property or his interest therein. In such a case the action, no matter for what amount, is only competent in the Court of Session.[3]

(2) *Declarators and Actions Affecting Status.*—There is a concurrent jurisdiction in the Sheriff Court with the Court of Session to try all actions of declarator where the value of the cause is over £50 in value, with the exception of declarators of marriage or of nullity of marriage, and actions the direct or main object of which is to determine the personal *status* of individuals.[4] This exception includes all consistorial actions, with the exception of actions of separation and aliment, and adherence and aliment, to hear and determine which the Sheriff Court has now a concurrent jurisdiction with the Court of Session.[5]

(3) *Aliment.*—It is now clear that the Sheriff Court has a concurrent jurisdiction with the Court of Session in actions by wives against their husbands for aliment, provided that they are actions of separation and aliment, adherence and aliment, or *interim* aliment,[6] and that there

[1] 7 Edw. VII. cap. 51. [2] Ibid., sec. 7.

[3] Pagan and Osborne *v.* Haig, 1910, S. C. 341.

[4] Sheriff Courts (Scotland) Act, 1907, secs. 5 (1) and 7.

[5] Ibid., sec. 5 (2), as amended by the Sheriff Courts (Scotland) Act, 1913; Second Schedule repealing part of sec. 33 of 11 Geo. IV. and 1 Will. IV. cap. 69.

[6] Ibid., sec. 5 (2), as amended by 1913 Act; Macdonald *v.* Macdonald, 1908, 24 Sh. Ct. Rep. 271; Low *v.* Low, 1908, 16 S. L. T. 352; Samuel *v.* Samuel, 1909, 1 S. L. T. 245; Macfarlane *v.* Macfarlane, 1909, 26 S. L. R. 48; Scott *v.* Scott, 1910, 27 Sh. Ct. Rep. 5.

is concurrent jurisdiction in actions of permanent aliment between children and their parents.[1]

(4) *Custody of Children.*—There is no authoritative decision whether the Sheriff Court has a concurrent jurisdiction with the Court of Session to make orders with regard to the permanent custody of children,[2] although in a case decided prior to the recent Sheriff Courts Act Lord M'Laren gave it as his opinion that an application for the custody of children is an appeal to the *nobile officium* of the Court, and accordingly only to be entertained by the Inner House of the Court of Session.[3] The Sheriff Court, however, has undoubtedly a concurrent jurisdiction with the Court of Session to regulate the *interim* possession of children,[4] and in ordinary applications under the Guardianship of Infants Act, 1886.[5]

(5) *Heritable Right and Title.*—The Sheriff Court has a concurrent jurisdiction with the Court of Session in actions relating to questions of heritable right and title where the value of the subject in dispute exceeds £50 by the year or £1000 in value,[6] with the exception of general and special adjudications,[7] and possibly adjudications in implement.[8]

(6) *Reductions.*—There is no concurrent jurisdiction by the Sheriff Court in actions of reduction, which are incompetent in the Sheriff Court;[9] but where it is enacted in a statute that all disputes are to be decided in the Sheriff Court, and the action resolves itself into a reduction, the Sheriff has jurisdiction to try it.[10]

(7) *Irritancy and Removing and Division of Commonty.*—In these actions where the subjects exceed £50 by the year or £1000 in value, the Sheriff Court has an equal jurisdiction with the Court of Session.[11]

(8) *Trusts.*—The Sheriff Court has a concurrent jurisdiction with the Court of Session to remove trustees on *mortis causa* or marriage-contract trusts in the event of any trustee being or becoming insane, or incapable of acting by reason of physical or mental disability, or by

[1] 11 Geo. IV. and 1 Will. IV. cap. 69, sec. 32.

[2] Macdonald *v.* Macdonald, 1908, 24 Sh. Ct. Rep. 271; Naysmith *v.* Naysmith, 1910, 26 Sh. Ct. Rep. 319; Yuille *v.* Taig, etc., 1911, 27 Sh. Ct. Rep. 195.

[3] A. B. *v.* C. B., 1906, 8 F. 973.

[4] Sheriff Courts (Scotland) Act, 1907, sec. 5 (2), as amended by the Sheriff Courts (Scotland) Act, 1913.

[5] 49 & 50 Vict. cap. 27.

[6] Sheriff Courts (Scotland) Act, 1907, sec. 5 (4), sec. 5 (second proviso), sec. 7.

[7] Act 1672, cap. 45 (record edition), cap. 19 (12mo edition).

[8] Erskine's Inst. ii. 12. 53.

[9] Sheriff Courts (Scotland) Act, 1907, sec. 5 (4).

[10] Davie *v.* Colinton Friendly Society, 1870, 9 M. 96.

[11] Sheriff Courts (Scotland) Act, 1907, secs. 5 (3), (4), 7.

continuous absence from the United Kingdom for a period of six calendar months or upwards.[1]

(9) *Entails.*—Applications under the Entail Acts may be made either in the Court of Session or in the Sheriff Court under secs. 32 and 33 of the Entail Improvement Act, 1770;[2] sec. 16 of the Entail Amendment Act, 1853;[3] secs. 3, 4, and 14 of the Entail Amendment (Scotland) Act, 1868;[4] and secs. 5, 6, and 14 of the Entail (Scotland) Act, 1882.[5] (See Chaps. iii., x.)

(10) *Sequestration.*—In the award of sequestration the Sheriff Court and the Court of Session have concurrent jurisdiction;[6] also in appeals against resolutions of creditors at meetings and against deliverances of trustees or commissioners.[7]

(11) *Maritime Actions.*—In maritime causes or proceedings the Sheriff Court has a concurrent jurisdiction with the Court of Session in all actions over £50 in value formerly competent to the High Court of Admiralty in Scotland, provided that the defender is upon any legal ground of jurisdiction amenable to the jurisdiction of the Sheriff before whom such cause or proceeding may be raised.[8]

(12) *Real Actions.*—Where the value of the cause is above £50, real actions may be raised either in the Sheriff Court or in the Court of Session.[9]

(13) *Judicial Factors.*—In the appointment of judicial factors, including factors *loco tutoris* and *curators bonis*, the Sheriff Court has a concurrent jurisdiction with the Court of Session where the yearly value of the estate does not exceed £100.[10]

(14) *Miscellaneous.*—There is also concurrent jurisdiction in actions for choosing curators;[11] for making up tutorial and curatorial inventories;[12] and in petitions for protection of a wife's property.[13]

[1] Trusts (Scotland) Amendment Act, 1891 (54 & 55 Vict. cap. 44), sec. 8.
[2] 10 Geo. III. cap. 51.
[3] 16 & 17 Vict. cap. 94.
[4] 31 & 32 Vict. cap. 84.
[5] 45 & 46 Vict. cap. 53.
[6] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. cap. 20), sec. 16.
[7] Ibid., sec. 165.
[8] Sheriff Courts (Scotland) Act, 1907, secs. 4 and 7; Acts 1609, cap. 22 (record edition), cap. 15 (12mo edition); 1681, cap. 82 (record edition), cap. 16 (12mo edition); 5 Anne, cap. 7, sec. 19; 1 & 2 Geo. IV. cap. 39.
[9] Sheriff Courts (Scotland) Act, 1907, sec. 7; Bannatyne *v.* Newendorff, 1841, 3 D. 429. See also Wightman *v.* Wilson, 1858, 20 D. 779, per Lord Deas, p. 786; Scottish Central Rly. Co. *v.* Ferguson, Rennie & Co., 1863, 1 M. 750; Duncan *v.* Lodijensky, 1904, 6 F. 408.
[10] Judicial Factors (Scotland) Act, 1880 (43 & 44 Vict. cap. 4).
[11] Act 1555, cap. 8 (record edition), cap. 35 (12mo edition).
[12] Act 1672, cap. 2.
[13] 37 & 38 Vict. cap. 31, sec. 2.

II. Justiciary Court. — Although the Court of Session has a criminal jurisdiction in certain cases concurrently with the Court of Justiciary, it is in practice never exercised.[1] It may be pointed out, however, that the Court of Session, as well as the Court of Justiciary, has power to punish perjury or subornation of perjury,[2] arising in the course of a Court of Session process, deforcement of officers,[3] fraudulent bankruptcy,[4] wrongous imprisonment,[5] forgery,[6] and the celebration of clandestine marriages.[7]

III. Lyon Court.—The Court of the Lyon King of Arms has a concurrent jurisdiction with the Court of Session to entertain complaints as to the conduct of messengers-at-arms, and to deprive them of their office,[8] though it has no jurisdiction to try actions of damages by third persons against messengers, the Court of Session alone having jurisdiction in such cases.[9]

Where the Lyon Court fines a messenger-at-arms, or deprives, or refuses to deprive, a messenger of his office, there is an appeal to the Court of Session.[10]

IV. Teind Court.—Originally, actions of proving the tenor could only be brought in the Court of Session,[11] but by the Act 1707, cap. 9, the Court of Teinds was given a concurrent jurisdiction to declare the tenor of valuations and subvaluations.[12]

[1] Alison's Criminal Law, ii. 64, 65.

[2] 1555, cap. 22 (record edition), cap. 47 (12mo edition); Hume, i. 379; Alison, ii. 64.

[3] 1581, cap. 23 (record edition), cap. 118 (12mo edition); Hume, i. 386; ii. 38; Alison, ii. 64.

[4] 1696, cap. 5; Lord Advocate *v.* Duncan, 1823, 2 S. 132 (N. E. 123); affd. 1825, 1 W. & S. 608; 7 & 8 Geo. IV. cap. 20; The King *v.* Dick and Lawrie, 1832, 4 Jur. 594; Alison, ii. 64.

[5] 1700-1, cap. 6; Hume, ii. 37; Alison, ii. 64.

[6] Hume, i. 162; ii. 71; Alison, ii. 64.

[7] 1661, cap. 246 (record edition), cap. 34 (12mo edition); 1698, cap. 6; Hume, i. 463; Alison, ii. 64.

[8] Acts 1592, cap. 29 (record edition), cap. 127 (12mo edition); 1672, cap. 47 (record edition), cap. 21 (12mo edition); The Lords *v.* Andrew Murray, 1532, Mor. 7319; Heriots *v.* Fleming, 1666, Mor. 7649; Grierson *v.* M'Ilroy, 1668, Mor. 7651; Hog *v.* Douglas, 1696, 4 Brown's Supp. 355; Lermont *v.* Lermont, 1699, Mor. 3096; Hunter *v.* Montgomery, 1732, Mor. 3097; M'Lachlan *v.* Black, 1821, 1 S. 217 (N. E. 206).

[9] A. *v.* B., 1627, Mor. 7647; Heriots *v.* Fleming, 1666, Mor. 7649; Grierson *v.* M'Ilroy, 1668, Mor. 7651.

[10] Lindsay *v.* Drummond, 1744, Mor. 8889; Clyne *v.* Murray, 1831, 9 S. 338.

[11] Act 1672, cap. 40 (record edition), cap. 16 (12mo edition); Concerning the Session, sec. 5; Balnagown *v.* M'Kenzie, 1663, Mor. 15790; Smart *v.* Ewing, 1673, 3 Brown's Supp. 149.

[12] Alexander *v.* Oswald, 1840, 3 D. 40; Lord Lynedoch *v.* Liston, 1841, 3 D. 1078; Earl of Wemyss *v.* Duke of Buccleuch, 1883, 10 R. 1084.

V. Exchequer Court.—There may be causes which can be competently raised either in the Court of Session or in the Court of Exchequer. Such are causes which, not having reference directly to the Royal revenue, still raise points which ultimately involve payment of, or repayment to, public money. Thus, where the Lord Advocate pursued an action for repetition of money paid to a contractor for beef which was disconform to contract, it was held that though it was competently raised in the Court of Exchequer, it might have been raised in the Court of Session.[1] Again, where an action was raised in the Court of Session to compel the Master of the Mint in Scotland to expend upon the Warden's lodgings a part of the public money allowed to the Master for keeping the buildings, etc., of the Mint in repair, it was decided that the action, while undoubtedly competent in the Court of Exchequer, was also competent in the Court of Session.[2] In one action by the Postmaster-General against the cautioners of a deputy-postmaster for the recovery of arrears, it was argued that the Court of Exchequer had exclusive jurisdiction, but the Court held that it was quite competently raised in the Court of Session;[3] and where an action of constitution was raised against the cautioners of a Receiver of Land Taxes, who had died largely indebted to the Crown, in order that there might be an adjudication of his land estate pending an action in the Exchequer Court, it was held competently raised in the Court of Session though proceedings in the Court of Exchequer for payment were also being taken.[4]

[1] Lord Advocate *v.* Hogarth, 1859, 21 D. 213.

[2] Craigie *v.* Hepburn and Alves, 22nd December 1809, F. C.

[3] Postmaster-General for Scotland *v.* Kerr and Others, 8th July 1813, F. C.

[4] Earl of Galloway, etc. *v.* Commissioners of His Majesty's Treasury, 1800, 4 Paton's App. 165.

CHAPTER V

JURISDICTION EXCLUDED

It has sometimes been laid down in general terms that the jurisdiction of the Court of Session is excluded in various well-defined causes, such as criminal causes, ecclesiastical causes, brieves, etc. This, however, is by no means an accurate statement, and it will accordingly be necessary to treat each of these causes in detail and make the necessary qualifications.

I. Criminal Causes.—1. *Original Jurisdiction.*—(1) *History.*—At its institution[1] the Court of Session had no original jurisdiction conferred upon it with regard to crimes. It succeeded to the jurisdiction of the Session Court of James I., which was expressly declared incompetent to cognosce in any action or cause concerning crimes.[2] Later, however, a criminal jurisdiction was given to the Court of Session by statute, enabling it to punish perjury and subornation of perjury arising in the course of a competent process before any of its Judges,[3] contravention of law burrows,[4] deforcement of officers of law,[5] breach of arrestment,[6] clandestine marriages,[7] fraudulent bankruptcy,[8] and wrongous imprisonment.[9] Though the statutory jurisdiction has not been repealed, it has long ago fallen into desuetude.

The crime of forgery, disclosed in the course of an action depending before the Court of Session, was in use to be punished by that Court,[10] but though in the process of reduction-improbation the investigation into a case of alleged forgery is still competent before the Court of Session, the punishment of the crime, if proved, is no longer a matter for the civil Judge, and the practice now is for the case to be remitted to the Crown authorities, to be dealt with before the Justiciary Court, if so advised.

[1] Act 1532, cap. 2 (record edition); 1537, cap. 36-41 (12mo edition).

[2] King *v.* Sheriff of Fife, 1500, reported in Balfour's Practicks, p. 266.

[3] 1555, cap. 47 (12mo edition).

[4] 1581, cap 22 (record edition), cap. 117 (12mo edition); 1593, cap. 13 (record edition), cap. 170 (12mo edition).

[5] 1581, cap. 23 (record edition), cap. 118 (12mo edition); 1587, cap. 85; 1592, cap. 72 (record edition), cap. 152 (12mo edition).

[6] 1581, cap. 23 (record edition), cap. 118 (12mo edition).

[7] 1661, cap. 246 (record edition), cap. 34 (12mo edition); 1698, cap. 6.

[8] 1696, cap. 5.

[9] 1700-1, cap. 6.

[10] Erskine's Inst. i. 3. 21; Hume on Crimes, i. 162, 163.

(2) *General Rule.*—As regards ordinary crimes and their punishment, therefore, the original jurisdiction of the Court of Session may be said to be now excluded. The Court of Session is not, however, barred from investigating, in the course of an action or defence, facts imputing crime or illegal acts, so far as these are the grounds of civil or patrimonial conclusions.[1] On the contrary, it is quite competent to decide in the Court of Session that the signature of a deed has been forged, and for the deed to be reduced accordingly;[2] or that an assault[3] or theft[4] has been committed, and to award damages therefor; or where the defence to an action under a fire insurance policy is a plea of wilful fire-raising, for the Court to hold that the defence is proved and to assoilzie the defenders.[5] The Court of Session, however, cannot entertain an action or defence where a sentence or record of a criminal Court is standing against the person pursuing or defending, as the case may be, in the same circumstances, and would require to be reduced or set aside by the civil Court as a condition precedent of the claim or defence.[6] The reason for the refusal of the Court of Session in such circumstances is that the person convicted has failed to avail himself of the opportunity for review afforded him in the Criminal Appeal Court. Where, however, there is no review by a criminal Court possible, as where the question at issue is purely one of fact, this rule does not hold good, and accordingly a civil action can be raised by a party convicted in a criminal Court for damages arising out of the same circumstances, notwithstanding that the conviction against him is still standing.[7] In a recent case,[8] where a motor driver was convicted before the Sheriff, counter actions were raised in the Sheriff Court by the owner of the motor and the owner of a vehicle with which the motor had been in collision, and the owner of the motor was assoilzied in the one action and was awarded damages in the other. In a more recent case in the Outer House[9] the Lord Ordinary struck out of the

[1] Hume on Crimes, ii. 71.

[2] M'Vitie *v.* Barbour, 1838, 16 S. 1184; Balfour *v.* Robertson, 1839, 1 D. 458.

[3] M'Laren *v.* Robertson, 1859, 21 D. 183.

[4] A. *v.* B., 1902, 9 S. L. T. 411.

[5] Ker *v.* Sun Fire Office, 1793, Mor. 14078.

[6] Robertson *v.* Bissett, 1829, 7 S. 633; Maclellan *v.* Miller, 1832, 11 S. 187; Mackintosh *v.* Fraser, 1834, 12 S. 872; Gilchrist *v.* Anderson, 1838, 1 D. 37; Barnet *v.* Whyte, 1849, 11 D. 666; Bell *v.* Black and Morrison, 1865, 3 M. 1026; Kennedy *v.* Wise, 1890, 17 R. 1036.

[7] Wood *v.* North British Rly. Co., 1899, 1 F. 562.

[8] Dunn *v.* Mitchell, 1910, 6 Adam, 365.

[9] Oliver *v.* Borland, 1911, 2 S. L. T. 46. See, however, Shaw *v.* Craig, 1916, 1 S. L. T. 116.

condescendence of an action any reference to the fact that the defender had been convicted and fined in a trial of the same circumstances in a criminal Court.

In a case[1] where a man had been convicted before the Police Court of an assault on the police, an action by the person convicted in respect of an assault upon him by a policeman immediately previous to his arrest was held relevant.

(3) *Exceptions.*—There are some matters of a more or less criminal nature, however, in which the Court of Session has still jurisdiction. These are cases where there has been malversation, misconduct, or gross neglect of duty on the part of persons connected with the administration of the law, or of trust or bankruptcy matters, or where the authority of the Court has been defied or treated with contempt.

(a) *Malversation, etc., of Persons Connected with the Administration of the Law.*—The Court of Session may deprive any clerk, extractor or other officer of Court of his office and subject him in expenses.[2] It may remove judicial factors, whether their delict be mere neglect to fulfil the requirements of the Act of Sederunt, 13th February 1730, or the Judicial Factors Act, 1849;[3] also tutors-at-law.[4] Judges of inferior Courts[5] other than Sheriffs or salaried Sheriffs-Substitute[6] and clerks of inferior Courts[7] may be deprived of their offices or fined by the Court of Session, who may also remove enrolled law agents or notaries public.[8]

[1] Wilson *v.* Bennett, 1904, 6 F. 269.

[2] Lang *v.* Lang, 1831, 9 S. 748; Lord Advocate *v.* Bruce, 1837, 15 S. 1184; 1 & 2 Vict. cap. 118, sec. 30.

[3] 12 & 13 Vict. cap. 51, secs. 20 and 21; Accountant of Court *v.* Jaffray, 1851, 14 D. 292; 1854, 17 D. 71; Accountant of Court *v.* M'Allister, 1853, 16 D. 301; Accountant of Court *v.* Wilkie, 1856, 18 D. 793; Marshall *v.* Chisholm, 1901, 3 F. 642.

[4] Butchart *v.* Butchart, 1851, 13 D. 1258.

[5] Baron Bailie of Calder, reported in Angus, Complainer, 1751, Mor. 14976; Duffs *v.* Sutherland, 1793, Mor. 14981; Anderson *v.* Spence, 1830, 8 S. 820.

[6] These Judges may be removed by the Secretary of Scotland upon a report prepared at his instance by the Lord President of the Court of Session and the Lord Justice-Clerk for the time being. See sec. 13 of the Sheriff Courts (Scotland) Act, 1907.

[7] Angus, Complainer, 1751, Mor. 14976; Sievwright, A. S., 4th February 1786; Sellar *v.* Duff, 11th February 1809, F. C.; Syme *v.* Murray, 19th January 1810, F. C.; Campbell *v.* M'Cowan, 1824, 3 S. 246 (N. E. 173); M'Farlanes *v.* A. B., 1830, 5 S. 537 (N. E. 504); affd. 4 W. & S. 123; H.M. Advocate *v.* Suter, 1836, 14 S. 622; Galbraith *v.* Sawers, 1840, 3 D. 52; Manson *v.* Smith, 1871, 9 M. 492, per Lord Cowan, p. 495; Macbeth *v.* Innes, 1873, 11 M. 404; A. S., 6th March 1783.

[8] Law Agents (Scotland) Act, 1873 (36 & 37 Vict. cap. 63), secs. 1, 14, 22; Incorporated Society of Law Agents *v.* Laing, 1893, 21 R. 267; Glasgow Procurators *v.* Colquhoun, 1900, 2 F. 1192.

The procedure by which the conduct of these several parties has been brought to the notice of the Court has varied. In the case of clerks, extractors, etc., of the Supreme Court, the procedure is by petition and complaint.[1] With regard to judicial factors, proceedings have usually arisen on a report by the Accountant of Court, followed by proceedings resembling those of a petition and complaint,[2] but sometimes a simple petition by a party interested has been presented.[3] The only case against a tutor-at-law has been by petition and complaint.[4] Judges of inferior Courts have been proceeded against by summary complaint;[5] clerks of inferior Courts by petition and complaint;[6] and law agents and notaries public by petition to remove.[7]

(b) *Malversation, etc., of Persons Connected with Trust or Bankruptcy Matters.*—The Court of Session may remove ordinary trustees[8] or trustees and commissioners in sequestrations[9] from their office, and the person so removed is usually made liable in the expenses of his removal. In the former case the procedure is by simple petition to the Inner House; in the latter case the attention of the Court has sometimes been directed to the case by a report from the Accountant in Bankruptcy, sometimes by a petition and complaint, and sometimes by simple petition.

(c) *Where the Authority of the Court has been Defied or Treated with Contempt.*—(i.) *Breach of Interdict.*—Breach of interdict partakes of the nature of a criminal offence, and the manner in which it is brought to the knowledge of the Court is by way of petition and complaint. This

[1] Lang *v.* Lang, 1831, 9 S. 748; Lord Advocate *v.* Bruce, 1837, 15 S. 1184.

[2] Accountant of Court *v.* Jaffray, 1851, 14 D. 292; Accountant of Court *v.* M'Allister, 1853, 16 D. 301; Accountant of Court *v.* Wilkie, 1856, 18 D. 793.

[3] Marshall *v.* Chisholm, 1901, 3 F. 642.

[4] Butchart *v.* Butchart, 1851, 13 D. 1258.

[5] Angus, Complainer, 1751, Mor. 14976; Duffs *v.* Sutherland, 1793, Mor. 14981; Anderson *v.* Spence, 1830, 8 S. 820.

[6] Sellar *v.* Duff, 11th February 1809, F. C.; Syme *v.* Murray, 19th January 1810, F. C.; Campbell *v.* M'Cowan, 1824, 3 S. 246 (N. E. 173); M'Farlanes *v.* A. B., 1830, 5 S. 537 (N. E. 504); affd. 4 W. & S. 123; H.M. Advocate *v.* Suter, 1836, 14 S. 622.

[7] Incorporated Society of Law Agents *v.* Laing, 1893, 21 R. 267; Glasgow Procurators *v.* Colquhoun, 1900, 2 F. 1192.

[8] Stewart *v.* Chalmers, 1904, 7 F. 163; Neilson *v.* Stewart's Trs., 1905, 42 S. L. R. 434; Cherry *v.* Patrick, 1910, S. C. 32; Wishart, Petr., 1910, 2 S. L. T. 229.

[9] Bell's Comm. (5th ed.), ii. 382; Sanders *v.* Kibble and Stewart, 1823, 2 S. 196 (N. E. 173); Aytoun *v.* Macculloch, 1824, 3 S. 80 (N. E. 54); Baillie *v.* Anderson, 1844, 6 D. 1376; Richmond *v.* M'Phun, 1854, 16 D. 546; Accountant in Bankruptcy *v.* Gow, 1862, 1 M. 124; Accountant in Bankruptcy *v.* Peacock's Tr., 1867, 6 M. 158; Lang *v.* Hally, 1870, 8 M. 753; Paterson *v.* Robson, 1872, 11 M. 76; Accountant in Bankruptcy *v.* Davie, 1884, 11 R. 1013.

is not a proceeding before a Lord Ordinary, but must be presented to the Inner House.[1] Being of the nature of a criminal proceeding, the concurrence of the Lord Advocate is necessary,[2] and a conclusion for a sum of money to the complainer without punishment is incompetent.[3] A petition and complaint is usually only good against persons actually named in the interdict,[4] but where a person interdicted assumes a partner, and the new partnership proceeds to do what the original partner was interdicted from doing, the petition and complaint may be presented against the new partnership without the necessity of a new interdict.[5] The *de facto* knowledge of an interdict is quite sufficient, and may be proved by parole evidence.[6] Intention to commit a breach of interdict is not sufficient ground for a petition and complaint.[7]

The procedure in a petition and complaint for breach of interdict is regulated by Act of Sederunt, 11th July 1828.[8] The petition and complaint is boxed to the Inner House and appears on the Single Bills when an order is taken for service upon the respondent and for answers in writing within fifteen days, and usually for the appearance of the respondent at the bar. The case may then be remitted to the junior Lord Ordinary or any other Lord Ordinary if it shall seem expedient to do so. The Division, however, may decide to hear the petition itself without any remit to a Lord Ordinary.[9] After the time allowed for answers, or after answers have been given in, the petition may be enrolled for further procedure before the Lord Ordinary or the Division as the case may be. If there is a plea to the relevancy, this must first be disposed of.[10] If the breach is denied, a proof is led before either the Lord Ordinary [11] or one of the Judges of the Division,[12] or on commission.[13] Notwith-

[1] Ramage *v.* Steel, 1843, 6 D. 146; M'Pherson *v.* Thorne, 1844, 6 D. 422; M'Neill *v.* Scott, 1866, 4 M. 608.

[2] Duke of Northumberland *v.* Harris, 1832, 10 S. 366; Usher *v.* Mags. of Edinburgh, 1839, 1 D. 639; Mackenzie *v.* Thomson, 1843, 5 D. 771; Bell *v.* Gow, 1862, 1 M. 84; Paterson *v.* Robson, 1872, 11 M. 76.

[3] Bell *v.* Jameson, 1848, 10 D. 1413.

[4] Pattison *v.* Fitzgerald, 1823, 2 S. 536 (N. E. 468).

[5] Dudgeon *v.* Thomson & Co., 1876, 3 R. 604; 1877, 3 A. C. 34; Harvie *v.* Ross, 1886, 14 R. 71.

[6] Welsh *v.* Stewart, 1818, 1 Murray, 403-405; Clark *v.* Stirling, 1839, 1 D. 955.

[7] Hunter *v.* Wilson, 1848, 10 D. 893.

[8] Secs. 83-90.

[9] Secs. 83 and 89.

[10] Henderson *v.* Maclellan, 1874, 1 R. 920.

[11] Dudgeon *v.* Thomson and Donaldson, 1876, 3 R. 974.

[12] Macleod's Trs. *v.* Macpherson, etc., 1883, 10 R. 792; Welsbach Incandescent Gas Light Co., Ltd. *v.* M'Mann, 1901, 4 F. 395.

[13] Menzies *v.* Macdonald, 1864, 2 M. 652; Mackenzie *v.* Coulthart, 1889, 16 R. 1127.

standing the provision in the Act of Sederunt, 11th July 1828,[1] a jury trial is unusual.[2] The proof is reported to the Division and counsel are heard, and a decision arrived at whether or not a breach has taken place. If answers are not lodged, the respondent will be ordained to appear personally at the bar, and on cause shown may be allowed further time to answer. When counsel are heard upon the proof, or if the respondent stands confessed by no answers being lodged, the respondent must appear personally at the bar. If the respondent fails to attend, an interlocutor will be issued appointing the respondent personally to appear under certification that, if he do not obtemper the order, a warrant will be issued for his apprehension, and should he still fail to appear a warrant for his apprehension will be issued.[3] The personal presence of the respondent at the proof or sentence has, however, been dispensed with in particular cases. In one case[4] where the Court only inflicted a fine, the respondents were not present. In another case[5] where there was no fine imposed, but expenses were awarded against them, it was not thought necessary for the respondents to be personally present at the bar. In a later case,[6] as the respondent had been ill and the complainer did not insist upon his presence, he was fined a small sum in absence; and in a recent case[7] it was finally decided that the presence of the respondent was unnecessary.

Where there is an interdict for a specific period and the interdict is thereafter continued and a breach of the renewed interdict has taken place, it has been held that personal intimation of the renewal of the interdict to the respondent is unnecessary.[8]

Though a petition and complaint is of the nature of a criminal proceeding, it is not affected by sec. 3 of the Evidence Act, 1853, and the respondent can competently be examined as a witness at the proof.[9] A petition and complaint in the Sheriff Court can be appealed to the Court of Session.[7] For sentence for breach of interdict, see *infra*, Part viii. Chap. xiii.

[1] Sec. 86.

[2] Dudgeon *v.* Thomson and Donaldson, 1876, 3 R. 974.

[3] Duke of Atholl *v.* Robertson, 1872, 10 M. 298; Welsbach Incandescent Gas Light Co., Ltd. *v.* M'Mann, 1901, 4 F. 395.

[4] Hamilton *v.* Caledonian Rly. Co., 1847, 10 D. 41.

[5] Anderson *v.* Connacher, 1850, 13 D. 405.

[6] Walker *v.* Junor, 1903, 5 F. 1035.

[7] Stark's Trs. *v.* Duncan, 1906, 8 F. 429.

[8] Henderson *v.* Maclellan, 1874, 1 R. 920.

[9] Christie Miller *v.* Bain, 1879, 6 R. 1215. See also Mackay *v.* Ross, 1853, 1 Irvine, 288.

(ii.) *Contempt of Court.*—The power of the Court of Session to punish any contempt of its proceedings, whether direct or constructive, is undoubted, and the contempt may be dealt with on the spot, if that is possible, or if not, by way of summary complaint presented within a reasonable time after the contempt is alleged to have been committed.[1] Contempt of Court may express itself in many forms. It may take the form of letters to Judges reflecting upon their partiality and general administration of justice. Thus in one case [2] a Writer to the Signet, who wrote to the Lord President reflecting on his judicial conduct and containing charges against the Court of an insulting nature, was publicly censured and ordered to find caution for his good behaviour for five years; and in another case [3] a party to a suit, who wrote to the Judges and others defaming the Judges and the administration of justice, was imprisoned for four months and ordered to find caution for his good behaviour for five years.

It may rest in an attempt to mislead the Court, as when a person gave a false certificate of character to a prisoner to be used in mitigation of sentence; [4] or in absolute defiance of the orders of Court, as when a person refused to deliver up the custody of a child when ordered to do so; [5] or refused to give information to the Court as to the whereabouts of his stepson of which he was well aware; [6] or delivered to a third party a document which he was ordered to produce.[7]

It may take the form of intimidation of a party to a cause by his opponent,[8] or of a witness in a case,[9] or of a Clerk of Court.[10] On the other hand, the contempt may be shown by a juryman [11] or a witness [12] coming into Court intoxicated; or by a witness, whether a commoner [13]

[1] Erskine's Inst. i. 2. 8; Hume on Crimes, i. 380, 405, 406; ii. 138, 140; Hamilton *v.* Anderson, 1858, 3 Macq. 363, per Lord Chancellor Chelmsford, p. 373; Macleod *v.* Speirs, 1884, 11 R. (J.) 26; Petrie *v.* Angus, 1889, 17 R. (J.) 3.

[2] Lord Advocate *v.* Jamieson, 1822, 1 S. 285 (N. E. 264).

[3] Lord Advocate *v.* Hay, 1822, 1 S. 288 (N. E. 267).

[4] H.M. Advocate *v.* Nimmo and Forsyth, 1839, 2 Swinton, 338—dismissed after satisfactory explanation.

[5] Leys *v.* Leys, 1886, 13 R. 1223—imprisoned during Court's pleasure; Edgar *v.* Fisher's Trs., 1893, 21 R. 59, 1076—sequestrated the estate.

[6] Muir *v.* Milligan, 1868, 6 M. 1125—imprisoned during the pleasure of the Court.

[7] H.M. Advocate *v.* Galloway, 1839, 2 Swinton, 465—fined £100.

[8] Paterson *v.* Kilgour, 1865, 3 M. 1119—public censure.

[9] M'Culloch *v.* Babington, 1851, 24 Jur. 76; Forkes *v.* Weir, 1897, 5 S. L. T. 194—Court satisfied with an undertaking to desist.

[10] Spalding *v.* Lawrie, 1836, 14 S. 1102—retraction and apology.

[11] H.M. Advocate *v.* Yates, 1847, Arkley, 238—fined £20.

[12] Allan, 1826, Shaw's Justiciary Cases, 172—one month's imprisonment.

[13] Petrie *v.* Angus, 1889, 17 R. (J.) 3—seven days' imprisonment.

or a peer,[1] wilfully failing to appear, escaping from the witness room,[2] refusing to be sworn,[3] refusing to give evidence,[4] or prevaricating.[5]

Lastly, it may arise from the publication of matters relating to a cause either on the part of one of the parties or by a third person. Thus, it has been held to be a contempt of Court for a party to a cause to have copies of a slanderous summons printed and sent to other people,[6] to publish a partial statement,[7] to circularise customers,[8] or to publish an opinion of counsel[9] bearing upon a pending litigation. Again, although there can be no objection to a newspaper publishing a fair report of the proceedings in any Court of Justice, it has been held a contempt of Court for a newspaper to publish statements,[10] even made at a public meeting,[11] or to indulge in criticisms[12] of a pending cause; to publish a document which is not a public document,[13] such as an unclosed record;[14] or to publish a false or biassed report of Court proceedings.[15] It is a question whether the publication of proceedings against a person for contempt of Court is not of itself a new contempt.[16]

2. *Appellate Jurisdiction.*—(1) *Court of Justiciary.*—The Court of Justiciary being a sovereign Court, the Court of Session has no jurisdiction to review its judgments.[17]

(2) *Inferior Courts.*—(a) *General Rule.*—With regard to the judgments of inferior Courts, if the action is of a criminal nature, the case

[1] Fraser *v.* Nicholl, 1840, 2 D. 1254—letters of second diligence.

[2] Innes and M'Ewan, 1831, Shaw's Justiciary Cases, 238—imprisonment for one month.

[3] Tweedie, 1829, Shaw's Justiciary Cases, 222—liberated after being a fortnight in jail.

[4] Kerr, 1822, Shaw's Justiciary Cases, 68—four months' imprisonment.

[5] M'Ewen *v.* M'Leod, 1829, Shaw's Justiciary Cases, 213—six weeks' hard labour; Macleod *v.* Speirs, 1884, 11 R. (J.) 26—ten days' imprisonment with hard labour.

[6] Gilfillan *v.* Ure, 1824, 3 S. 22 (N. E. 15)—deliver up copies and pay expenses.

[7] Henderson *v.* Laing, 1824, 3 S. 384 (N. E. 271)—payment of expenses.

[8] St. Mungo Manufacturing Co. *v.* Hutchison, Main & Co., Ltd., 1908, 15 S. L. T. 893—payment of expenses.

[9] Miller *v.* Mitchell, 1835, 13 S. 644; 14 S. 172—papers destroyed and payment of expenses.

[10] Watson and Murray, 1820, Shaw's Justiciary Cases, 9—Watson fined £5; Murray, one month's imprisonment.

[11] M'Lauchlan *v.* Carson, 1826, 5 S. 147 (N. E. 133)—apology and expenses.

[12] Smith *v.* Ritchie & Co., 1892, 20 R. (J.) 52—interdicted—no expenses.

[13] Richardson *v.* Wilson, 1879, 7 R. 237.

[14] Graham *v.* Farquhar, 1893, 1 S. L. T. 63—warning given.

[15] M'Leod and Carse, 1820, Shaw's Justiciary Cases, 3—M'Leod, four months' imprisonment; Carse rebuked.

[16] Lord Advocate *v.* Prentice, 1822, 1 S. 385 (N. E. 361).

[17] Strachan *v.* Commissioners of Justiciary, 1684, Mor. 7415.

cannot be brought before the Court of Session for review,[1] except there is excess of jurisdiction,[2] or it is impossible by any other means to get the judgment set aside.[3]

(b) *Civil or Criminal.*—(i.) *Cases Falling under Summary Jurisdiction Act.*—There has, however, been great difficulty in deciding what is a civil case and what a criminal case. Down to the passing of the Summary Procedure Act, 1864,[4] this difficulty was keenly felt, but by sec. 28 of that Act it was enacted that in all proceedings by way of complaint instituted in Scotland in virtue of any statutes authorising convictions for offences and the recovery of penalties and the enforcement of orders by imprisonment upon summary complaint before Sheriffs, Justices, and Magistrates "the jurisdiction shall be deemed and taken to be of a criminal nature where in pursuance of a conviction or judgment upon such complaint, or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required, in case of default of payment or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation; and in all other proceedings instituted by way of complaint under the authority of any Act of Parliament the jurisdiction shall be held to be civil." The sole purpose of this section was to indicate the Court of Review,[5] and this is to be tested not by the judgment pronounced, but by the sentence authorised. Accordingly, since this section came into operation, it has been held that if the sentence authorised includes a warrant of imprisonment for a limited period *in modum pœnæ*, and not in execution until liberated in due course of

[1] Berry *v.* Walker, 17th January 1809, F. C.; Johnstone *v.* Guthrie, 15th May 1810, F. C.; Johnston *v.* Cuming, 1810, Hume's Dec. 260; Meek *v.* Watson, 5th June 1812, F. C.; Porteous *v.* Brown, 9th July 1818, F. C.; Roger *v.* Gray, 24th November 1820, F. C.; Jobson and Hay *v.* Lambert, 1828, 7 S. 83; Robertson *v.* Bissett, 1829, 7 S. 633; Asbury *v.* Bell, 1836, 14 S. 481; M'Caul *v.* Millar, 1838, 16 S. 617; Mackenzie *v.* Scott, 1845, 8 D. 271; Smith and Gilmour *v.* Conn, 1866, 4 M. 671; Scott *v.* Muir and Annan, 1868, 7 M. 270; Lang *v.* Allan and Mann, 1869, 7 M. 473; Forbes *v.* Adair, 1871, 10 M. 244.

[2] Heritors of Corstorphine *v.* Ramsay, 10th March 1812, F. C.; Crookshanks, Petr., 22nd January 1814, F. C.; Brown *v.* Heritors of Kilbery, 1825, 3 S. 480 (N. E. 334); Ross *v.* Findlater, 1826, 4 S. 514 (N. E. 522); M'Donald *v.* Dobbie, 1864, 2 M. 407; M'Arthur *v.* Linton, 1864, 2 M. 659.

[3] Wood *v.* North British Rly. Co., 1899, 1 F. 562.

[4] 27 & 28 Vict. cap. 53.

[5] Lowson *v.* Commissioners of Police for the Burgh of Forfar, 1877, 3 Coup. 433.

law, the jurisdiction is criminal;[1] if not, the jurisdiction is civil.[2] The Summary Jurisdiction (Scotland) Act, 1908,[3] however, has repealed the whole of the Summary Procedure Act, 1864, and there is now no statutory direction upon the question of civil or criminal jurisdiction in summary cases, except that all appeals under the former Act by way of stated case must be taken to the High Court.[4] The other modes of appeal are, however, expressly reserved,[5] and with regard to these, whether the Court will continue its present practice, notwithstanding the presumably deliberate repeal of the 28th section of the Act of 1864, cannot be anticipated, but it is hardly likely that the present practice, which is so well understood, will be disturbed.

(ii.) *Cases not Falling under the Summary Jurisdiction Act.*—With regard to cases in inferior Courts not falling under the Summary Jurisdiction Act, the difficulty still exists, and it is necessary in each case to decide, from the particular circumstances and the particular statute under which the complaint is laid, into which category, as regards review, the case will fall. The most exhaustive statement of the tests to be applied to discover whether a case is to be considered criminal or civil *quoad* review is to be found in a case under the Tweed Fishery Act[6] by Lord Ivory,[7] and these tests may be summarised thus:—The case is criminal (*a*) if the proceeding itself is not *ad civilem effectum* but *in vindicatam publicam*, and its end and object not the constitution and enforcement of a mere debt, but conviction as for an offence and sentence *in modum pœnæ;* (*b*) if the machinery for arriving at conviction and punishment savours throughout of criminal and not of civil process; and (*c*) if the mode of proof provided for in the statute itself directly or by implication excludes the competency of resorting to the respondent as a witness. This case was approved of in a unanimous decision of the whole Court.[8]

The principal test is, therefore, whether imprisonment, either immediate or in default of payment or performance, is authorised by

[1] Smith and Gilmour *v.* Conn, 1866, 4 M. 671; Scott *v.* Muir and Annan, 1868, 7 M. 270; Lang *v.* Allan and Mann, 1869, 7 M. 473; Forbes *v.* Adair, 1871, 10 M. 244.

[2] Ledgerwood *v.* M'Kenna, 1868, 7 M. 261; Todd *v.* Magowan, 1905, 7 F. (J.) 50.

[3] 8 Edw. VII. cap. 65.

[4] Ibid., sec. 60; *cp.* Burgh of Cumnock and Holmhead *v.* Murdoch, 1910, S. C. 571.

[5] 8 Edw. VII. cap. 65, sec. 76.

[6] 11 Geo. IV. cap. liv. (local).

[7] Stevenson *v.* Scott, 1854, 1 Irvine, 603.

[8] Bruce *v.* Linton, 1861, 24 D. 184.

the statute *in modum pœnæ*—a test very much akin to the test applied by sec. 28 of the Summary Procedure Act of 1864.

(c) *Cases Civil quoad Review.*—In the following cases the proceedings *quoad* review have been held to be of a civil character :—

A complaint under the Hawkers' Act ;[1]

A conviction for distributing handbills without the name of the printer ;[2]

A conviction for exposing spirits for sale without a licence ;[3]

An offence against the Act regarding the carriage of passengers in merchant vessels ;[4]

A conviction for allowing tippling during divine service ;[5]

A conviction for playing " long bools " on a turnpike road ;[6]

A conviction for permitting a savage dog to be at liberty ;[7]

A conviction for allowing tippling during unseasonable hours ;[8]

A breach of a liquor licence ;[9]

A conviction for transgressing regulations made by magistrates in accordance with statutory powers ;[10]

A conviction for breach of the general rules under the Coal Mines Regulation Act, 1860 ;[11]

A conviction for malicious mischief ;[12]

A complaint under the Public Health Act, 1867 ;[13]

An offence under the Dogs Act, 1871 ;[14]

A conviction against a company or corporation ;[15] and

A conviction for the breach of bye-laws passed under a statute involving a question of civil law.[16]

[1] 55 Geo. III. cap. 71 ; Campbell *v.* Young, 1835, 13 S. 535.

[2] 39 Geo. III. cap. 79 ; Dunlop *v.* Hart, 1835, 13 S. 1173.

[3] 6 Geo. IV. cap. 80, sec. 138 ; M'Donald *v.* Gray, 1844, 2 Broun, 107.

[4] 5 & 6 Vict. cap. 107 ; Somerville *v.* Hemmans, 1844, 6 D. 1205 ; 2 Broun, 220.

[5] 9 Geo. IV. cap. 58 ; Phillips *v.* Steel, 1847, 9 D. 318.

[6] 1 & 2 Will. IV. cap. 43 ; Campbell *v.* Strathern, 1847, Arkley, 386.

[7] Duncan *v.* Greig, 1848, Arkley, 421.

[8] Addison *v.* Stevenson, 1848, Arkley, 505.

[9] 16 & 17 Vict. cap. 67 ; Caldwell *v.* Baker, 1856, 18 D. 315 ; Hill *v.* Dymock, 1856, 19 D. 47 ; Gardner *v.* Porter, 1856, 2 Irvine, 522.

[10] Crighton *v.* Grant, 1859, 21 D. 488 ; *cp.* Dalrymple *v.* Chalmers, 1886, 1 White, 37 ; Meiklejohn and Another *v.* Fisherrow Harbour Commissioners, 1902, 3 Adam, 556.

[11] Macdonald *v.* Young, 1862, 4 Irvine, 154.

[12] Black *v.* Laing, 1879, 4 Couper, 276.

[13] Maitland *v.* Midlothian County Council, 1894, 1 Adam, 325.

[14] 34 & 35 Vict. cap. 56 ; White *v.* Main, 1897, 2 Adam, 348.

[15] North British Rly. Co. *v.* Dumbarton Harbour Board, 1900, 2 F. (J.) 28 ; 3 Adam, 121 ; Simpson *v.* Glasgow Corporation, 1902, 4 F. 611 ; Lindsay *v.* Low & Co., 1902, 4 F. (J.) 45 ; Braid *v.* Swan & Sons, Ltd., 1903, 5 F. 579 ; Lauder *v.* Hurst, Nelson & Co., Ltd., 1904, 7 F. (J.) 65 ; 4 Adam, 413.

[16] Dalrymple *v.* Chalmers, 1886, 1 White, 37 ; Meiklejohn and Another *v.*

Appeals from convictions in the Dean of Guild Court are civil,[1] and so are appeals under the Solway Act.[2]

A small debt appeal to the Circuit Court, when remitted, should not be remitted to the High Court but to the Court of Session.[3]

The question has been raised whether an appeal against a conviction under the Shop Hours Act, 1904, was civil or criminal, but was not decided, although the Court of Justiciary entertained it and decided the case on its merits.[4]

II. Ecclesiastical Causes.—1. *General Rule.*—As a general proposition it may be laid down that the Court of Session has no jurisdiction to review any judgment in a matter purely spiritual or ecclesiastical falling within the jurisdiction of the Courts or office-bearers of the Church of Scotland by law established,[5] or within the determination of the tribunals or office-bearers of any Scottish dissenting church or ecclesiastical society, according to the terms of its contract of association, so long as the latter are lawful.[6] The only

Fisherrow Harbour Commissioners, 1902, 3 Adam, 556; *cp.* Crighton *v.* Grant, 1859, 21 D. 488.

[1] Fraser *v.* Downie, 1901, 3 F. 881.

[2] 44 Geo. III. cap. xlv. (local); Park and Others *v.* Earl of Stair, 1852, J. Shaw's Reports, 532; Henderson *v.* Johnstone, 1862, 1 M. 128.

[3] Beattie *v.* Gemmell and Adamson, 1862, 24 D. 431; Burrell & Son *v.* Forster, 1868, 1 Couper, 103.

[4] Hamilton *v.* Fyfe, 1907, S. C. (J.) 79; 5 Adam, 170.

[5] Robertson *v.* Preston, 1780, Mor. 7465; M'Queen *v.* Grant, 1781, Mor. 7466; Sturrock *v.* Greig, 1849, 11 D. 1220; Lockhart *v.* Presbytery of Deer, 1851, 13 D. 1296; Paterson *v.* Presbytery of Dunbar, 1861, 23 D. 720; Wight *v.* Presbytery of Dunkeld, 1870, 8 M. 921; Cassie *v.* General Assembly of the Church of Scotland, 1878, 6 R. 221; Craig *v.* Anderson, 1893, 20 R. 941. The statutes upon which the Church of Scotland is established are as follows:—

Act 1560, Acts of Parliament (Thomson's edition),		ii. 535.
Declaration of Queen Mary, 1567	„	„ 548.
Act 1567, cap. 6	„	iii. 23.
Act 1567, cap. 8	„	„ 23.
Act 1571, cap. 2	„	„ 58.
Act 1578, cap. 3	„	„ 95.
Act 1579, cap. 6	„	„ 137.
Act 1579, cap. 7	„	„ 137.
Act 1592, cap. 8	„	„ 541.
Act 1640, cap. 43	„	v. 290.
Declaration of Estates containing Claim of Right, 11th April 1689	„	ix. 38.
Act 1689, cap. 4	„	„ 104.
Act 1690, cap. 7	„	„ 133.
Act 1690, cap. 53	„	„ 196.
Act 1707, 16th January	„	xi. 402.

10 Anne, cap. 12; 37 & 38 Vict. cap. 82, sec. 3; 5 Edw. VII. cap. 12, sec. 5.

Auchincloss *v.* Black, 1793, Hume's Dec. 595; Grieve *v.* Smith, 1808, Hume's

difference between the Established Church, in the domain of jurisdiction, and a dissenting church, lies in the matter of proof. In the case of the former its constitution is contained in the statutes and common law, whereas, in the case of the latter, the Court is not supposed to have any knowledge until proved before it, like the terms and conditions of any other association.[1]

2. *Exceptions.*—To the rule that the Court of Session has no jurisdiction in ecclesiastical matters there are several exceptions:—

(1) *Wrongs Done Maliciously and without Probable Cause.*—In actions of damages against ecclesiastical authorities, or individual members of such bodies, for wrongs done while in the exercise of their ecclesiastical functions, if it is averred that the wrong done to the pursuer was done maliciously and without probable cause, and the averments of malice and want of probable cause are sufficient, the Court of Session has jurisdiction.[2]

(2) *Excess of Jurisdiction.*—If the Church Courts or office-bearers act in excess of their jurisdiction, or of the powers committed to them by their deed of association,[3] or refuse to perform a duty imposed upon them,[4] the Court of Session has jurisdiction to review their decision. The pursuer must first have exhausted the modes of appeal open to him in the ecclesiastical Courts, however, before coming to the Court of Session.[5]

(3) *Where no Duty or Jurisdiction.*—Where there is no duty upon

Dec. 637; Smith *v.* Galbraith, 1839, 5 D. 665; Forbes *v.* Eden, 1865, 4 M. 143; 1867, 5 M. (H. L.) 36; Brook *v.* Kelly, 1893, 20 R. 470; 20 R. (H. L.) 104; Brown *v.* M'Dougall, 1901, 4 F. 297.

[1] Dunbar *v.* Skinner, 1849, 11 D. 945, per Lord Fullerton, p. 962.

[2] Maclean *v.* Fraser, 1823, 3 Murray, 353; M'Dougal *v.* Campbell, 1828, 6 S. 742; Auchincloss *v.* Black, 1793, Hume Dec. 595; Dunbar *v.* Presbytery of Auchterarder, 1849, 12 D. 284; Smith *v.* Presbytery of Auchterarder, 1849, 12 D. 296; Edwards *v.* Begbie, 1850, 12 D. 1134; Lang *v.* Presbytery of Irvine, 1864, 2 M. 823; *cp.* Sturrock *v.* Greig, 1849, 11 D. 1220. In this case it is now generally recognised that the averments of malice and want of probable cause were not sufficient, and that it was upon this ground that the action was dismissed.

[3] Earl of Kinnoull *v.* Presbytery of Auchterarder, 1838, 16 S. 661; 1839, M'L. & R. 220; 1841, 3 D. 778; 1843, 5 D. 1010; Clark *v.* Stirling, 1839, 1 D. 955; Presbytery of Strathbogie, 1839, 2 D. 258, 585, 1047, 1380; Edwards *v.* Cruikshank, 1840, 3 D. 282; Wilson *v.* Presbytery of Stranraer, 1842, 4 D. 1294; Smith *v.* Presbytery of Abertarff, 1842, 4 D. 1476; Edwards *v.* Leith, 1843, 15 Jur. 375; Cuninghame *v.* Presbytery of Irvine, 1843, 5 D. 427; Cruickshank *v.* Gordon, 1843, 5 D. 909; Sturrock *v.* Greig, 1849, 11 D. 1220, per Lord Justice-Clerk Hope, p. 1231; M'Millan *v.* Free Church, 1859, 22 D. 290; 1861, 23 D. 1314; Peake *v.* The Association of English Episcopalians in Scotland, 1884, 22 S. L. R. 3; Skerret *v.* Oliver, 1896, 23 R. 468.

[4] Sturrock *v.* Greig, 1849, 11 D. 1220, per Lord Justice-Clerk Hope, p. 1232.

[5] Edwards *v.* Begbie, 1847, 9 D. 1384; Lang *v.* Presbytery of Irvine, 1864, 2 M. 823; *cp.* Craigie *v.* Mill, 1826, 4 S. 447 (N. E. 453).

an ecclesiastical Court or its office-bearers, or members of an ecclesiastical body or society, to do or say a particular thing, and the result of doing or saying the thing has caused an injury, the Court of Session has jurisdiction to entertain an action in respect of the wrong done, even though the defender pleads his ecclesiastical position; and malice and want of probable cause do not require to be averred. Thus, where a minister slandered a member of his congregation in his sermon[1] or prayer,[2] or at a meeting of heritors;[2] where a minister was slandered by a heritor in a letter to a meeting of heritors and kirk-session;[3] where a sentence of deposition of a clergyman was published by a bishop after the former had resigned;[4] where a clergyman referred in public to his refusal to admit a parishioner to the sacrament;[5] where a member of a religious society referred in public to accusations made at a meeting of the society against one of its members;[6] where a member of a congregation slandered another member to an elder openly in the latter's shop;[7] where members of a congregation slandered one of their number who was a candidate for the eldership.[8]

(4) *Where Cleavage in Church.*—In questions of property or endowments, where there has been a cleavage in the church or society, the Court of Session has jurisdiction to inquire into, and determine, the religious principles of those who originated or founded the particular church, sect, or society, and to give the property or endowments to that portion of the church, sect, or society that adheres to the original religious principles.[9] This has not always been the law, as the Court was wont to give the property and endowments to the majority without

[1] Scotlands *v.* Thomson, 1776, Mor. 13934; Snodgrass *v.* Wotherspoon, 1762, reported in M'Queen *v.* Grant, 1781, Mor. 7466, at p. 7467; Adam *v.* Allan, 1841, 3 D. 1058; Smith *v.* Gentle, 1844, 6 D. 565.

[2] Dunbar *v.* Stoddart, 1849, 11 D. 587.

[3] Sangster *v.* Hepburn, 1803, Hume's Dec. 617.

[4] Dunbar *v.* Skinner, 1849, 11 D. 945.

[5] M'Queen *v.* Grant, 1781, Mor. 7466.

[6] Grieve *v.* Smith, 1808, Hume's Dec. 637.

[7] Rankine *v.* Roberts, 1873, 1 R. 225.

[8] Jack *v.* Fleming, 1891, 19 R. 1.

[9] Davidson *v.* Aikman, 27th June 1805, F. C.; 1813, 5 Paton's App. 719 (1st appeal); 1820, 2 Bligh, 529; 6 Paton's App. 618 (2nd appeal); Macintyre and Others *v.* Macree, Caw, and Others, 24th February 1809, F. C.; Galbraith *v.* Smith, 1837, 15 S. 808; Smith *v.* Galbraith, 1839, 5 D. 665; Craigie *v.* Marshall, 1850, 12 D. 523; Cairncross *v.* Meek, 1858, 20 D. 995; 3 Macq. 827; Couper *v.* Burn, 1859, 22 D. 120; Presbytery of Edinburgh *v.* De la Condamine, 1868, 7 M. 213; "The Ferguson Bequest Fund" Case, 1879, 6 R. 486; Kennedy *v.* Morrison, etc., and Lee, etc., 1879, 6 R. 879; Peake *v.* The Association of English Episcopalians in Scotland, 1884, 22 S. L. R. 3; Thomson *v.* Anderson, 1887, 14 R. 1026; Burnett *v.* St. Andrew's Episcopal Church, Brechin, 1888, 15 R. 723; Bannatyne *v.* United Free

investigating whether they adhered to the original religious principles,[1] but the law is now as stated above.

(5) *Where a Civil Right is Affected.*—Where a civil right is affected by anything done by an ecclesiastical Court, or an office-bearer acting in an ecclesiastical capacity, or by a heritor, or when any civil right in any ecclesiastical matter is at issue, an action is competent in the Court of Session to establish the right and to claim damages for its invasion. Thus, where a sentence of a presbytery declared that a solicitor was incapable of appearing in future in that character at the bar of the presbytery, the Court of Session sustained an action for the rescission of the sentence and for damages.[2] Again, an action with regard to seat rents,[3] churchyards,[4] glebes,[5] offices in the church,[6] *jus devolutum*,[7] allocation of seats in a church,[8] or compensation for patronage[9] and raising a question of civil right was held competent in the Court of Session. Where no civil right, however, is affected the Court of Session has no jurisdiction to interfere.[10]

(6) *Teind Causes.*—The Court of Session, acting as Commissioners for the Plantation of Kirks and Valuation of Teinds, has jurisdiction under several Acts of Parliament relating to the Church of Scotland:—

Church of Scotland, 1902, 4 F. 1083; 7 F. (H. L.) 1; United Free Church *v.* M'Iver, 1902, 4 F. 1117; 7 F. (H. L.) 1; Lyon's Trs. *v.* Aitken, 1904, 6 F. 608; Free Church Assembly *v.* Johnston, 1905, 7 F. 517.

[1] Bryson and Others *v.* Wilson and Others, 30th June 1752, Elchies' Dec. i. Title to Pursue, No. 1; Wilson *v.* Jobson, 13th December 1771, F. C.; Allan *v.* M'Crae, 25th May 1791, F. C.; Dunn *v.* Brunton, 13th May 1801, F. C. (Appendix, No. 14); Bulloch *v.* Smith, 31st January 1809, F. C., and other cases mentioned in the judgment of Lord Justice-Clerk Hope in Craigie *v.* Marshall, 1850, 12 D. 523, at p. 535.

[2] Rutherford *v.* Presbytery of Kirkcaldy, 17th November 1785, Mor. 7469.

[3] Clapperton *v.* Mags. of Edinburgh, 1840, 2 D. 1385; Edinburgh Ecclesiastical Commissioners *v.* Kirk-Session of High Kirk, Edinburgh, 1888, 15 R. 952.

[4] Wright *v.* Lady Elphinstone, 1881, 8 R. 1025; Russell *v.* Marquess of Bute, 1882, 10 R. 302; Steel *v.* Kirk-Session of St. Cuthbert's, 1891, 18 R. 911; Fraser *v.* Turner, 1893, 21 R. 278.

[5] Bain *v.* Lady Seafield, 1887, 14 R. 939; Gilmour *v.* Sutherland, 1900, 38 S. L. R. 561.

[6] Mags. of Gorbals *v.* Kirk-Session of Gorbals, 1823, 2 S. 194 (N. E. 172); Dow *v.* Imrie, 1887, 14 R. 928; Maclagan *v.* Brown, 1887, 14 R. 1083; Hastie *v.* M'Murtrie, 1889, 16 R. 715.

[7] Stewart *v.* Presbytery of Paisley, 1878, 6 R. 178; M'Farlan *v.* Cupar and Scoular Presbytery, 1878, 16 S. L. R. 480; Dunbar *v.* Presbytery of Abernethy, 1889, 26 S. L. R. 517.

[8] Stiven *v.* Heritors of Kirriemuir, 1878, 6 R. 174; Stephen *v.* Anderson, 1887, 15 R. 72; Mackay *v.* Wood, 1889, 17 R. 38; Peebles *v.* Jardine, 1903, 5 F. 932.

[9] Earl of Strathmore *v.* Rescobie Heritors, 1888, 15 R. 364; Paterson *v.* Paterson, 1888, 15 R. 1060.

[10] Forbes *v.* Eden, 1865, 4 M. 143; 1867, 5 M. (H. L.) 36; Brook *v.* Kelly, 1893, 20 R. 470; 20 R. (H. L.) 104; Skerret *v.* Oliver, 1896, 23 R. 468.

(*a*) Act anent Plantation of Kirks and Valuation of Teinds.[1]

(*b*) The New Parishes (Scotland) Act, 1844,[2] being an Act to facilitate the disjoining or dividing of extensive or populous parishes and the erecting of new parishes, as amended by the United Parishes (Scotland) Act, 1868,[3] and the United Parishes (Scotland) Act, 1876.[4]

(*c*) Petitions to feu glebes or to grant building leases thereon for any term not exceeding ninety-nine years.[5]

(*d*) The Ecclesiastical Buildings and Glebes (Scotland) Act, 1868.[6] Under this Act there is an appeal to the Sheriff to stay proceedings before any presbytery relating to the building, rebuilding, repairing, adding to, or other alteration of churches or manses, or to the designing or excambing of glebes or additions to glebes, or to the designing or excambing of sites for or additions to churchyards, and the suitable maintenance thereof (including the building or repairing of churchyard walls), and to dispose of the same himself, and his decision is final, unless an appeal is taken to the Lord Ordinary in teind causes within twenty days of the decision of the Sheriff; and the decision of the Lord Ordinary is final.[7] If, however, an appeal is not taken timeously to the Sheriff, the proceedings of the presbytery are final.[8]

(7) *Civil Court may be Called to Aid Ecclesiastical Court.*—By several statutes the Court of Session may be called upon to aid the ecclesiastical Courts. Thus, on the application of an entrant minister, the Court of Session may grant letters of charge against all possessors and occupants of his manse and glebe, whether the same be set in feu or tack, or not, to remove therefrom within ten days in order that the entrant minister may take possession.[9] The Court may also grant letters of horning and poinding to enforce execution of a presbytery's decree against heritors for church or manse repairs.[10] It may also suspend a charge given on a presbytery's decree.[11] The Court may also be called upon to "give all due assistance for making the sentences and censures of the Church of Scotland and judicatories thereof to be obeyed, or otherwise effectual,

[1] Act, 21st February 1707, cap. 10 (record edition), cap. 9 (12mo edition).

[2] 7 & 8 Vict. cap. 44. [3] 31 & 32 Vict. cap. 30. [4] 39 & 40 Vict. cap. 11.

[5] The Glebe Lands (Scotland) Act, 1866 (29 & 30 Vict. cap. 71).

[6] 31 & 32 Vict. cap. 96.

[7] Heritors of Pitsligo *v.* Gregor, 1879, 6 R. 1062; Mags. of Arbroath *v.* Presbytery of Arbroath, 1883, 10 R. 767; Earl of Camperdown *v.* Presbytery of Auchterarder, 1902, 5 F. 61; *cp.* Oliphant *v.* Presbytery of St. Andrews, 1901, 8 S. L. T. 314.

[8] Walker *v.* Presbytery of Arbroath, 1876, 3 R. 498; 4 R. (H. L.) 1.

[9] Act 1572, cap. 5 (record edition), cap. 48 (12mo edition); M'Callum *v.* Grant, 1826, 4 S. 527 (N. E. 535), per Lord Glenlee.

[10] Act 1572, cap. 15 (record edition), cap. 54 (12mo edition).

[11] Duke of Abercorn *v.* Presbytery of Edinburgh, 1869, 7 M. 875; 1870, 8 M. 733.

as accords,"[1] and may thus enforce the attendance of witnesses and the production of documents in the Courts of the Church of Scotland,[2] and even, it is thought, in causes within churches not established.[3] In one case,[4] where a minister of the Free Church of Scotland was loosed from his pastoral charge and the charge declared vacant by the Church Courts, and he persisted in preaching in the church, the Court of Session interdicted him at the instance of the trustees of the church.

Extracts of minutes of the Courts of the Church of Scotland are probative, but an extract from the meetings of a kirk-session of a dissenting church is not evidence, such a body not having the privileges belonging to Courts recognised by the law.[5]

III. Small Value of Cause.—(1) *Original Jurisdiction.* — The original jurisdiction of the Court of Session is excluded in all causes competent in the Sheriff Court not exceeding £50 in value, exclusive of interest and expenses.[6] The actions incompetent in the Sheriff Court and only competent in the Court of Session have already been detailed under the head of *Privative Jurisdiction*, at p. 79 *et seq.*, and these may be raised in the Court of Session irrespective of value.

An action raised against a foreigner in the Sheriff Court, the sole ground of jurisdiction against whom being that he is the owner or part owner or tenant or joint-tenant, whether individually or as a trustee, of heritable property within the Sheriff's territory, is not competent where the action does not relate to such property or to his interest therein, and such an action, irrespective of value, must be raised in the Court of Session.[7] The fact that arrestments to found jurisdiction had been laid on would not make such an action competent in the Sheriff Court. Arrestments to found jurisdiction in the Sheriff Court are by the Sheriff Courts Act, 1907, made a ground of jurisdiction "where the defender a person not otherwise subject to the jurisdiction of the Courts of Scotland."[8] There is, however, jurisdiction in this case over the

[1] Act 1693, cap. 38 (record edition), cap. 22 (12mo edition).

[2] Moodie, Petr., 18th May 1819, F. C.; Barclay *v.* Gifford, 1843, 5 D. 1136, per Lord Meadowbank, p. 1140; Presbytery of Dunkeld *v.* Wight, 23rd August 1870, Journal of Jurisprudence, xiv. 632; Presbytery of Lews *v.* Fraser, 1874, 1 R. 888.

[3] Presbytery of Lews *v.* Fraser, 1874, 1 R. 888, per Lord Ardmillan, p. 894.

[4] Brown *v.* M'Dougall, 1901, 4 F. 297.

[5] Arneil *v.* Robertson, 1842, 5 D. 400; Mathers *v.* Laurie, 1849, 12 D. 433.

[6] Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), sec. 7; Dickson and Walker *v.* Mitchell & Co., 1910, S. C. 139.

[7] Pagan and Osborne *v.* Haig, 1910, S. C. 341; *cp.* Allan *v.* Alexander's Trs., 1908, 16 S. L. T. 491.

[8] Sheriff Courts (Scotland) Act, 1907, sec. 6 (*c*).

defender in the Court of Session, and accordingly arrestments to found jurisdiction in the Sheriff Court would have been inept.[1]

Where the defender is not otherwise subject to the jurisdiction of the Scottish Courts, the fact that arrestments in a Sheriff Court case have been laid on by means of signet letters and not after the forms provided by the Sheriff Courts Act, 1907, does not affect the question of competency, and so if the action is for a sum not exceeding £50, exclusive of interest and expenses, the Sheriff has a privative jurisdiction.[2]

Formerly an action against defenders who were not subject to the jurisdiction of the same sheriffdom required to be raised in the Court of Session irrespective of the value of the cause,[3] but now[4] the action may be raised in the sheriffdom where one of the defenders has his residence, and the Sheriff has a power of transference should the convenience of parties, the nature of the cause, or the probable sources of evidence make this advisable.

An English railway company rented an office in Glasgow, where it canvassed for traffic, quoted rates to enquirers, distributed time-tables and advertisements, and occasionally collected special accounts, but where no terminal duties were performed, nor tickets issued, nor goods received for transmission. The company had no banking account in Glasgow. In these circumstances it was held that an action in the Sheriff Court of Glasgow was competent.[5]

Special cases were introduced by the Court of Session Act of 1868[6] for the purpose of affording litigants a new method of having questions of law decided which otherwise would require to have been tried by other forms of process, such as, by petitory action, declarator, or multiplepoinding. At a time when the original jurisdiction of the Court of Session was excluded in causes not exceeding £25 in value, it was held[7] that special cases of the value of £25 and under were

[1] Pagan and Osborne *v.* Haig, 1910, S. C. 341, per Lord Mackenzie (Ordinary), p. 346.

[2] Dickson and Walker *v.* Mitchell & Co., 1910, S. C. 139.

[3] M'Eachern *v.* M'Pherson and M'Lachlan, 1824, 3 S. 211 (N. E. 150); Reid *v.* Turner, 1830, 8 S. 960; Paterson *v.* Mackenzie, 1844, 16 Jur. 278.

[4] Sheriff Courts (Scotland) Act, 1907, sec. 6 (*a*), as amended by the Sheriff Courts (Scotland) Act, 1913; First Schedule, rules 19 and 20.

[5] Sheriff Courts (Scotland) Act, 1907, sec. 6 (*b*), amended by Sheriff Courts (Scotland) Act, 1913; Hay's Trs. *v.* London and North-Western Rly. Co., 1909, S. C. 707; *cp.* Jack *v.* North British Rly. Co., 1885, 12 R. 1029; Laidlaw *v.* Provident Plate Glass Insurance Co., Ltd., 1890, 17 R. 544.

[6] Court of Session (Scotland) Act, 1868 (31 & 32 Vict. cap. 100), sec. 63.

[7] Bruce, 1889, 17 R. 276.

incompetent. As Lord President Inglis said:[1] "It is clear on the statute of 1868 that nothing was intended to be made the subject of a special case except questions which could be raised by some other form of process in this Court;" and Lord Adam:[1] "The statute of 1868, when introducing special cases, did not contemplate extending the jurisdiction of the Court to a class of cases which, prior to that date, it could not competently have dealt with." The jurisdiction of the Court of Session is now excluded in causes competent in the Sheriff Court not exceeding £50 in value, exclusive of interest and expenses, and accordingly as petitory actions, declarators, and multiplepoindings of the value of £50 or under are incompetent in the Court of Session, special cases of the value of £50 and under are now incompetent except they involve questions which could not be tried in processes competent in the Sheriff Court, in which latter case the value of the special case is of no moment.

(2) *Appellate Jurisdiction.*—The appellate jurisdiction of the Court of Session is excluded in all *ordinary* causes competently originated in the Sheriff Court of a value not exceeding £50 in value, exclusive of interest and expenses,[2] except where the Sheriff, after final judgment by him, on an appeal on the motion of either party made within seven days of the date of the final interlocutor, certifies the cause as suitable for appeal to the Court of Session.[3]

In a *summary* cause, which includes actions (other than actions brought and conducted in the Small Debt Court, and claims under the Workmen's Compensation Act) for payment of money not exceeding £50 in amount, exclusive of interest and expenses, and all actions in which either the parties admit that the value of the action, exclusive of interest and expenses, does not exceed £50, or which they consent at any stage shall be tried summarily,[4] the appellate jurisdiction of the Court of Session is excluded except the Sheriff after final judgment by him, as aforementioned, certifies the cause as suitable for appeal to the Court of Session.[3] Where the action is for a sum exceeding £20 but less than £50, and the real controversy between the parties involves the interpretation of a continuing contract which affects a larger sum than £50, the action is not a "summary cause."[5] A "summary cause"

[1] Bruce, 1889, 17 R. 276, at p. 277.

[2] Sheriff Courts (Scotland) Act, 1907, sec. 7. See *Review, Removal, and Report*, Part ix. Chap. iv. (2) (b), *infra*.

[3] Ibid., sec. 28, as amended by the Sheriff Courts (Scotland) Act, 1913.

[4] Ibid., sec. 3 (*i*), as amended by the Sheriff Courts (Scotland) Act, 1913.

[5] Stevenson *v.* Sharp, 1910, S. C. 580; Abrahams, Ltd. *v.* Campbell, 1911, S. C. 353; *cp.* Duke of Argyll *v.* Muir, 1910, S. C. 96.

in the sense of the Sheriff Courts (Scotland) Act, 1907, is an action for payment of money and nothing else.[1] A small debt action remitted to the ordinary roll of the Sheriff Court in terms of sec. 48 of the Sheriff Courts (Scotland) Act, 1907, cannot be appealed to the Court of Session in respect that it is not a summary cause and is of less value than £50.[2] (See *Review, Removal, and Report*, Part ix. Chap. iv. (2) (b).)

(3) *Determination of the Value of the Cause.*[3]—(a) *Ordinary Actions.*—In ordinary actions the original conclusions of the summons determine the value of the cause,[4] and the question to be decided is what sum on the face of the summons would the defender require to pay to be rid of the action.[5] The amount decerned for is not the test of the right to appeal.[6] Accordingly, in cases decided prior to the Sheriff Courts (Scotland) Act, 1907, where an action with conclusions in excess of the privative jurisdiction of the Sheriff fell asleep, and when awakened resolved itself into a question of expenses;[7] where there was a conclusion for £32, and the defender admitted liability for £26, which was consigned and uplifted by the pursuer, and a proof was led as to the balance of £6, which resulted in favour of the defender;[8] where there was a conclusion for £92 under deduction of a counter claim for £57, leaving a balance of £35, restricted to £25, for which the Sheriff gave decree;[9] where a libel concluded for a sum above £25, and the defender offered payment of the whole except £4, 16s. 8d.;[10] where a sum of £24, 4s. with interest was concluded for, and the pursuer reserved his right to re-delivery of an I. O. U. for £5;[11] the jurisdiction of the Court of Session was sustained.

(b) *Actions ad Factum Præstandum.*—The first proviso of sec. 7 of the Sheriff Courts (Scotland) Act, 1907, having been repealed by the

[1] Abrahams, Ltd. *v.* Campbell, 1911, S. C. 353, per Lord President Dunedin p. 356.

[2] Price *v.* Canadian Pacific Rly. Co., 1911, S. C. 631.

[3] See *Review, Removal, and Report*, Part ix. Chap. iv. (2) (b), *infra*.

[4] M'Ewen *v.* Davies, 1824, 2 S. 696 (N. E. 584); Taylor *v.* Purves, 1824, 3 S. 286 (N. E. 201); Dickson *v.* Bryan, 1889, 16 R. 673; Welsh *v.* Duncan, 1893, 20 R. 1014; Standard Shipowners' Mutual Association *v.* Taylor, 1896, 23 R. 870; Stirling Parish Council *v.* Perth Parish Council, 1898, 25 R. 964; Soutar *v.* Mulhern, 1907, S. C. 723.

[5] North British Rly. Co. *v.* M'Arthur, 1889, 17 R. 30.

[6] Ewing *v.* Hare, 1822, 2 S. 47 (N. E. 41); Giffen *v.* Orr, 1824, 3 S. 301 (N. E. 212).

[7] Robertson *v.* Wilson, 1857, 19 D. 594.

[8] Wilson *v.* Wallace, 1858, 20 D. 764.

[9] Inglis *v.* Smith, 1859, 21 D. 822.

[10] Young & Co. *v.* Hutchison, 1832, 10 S. 643.

[11] Brydon *v.* Macfarlane, 1864, 3 M. 7.

Sheriff Courts (Scotland) Act, 1913, it would seem that "those older decisions are still law which hold that the value of the cause is the value of the true subject of the cause as determined by the Court, and is not necessarily settled by the actual sum that you find in the conclusions."[1]

In an action decided previous to the Sheriff Courts (Scotland) Act, 1907, it was held that where there is a conclusion *ad factum præstandum* and an alternative conclusion for a sum under £25, there was no review.[2] Where, however, there was a crave against the defender for specific performance, and, failing performance, to ordain him to pay a sum under £25 "or such other sum as shall be ascertained to be the price or value," an appeal to the Court of Session was held to be competent.[3]

(c) *Continuing Liability.*—Although the original conclusion is for a sum within the privative jurisdiction of the Sheriff, an appeal to the Court of Session is competent where there is a continuing liability.[4]

(d) *Accounting.*—Where an action in the Sheriff Court is for an accounting, and the conclusion is for a sum within the privative jurisdiction of the Sheriff, "or such other sum less or more as should appear on accounting to be the just balance of the defender's intromissions," the value of the cause is held to exceed the privative jurisdiction.[5] Where, however, the pursuer can recover no more than the sum concluded for, and that sum is within the privative jurisdiction of the Sheriff, there is no appeal.[6]

(e) *Other Conclusions than for Money.*—Where a petition for sequestration of effects for a rent of £13 contained conclusions for caution and removing, an appeal was held competent.[7] Where an action concluded for interdict and £50 damages, and the conclusion for interdict was dropped out of the case, an appeal was held to be incompetent.[8]

[1] Lord President Dunedin in Dickson and Walker *v.* Mitchell & Co., 1910, S. C. 139, at pp. 145, 146; *cp.* Purves *v.* Brock, 1867, 5 M. 1003; Galloway *v.* M'Ghie, 1869, 41 Jur. 400; Henry *v.* Morrison, 1881, 8 R. 692.

[2] Cameron *v.* Smith, 1857, 19 D. 517. See also Singer Manufacturing Co. *v.* Jessiman, 1881, 8 R. 695.

[3] Shotts Iron Co. *v.* Kerr, 1871, 10 M. 195; Aberdeen *v.* Wilson, 1872, 10 M. 971.

[4] Drummond *v.* Hunter, 1869, 7 M. 347; Cunningham *v.* Black, 1883, 10 R. 441; Paisley Parish Council *v.* Glasgow and Row Parish Councils, 1907, S. C. 674; *cp.* Macfarlane *v.* Friendly Society of Stornoway, 1870, 8 M. 438; Nixon *v.* Caldwell, 1876, 3 R. (J.) 31; Heddle *v.* Gow, 1880, 18 S. L. R. 96; Melrose Parish Council *v.* Hawick Parish Council, 1912, S. C. 1029.

[5] Stott *v.* Gray, 1834, 12 S. 828.

[6] Stevens, Son & Co. *v.* Grant, 1877, 5 R. 19; *cp.* Inglis *v.* Smith, 1859, 21 D. 822.

[7] Thomson *v.* Barclay, 1883, 10 R. 694. See also Aitchison *v.* M'Donald, 1911, S. C. 174.

[8] David Allen & Sons Billposting, Ltd. *v.* Dundee and District Billposting Co., Ltd., 1912, S. C. 970.

(f) *Restriction.*—The effect of the restriction of the conclusions of a summons in estimating the value of a cause depends upon the time when the restriction is made. If a summons is restricted to a sum within the privative jurisdiction of the Sheriff before the closing of the record, no appeal is competent.[1] Where, however, the restriction takes place after the closing of the record, and the original conclusion exceeded the privative jurisdiction of the Sheriff, an appeal is competent.[2]

In a case where the Sheriff ordered consignation of the balance of the proceeds of a sale consequent on a sequestration for rent, it was held that the order for consignation was the commencement of a new cause; and though the original action of sequestration for rent was for £53, 19s., the sum ordered to be consigned fell within the privative jurisdiction of the Sheriff, and an appeal to the Court of Session regarding a ranking on the consigned sum was incompetent.[3]

(g) *Several Pursuers or Defenders.*—In an action decided since the passing of the Sheriff Courts (Scotland) Act, 1907, where separate actions by different pursuers were raised in the Sheriff Court against the same defender arising out of one accident, and were conjoined, and the conclusions were each for £50 or less, but combined amounted to more than £50, it was held that there was an appeal to the Court of Session, notwithstanding that decree was granted for £10 in the one case and for £50 in the other.[4]

A creditor, whose individual claim fell within the privative jurisdiction of the Sheriff, sued in his own right and as onerous assignee of other creditors who had a community of interest, making a total which exceeded the Sheriff's privative jurisdiction, and the action was held competent in the Court of Session.[5]

Where an action is raised by a pursuer against several defenders, arising out of the same circumstances, concluding against each for a sum within the privative jurisdiction of the Sheriff, but when combined exceeds that limit, an appeal to the Court of Session is competent.[6]

(h) *Interest.*—Formerly interest, if concluded for, might be added

[1] M'Ewen *v.* Davies, 1824, 2 S. 696 (N. E. 584); Inglis *v.* Smith, 1859, 21 D. 822; Cairns *v.* Murray, 1884, 12 R. 167.

[2] Buie *v.* Stiven, 1863, 2 M. 208; M'Kimmie's Trs. *v.* Armour, 1899, 36 S. L. R. 675; Tait *v.* Lees, 1902, 5 F. 304.

[3] Dobbie *v.* Thomson, 1880, 7 R. 983. See also M'Kimmie's Trs. *v.* Armour, 1899, 36 S. L. R. 675.

[4] Campbell and Cowan & Co. *v.* Train, 1910, S. C. 147.

[5] Birrell *v.* Taylor, 1884, 12 R. 151.

[6] Dykes *v.* Merry and Cuninghame, 1869, 7 M. 603; Nelson, Donkin & Co. *v.* Browne and Others, 1876, 3 R. 810.

to the amount sued for in estimating the value of the cause for review,[1] but interest is no longer a factor in determining the value.[2]

(i) *Expenses.*—Expenses are not included in the value of a cause for review.[2] A recent decision of the First Division makes an exception in the case of a suspension of a charge, where the expenses in the decree are added to the principal sum in estimating the value of the suspension,[3] but this is contrary to a decision of the whole Court on the same point.[4]

(j) *Remit.*—Where the subject in dispute in an action in the Sheriff Court was heritage worth more than £1000, but it was admitted that the real question between the parties involved no more than £10, the Court held it incompetent to have the case remitted from the Sheriff Court to the Court of Session.[5]

IV. Brieves.—The original jurisdiction of the Court of Session is excluded in the brieves still competent, with the exception of the brieve of cognition, which is now directed to the Lord President of the Court of Session. There is, however, appellate jurisdiction in the Court of Session.

(1) *Brieve of Service of Heirs.* — Brieves from Chancery for the service of heirs have been abolished,[6] and the procedure is now by a petition of service to the Sheriff of the county or the Sheriff of Chancery.[7] A declarator of heirship in the Court of Session is not competent.[8] An appeal, however, for jury trial in the Court of Session is competent to any of the parties to the petition at any time before proof is begun to be taken by the Sheriff.[9] Where the Sheriff refuses to serve a petitioner, and dismisses his petition, or repels the objection of an opposing party, there is an appeal to the Court of Session in the form of a note of appeal, or as nearly as may be, under the Court of Session Act, 1868.[10]

A petition for service as heir-male in general of a person deceased, without reference to any destination, is competent, and a person may object to such a petition without presenting a competing petition, and may appeal if his objection is not given effect to.[11]

[1] Mitchell *v.* Murray, 1855, 17 D. 682 ; Tennent *v.* Earl of Glasgow, 1864, 2 M. (H. L.) 22 ; Martin & Sons *v.* Robertson, Ferguson & Co., 1872, 10 M. 949.

[2] Sheriff Courts (Scotland) Act, 1907, sec. 7.

[3] Aitchison *v.* M'Donald, 1911, S. C. 174.

[4] Hopkirk *v.* Wilson, 1855, 18 D. 299.

[5] Muirhead *v.* Gilmour, 1909, 46 S. L. R. 425.

[6] Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. cap. 101), sec. 27.

[7] Ibid., sec. 28.

[8] Menzies *v.* M'Kenna, 1914, S. C. 272.

[9] Titles to Land Consolidation (Scotland) Act, 1868, sec. 41.

[10] Ibid., secs. 42, 44, 45.

[11] Sir A. Moncrieff *v.* Lord Moncreiff, 1904, 6 F. 1021 ; *cp.* Forbes *v.* Hunter,

Decrees of service may also be brought under review by reduction.[1]

(2) *Brieve of Terce.*—This is a process whereby the widow of a man who dies infeft in heritage may establish judicially her right to a life-rent of one-third thereof. The brieve is directed to the Sheriff of the county within which the lands lie, or to the Sheriff of Edinburgh if the lands are in more than one county. An appeal to the Court of Session is competent previous to the order for trial, or at least previous to the verdict of the inquest, but after the verdict of the inquest the only method of review is by an action of reduction.[2]

(3) *Brieve of Tutory.*—This form of process is still competent, but is almost entirely superseded by the procedure whereby a factor *loco tutoris* may be appointed under the Judicial Factors Act, 1849.[3] It is excluded from the original jurisdiction of the Court of Session, but an appeal to the latter is competent.[4] A reduction is also competent.[5]

(4) *Brieve of Cognition.*—It is no longer competent to direct a brieve for the cognition of a person alleged to be *incompos mentis prodigus et furiosus*, or of a person alleged to be *incompos mentis fatuus et naturaliter idiota* to the Judge Ordinary, and the brieves of furiosity and idiotry hitherto in use are now abolished. In lieu thereof a brieve from Chancery written in the English language is directed to the Lord President of the Court of Session directing him to inquire whether the person sought to be cognosced is insane, who is his nearest agnate, and whether such agnate is of lawful age. The brieve is served upon the person sought to be cognosced on an *inducie* of fourteen days, and is tried before the Lord President and a special jury, or before any other Judge of the Court of Session to whom the Lord President may remit the same and a special jury, and the trial proceeds in the same manner as jury trials in civil causes are conducted, with the like remedies as to motions for new trials and bills of exceptions which are competent with reference to such jury trials.[6]

(5) *Brieves of Perambulation, Lining, and Division.*—These brieves

3rd July 1810, F. C.; Cochrane *v.* Ramsay, 28th June 1821, F. C.; Graham's Guardians *v.* Graham, 1850, 13 D. 125, per Lord Fullerton (Ordinary), p. 128.

[1] Officers of State *v.* Alexander, 1839, 1 D. 1188; 1845, 7 D. 884; 1864, 2 M. 1294; 1866, 4 M. 741; 1868, 6 M. (H. L.) 54; Titles to Land Consolidation (Scotland) Act, 1868, sec. 43.

[2] Stair, ii. 6. 13; iv. 3. 11, 17, 18; Erskine's Inst. ii. 9. 50; Paxton *v.* Paxton, 1844, 2 D. 1102; Tennant *v.* Pollok, 1841, 4 D. 50; Matthew *v.* Wighton's Trs., 1843, 6 D. 305; Craik *v.* Penny, 1891, 19 R. 339.

[3] 12 & 13 Vict. cap. 51.

[4] Godwin *v.* Sawers, 1841, 3 D. 996; 31 & 32 Vict. cap. 101, sec. 41.

[5] Matthew *v.* Wighton's Trs., 1843, 6 D. 305.

[6] Court of Session Act, 1868 (31 & 32 Vict. cap. 100), sec. 101; A. S., 3rd December 1868; C. A. S., D, vi.

have long ago fallen into disuse, and are now superseded by actions of declarator.

V. Peerage Claims.—Prior to the Union, and for some time thereafter, the Court of Session adjudicated upon Scottish peerages,[1] but now the Committee of Privileges of the House of Lords has exclusive jurisdiction,[2] and the Court of Session refuses even to entertain an action of exhibition *in modum probationis* of writings relating to a claim to a peerage.[3] The Court of Session may, however, decide incidentally a person's right to a peerage in a case otherwise competently brought before it, and accordingly, where an objection was stated to the continuance of a person upon the roll of freeholders, in respect that he had acquired by succession the right to a peerage, the Court allowed the objector to prove that he had so succeeded.[4]

A reduction of a service on which a person claims to have right to a peerage is competent in the Court of Session.[5]

Though the Court of Session cannot substantively decide a claim to a peerage, it can adjudicate upon the right to a Scottish heritable office.[6]

VI. Lyon Court.—(1) *Original Jurisdiction.*—The original jurisdiction of the Court of Session is excluded in all matters placed by statute under the original jurisdiction of the Lyon King of Arms.[7] These are, to distinguish the arms of all noblemen and gentlemen with congruent differences and to matriculate them in his books; to give arms to virtuous and well-deserving persons; to inhibit and fine people using arms who are not worthy by the law of arms to bear signs armorial; and generally to decide all differences between competing claimants for the same arms. The Lyon King has, however, no jurisdiction in questions of precedence.[8] He has exclusive original juris-

[1] 6 Anne, cap. 11, Article xix. (Revised Statutes); Oliphant *v.* Oliphant, 1633, Mor. 10027; Bruce *v.* Earl of Kincardine, 1707, Mor. 3167; Lovat, 1730, reported in Riddell's Peerage Law, i. 285, 286 (note); Oxenfurd, 1733, reported in Riddell's Peerage Law, i. 294-303; Preface to Acts of Sederunt, 1532-1553, by Ilay Campbell, pp. xix. to xxvi., published in 1811.

[2] Kames' Law Tracts, 2nd ed. p. 211; 3rd ed. p. 220; Montrose Peerage, 1853, 1 Macq. 401, per Lord St. Leonards, p. 441.

[3] Campbell *v.* Crawford, 1824, 2 S. 737 (N. E. 615); revd. 2 W. & S. 440; Campbell *v.* Campbell, 1869, 7 M. 759; Barclay-Allardice *v.* Duke of Montrose, 1872, 10 M. 774.

[4] Dunbar *v.* Sinclair, 1790, Mor. 7395.

[5] Alexander *v.* Officers of State, 1868, 6 M. (H. L.) 54.

[6] Earl of Lauderdale *v.* Wedderburn, 1908, S. C. 1237; 1910, S. C. (H. L.) 35.

[7] Acts 1592, cap. 127 (12mo edition), cap. 29 (record edition); 1672, cap. 21 (12mo edition), cap. 47 (record edition).

[8] Preface to Acts of Sederunt, 1532-1553, by Ilay Campbell, p. xxi.; Royal College of Surgeons, Edinburgh *v.* Royal College of Physicians, Edinburgh, 1911, S. C. 1054.

diction in the appointment of messengers-at-arms,[1] but the Court of Session has a concurrent jurisdiction with the Lyon Court in complaints against such messengers.[2]

(2) *Appellate Jurisdiction.*—The Court of Session may review the proceedings of the Lyon Court with regard to grants and matriculation of arms,[3] penalties imposed for the improper or unauthorised use of arms,[4] and complaints against messengers-at-arms.[5]

An opinion has been expressed that should the Lyon King of Arms appoint a messenger who is infamous by a public sentence, or otherwise rendered incapable, a suspension of the appointment might be upheld by the Court of Session.[6]

VII. Removings.—Actions of removing, both ordinary and summary, are excluded from the original jurisdiction of the Court of Session, and can only be instituted in the Sheriff Court.[7] There is no appeal to the Court of Session,[8] but a suspension may be brought before extract.[9] After a decree has been implemented or executed, however, suspension is no longer competent,[10] and the only remedy is by an action of reduction.[11]

A summary ejectment against persons having no title to

[1] Act 1592, cap. 127 (12mo edition), cap. 29 (record edition).

[2] Act 1592, cap. 127 (12mo edition); cap. 29 (record edition); 1672, cap. 21 (12mo edition); cap. 47 (record edition); The Lords *v.* Andrew Murray, 1532, Mor. 7319; Heriots *v.* Fleming, 1666, Mor. 7649; Grierson *v.* M'Ilroy, 1668, Mor. 7651; Hog *v.* Douglas, 1696, 4 Brown's Supp. 355; Lermont *v.* Lermont, 1699, Mor. 3096; Hunter *v.* Montgomery, 1732, Mor. 3097; M'Lachlan *v.* Black, 1821, 1 S. 217 (N. E. 206).

[3] Dundas *v.* Dundas, 1762, 5 Brown's Supp. 493; Macdonell *v.* Macdonald, 1826, 4 S. 371 (N. E. 374); Cuninghame *v.* Cunyngham, 1849, 11 D. 1139; Hunter *v.* Weston, 1882, 9 R. 492; Royal College of Surgeons, Edinburgh *v.* Royal College of Physicians, Edinburgh, 1911, S. C. 1054.

[4] Procurator-Fiscal of Lyon Court *v.* Murray, 1778, Mor. 7656.

[5] Campbell Hook *v.* Copland and M'Coll, 1766, Mor. 7652; Clyne *v.* Murray, 1831, 9 S. 338.

[6] Lindsay *v.* Drummond, 1744, Mor. 8889.

[7] Sheriff Courts (Scotland) Act, 1907, secs. 34-38, Schedule I. rules 110-122, as amended by the Sheriff Courts (Scotland) Act, 1913. See also Act 1555, cap. 39 (12mo edition), cap. 12 (record edition); A. S., 14th December 1756; C. A. S., L, xv.; Sheriff Courts Act, 1853, secs. 29-31.

[8] 6 Geo. IV. cap. 120, sec. 44; 31 & 32 Vict. cap. 100, secs. 64 and 65; Gibson *v.* Scott, 1826, 4 S. 404 (N. E. 407); M'Nair *v.* Lord Blantyre's Tutors, 1833, 11 S. 935; Roy *v.* Earl of Wemyss, 1840, 2 D. 1345; Fletcher *v.* Davidson, 1874, 2 R. 71; Ross *v.* Brims, 1878, 15 S. L. R. 438.

[9] Greig and Scott *v.* Boyd and Latta, 1827, 6 S. 250; Graham *v.* Gordon, 1843, 5 D. 1207; Ballantyne *v.* Brechin, 1893, 1 S. L. T. 306; 1 & 2 Vict. cap. 86, sec. 4.

[10] Macintosh *v.* Robertson, 1830, 9 S. 75; M'Dougall *v.* Galt, 1863, 1 M. 1012.

[11] Mackenzie *v.* Mackenzie, 1823, 2 S. 149 (N. E. 137); Hog *v.* Hog, 1837, 15 S. 532.

possess may be brought under review by appeal to the Court of Session.[1]

VIII. Contract of Submission or Arbitration. — A contract of submission or arbitration does not wholly oust the jurisdiction of the Court of Session in cases otherwise competently brought before it. The effect of such a contract has been expressed by Lord Gifford[2] in the following terms:—"In common language, where no attempt is made at logical accuracy, it is sometimes said that a contract of submission or arbitration ousts the common law jurisdiction of all Judges. The parties have chosen a private Judge for themselves. But this is not strictly or logically accurate language. In strict language a contract of arbitration does not destroy the jurisdiction of the common law Judge. It only introduces a new plea into the cause, on which the common law Judge must decide by virtue of his inherent jurisdiction. If he decides that there has been a valid contract of arbitration, he may take several courses—he may dismiss the action, leaving the parties to go to their arbiter, and come back again, if necessary, for execution or for powers; or he may remit to the arbitrator, or suspend proceedings, or give effect to the award. If the common law Judge decides that there has been no valid arbitration, or that the award is bad, or *ultra vires compromissi,* he will proceed accordingly; but in dealing with arbitrations and awards the Judge is exercising his inherent jurisdiction, and is in no way divested thereof, and that whether he sustains the arbitration and award or whether he refuses to do so in whole or part. In short, the plea of arbitration is a plea on the merits of the case, which, if well founded, will indeed prevent the Judge from himself entering on the merits or going into proof, but will not, and cannot, deprive him of his jurisdiction. If the award is good, he will give effect to it, either by ordering it to be put in execution or otherwise. If it is bad, he will disregard it, repel the plea of arbitration, and proceed with the suit in common form. But in all cases he has jurisdiction to take either course; and if his jurisdiction is not subject to review, his decision will be final." And Lord Watson[3] in a case in the House of Lords thus refers to a contract to submit a matter in dispute to arbitration: "The jurisdiction of the Court is not wholly ousted by such a contract. It deprives the Court of jurisdiction to inquire into

[1] Clark *v.* Clarkes, 1890, 17 R. 1064; Barbour *v.* Chalmers & Co., 1891, 18 R. 610; Robb *v.* Brearton, 1895, 22 R. 885; Hutchison *v.* Alexander, 1904, 6 F. 532.

[2] Wilson *v.* Glasgow Tramway Co., 1878, 5 R. 981, at p. 992. See also Steuart *v.* Young's Paraffin Light and Mineral Oil Co., 1898, 6 S. L. T. 69.

[3] Hamlyn & Co. *v.* Talisker Distillery Co., 1894, 21 R. (H. L.) 21 at p. 25.

and decide the merits of the case, while it leaves the Court free to entertain the suit, and to pronounce a decree in conformity with the award of the arbiter. Should the arbitration from any cause prove abortive, the full jurisdiction of the Court will revive, to the effect of enabling it to hear and determine the action upon its merits. When a binding reference is pleaded *in limine*, the proper course to take is either to refer the question in dispute to the arbiter named, or to stay procedure until it has been settled by arbitration. The latter course was adopted in *Caledonian Rly. Co.* v. *Greenock and Wemyss Bay Rly. Co.*,[1] where the reference was to arbiters unnamed, but had been confirmed by statute. I cite that case, not as establishing, but as illustrating, the rule of procedure which was in force long before its date."

Where the contract of submission or clause of reference in the contract applies to all disputes under the contract, and the arbiter has full power to issue an effective award, the Court will dismiss the action.[2] In other cases the Court will sist the case in order that the parties may go before the arbiter.[3]

The Court of Session may grant an interdict against an arbiter proceeding further where he has taken a step which must inevitably render the award bad,[4] but only on clear grounds.[5] It may also reduce an award on various grounds—corruption of arbiter, excess of jurisdiction, acting beyond scope of reference, and misconduct of proceedings resulting in injustice to one of the parties.[6] Thus, where an arbiter refused to allow a party to take part in the reference, although he had a right to do so;[7] where he refused to receive a claim tendered by the pursuer;[8] where certain parts of the process were not put before him, and he refused to allow parties an opportunity of being heard;[9]

[1] 1872, 10 M. 892.

[2] Mackay *v.* Parochial Board of Barry, 1883, 10 R. 1046; Beattie *v.* M'Gregor, 1883, 10 R. 1094; Wright *v.* Greenock and Port-Glasgow Tramway Co., 1891, 29 S. L. R. 53; Mags. of Glasgow *v.* Caledonian Rly. Co., 1892, 29 S. L. R. 769; Gilmour *v.* Drysdale, 1905, 13 S. L. T. 433; North British Rly. Co. *v.* Newburgh and North Fife Rly. Co., 1911, S. C. 710.

[3] Meiklejohn *v.* Waddell, 1894, 1 S. L. T. 601; Barr *v.* Queensferry Commissioners, 1899, 1 F. 630; Muir *v.* Muir, 1906, 8 F. 365; W. & A. Robertson *v.* Gerrard, 1908, 16 S. L. T. 100.

[4] Birkmyre Bros. *v.* Moore and Weinberg, 1906, 14 S. L. T. 702.

[5] Dumbarton Water Commissioners *v.* Lord Blantyre, 1884, 12 R. 115.

[6] Adams *v.* Great North of Scotland Rly. Co., 1890, 18 R. (H. L.) 1; Holmes Oil Co., Ltd. *v.* Pumpherston Oil Co., Ltd., 1891, 18 R. (H. L.) 52. See also Rogerson, etc. *v.* Rogerson, 1885, 12 R. 583.

[7] Lanarkshire and Dumbartonshire Rly. Co. *v.* Main, 1894, 21 R. 1018.

[8] Drummond *v.* Martin and Others, 1906, 14 S. L. T. 365.

[9] Field and Allan *v.* Lownie, 1909, 2 S. L. T. 317.

where he failed to exhaust the reference;[1] and where the award was *ultra fines compromissi.*[2]

It has not yet been decided whether, after an award has been reduced on the ground of *ultra vires*, the arbiter can proceed with the reference.[3]

When the defender in an action in the Court of Session is of opinion that the cause is excluded by the terms of the clause of reference, his plea should be in the following terms:—"The action is excluded by the clause of reference in the said contract and ought therefore to be dismissed."[4] Where, however, the clause of reference does not exclude an action in the Court of Session, and the defender wishes that a sist should take place in order that a question which has been agreed to be referred should go before the arbiter, a different plea is necessary, and it should be after the following style:—"In respect that the question raised in condescendence . . . and answer . . . relative to . . . falls to be determined by *A. B.*, the arbiter named in the contract founded on, the action ought to be sisted pending the decision of that question."[5]

IX. Military Status, etc.—The Court of Session has no jurisdiction to determine questions of military *status*, arrears of military pay, army pensions, or actions of damages against the Secretary of State for War, or the War Department, for wrongful acts or illegal proceedings of courts-martial.[6]

X. Confirmation.—The confirmation of executors made either by the deceased himself or by the Court is excluded from the original jurisdiction of the Court of Session and proceeds in the name of the Sheriff. Petitions for confirmation may, however, be appealed to the Court of Session in the same way as in ordinary Sheriff Court actions, but where a cause relating to confirmation is appealed to the Court of Session and the appeal is sustained, the Court does not itself pronounce judgment. A remit is made to the Sheriff to do so in accordance with the directions of the Court of Session.[7]

XI. Other Statutory Exclusions.—In addition to the cases of

[1] Miller & Son *v.* Oliver and Boyd, 1903, 6 F. 77; Drummond *v.* Martin and Others, 1906, 14 S. L. T. 365; Pollich *v.* Heatley, 1909, 1 S. L. T. 491; 2 S. L. T. 244.

[2] Calder *v.* Mackay, 1860, 22 D. 741; Traill *v.* Coghill, 1885, 22 S. L. R. 616.

[3] Miller & Son *v.* Oliver and Boyd, 1906, 8 F. 390.

[4] Tough *v.* Dumbarton Water Commissioners, 1872, 11 M. 236.

[5] Gilmour *v.* Caledonian Insurance Co., 1891, 18 R. 1219; Wilson and M'Farlane *v.* Stewart & Co., 1898, 25 R. 655.

[6] Smith *v.* Lord Advocate, 1897, 25 R. 112; Mackie *v.* Lord Advocate, 1898, 25 R. 769.

[7] Erskine's Inst. i. 2. 6; i. 5. 28; Jerdon *v.* Forrest, 1897, 24 R. 395.

statutory exclusion already mentioned there are a number of statutes which either exclude the jurisdiction of the Court of Session, except in cases of excess of jurisdiction, or give only a restricted appeal to that Court, or fix a time limit within which to appeal to the Supreme Court. The most important of these statutes are as follows :—

Entail Acts, 1770, sec. 26 ; 1868, sec. 4 ; 1882, sec. 5 ;[1]

Small Debt (Scotland) Acts, 1837 to 1889 ;[2]

Defence Act, 1842 ;[3]

Poor Law (Scotland) Act, 1845 ;[4]

Lands Clauses Consolidation (Scotland) Act, 1845 ; and

Railway Clauses Consolidation (Scotland) Act, 1845 ;[5]

Burial Grounds (Scotland) Act, 1855 ;[6]

Bankruptcy (Scotland) Act, 1913 ;[7]

Boundaries of Burghs Extension (Scotland) Act, 1857 ;[8]

Lunacy (Scotland) Act, 1857 ;[9]

Education (Scotland) Act, 1872 ;[10]

[1] 10 Geo. III. cap. 51 ; 31 & 32 Vict. cap. 84 ; 45 & 46 Vict. cap. 53 ; Campbell and Others, Petrs., 1854, 16 D. 396 ; Hope Johnston, Petr., 1856, 19 D. 68 ; *cp.* Stirling's Trs. *v.* Stirling, 1862, 24 D. 993.

[2] 1 Vict. cap. 41, sec. 30 ; 52 & 53 Vict. cap. 26 ; Crombie *v.* M'Ewan, 1861, 23 D. 333 ; Wilson *v.* Glasgow Tramways Co., 1878, 5 R. 981 ; Lennon *v.* Tully, 1879, 6 R. 1253 ; Spalding *v.* Valentine & Co., 1883, 10 R. 1092 ; Cruickshank *v.* Gow & Sons, 1888, 15 R. 326 ; Wilson *v.* Scott, 1890, 18 R. 233 ; Gray *v.* Smart, 1892, 19 R. 692 ; Pollock *v.* Goodwin's Trs., 1898, 25 R. 1051 ; Curdie *v.* Hay, 1902, 10 S. L. T. 435 ; Jackson *v.* Lillie and Russell, 1902, 10 S. L. T. 448 ; *cp.* Murchie *v.* Fairbairn, 1863, 1 M. 800 ; Manson *v.* Smith, 1871, 9 M. 492 ; Shiell *v.* Mossman, 1871, 10 M. 58 ; Brown *v.* Rodger, 1884, 12 R. 340.

[3] 5 & 6 Vict. cap. 94 ; Sir H. M. Shaw-Stewart, Petr., 1905, 42 S. L. R. 599.

[4] 8 & 9 Vict. cap. 83 ; M'Laren *v.* Steele, 1857, 20 D. 48 ; Knox *v.* Macarthur, 1865, 3 M. 890 ; Motion *v.* M'Fall, 1899, 1 F. (J.) 85 ; *cp.* Ferguson *v.* Malcolm, 1850, 12 D. 732 ; Thompson *v.* Parochial Board of Inveresk, 1871, 10 M. 178 ; Harper *v.* Inspector of Rutherglen, 1903, 6 F. 23.

[5] 8 & 9 Vict. cap. 19 ; 8 & 9 Vict. cap. 33 ; Carmichael *v.* Caledonian Rly. Co., 1868, 6 M. 671 ; Main *v.* Lanark and Dumbarton Rly. Co., 1893, 21 R. 323 ; *cp.* Caledonian Rly. Co. *v.* Glasgow and Redburn Bridge Road Trs., 1849, 12 D. 399 ; Caledonian Rly. Co. *v.* Ogilvy, 1856, 2 Macq. 229.

[6] 18 & 19 Vict. cap. 68 ; Fulton *v.* Dunlop, etc., 1862, 24 D. 1027 ; Campbell *v.* Dunlop and Wilkie, 1864, 2 M. 503 ; Parish Council of Strichen *v.* Goodwillie, 1908, S. C. 835.

[7] 3 & 4 Geo. V. cap. 20. See also 19 & 20 Vict. cap. 89 ; Brown *v.* Lindsay, 1869, 7 M. 595 ; Rankine *v.* Douglas, 1871, 9 M. 1053 ; Foulis *v.* Downie, 1871, 10 M. 20.

[8] 20 & 21 Vict. cap. 70 ; Dubs *v.* Police Commissioners of Crosshill, 1876, 3 R. 758.

[9] 20 & 21 Vict. cap. 71 ; Wallace *v.* Glasgow District Board of Lunacy, 1882, 10 R. 245 ; *cp.* Roxburgh, Berwick, and Selkirk Lunacy Board *v.* Selkirk Parish Council, 1902, 4 F. 468.

[10] 35 & 36 Vict. cap. 62 ; Lord Advocate *v.* Stow School Board, 1876, 3 R. 469 ; Renfrew Burgh School Board *v.* Renfrew Parish School Board, 1877, 5 R. 142 ; Bone

Building Societies Act, 1874;[1]

Contagious Diseases (Animals) Act, 1878;[2]

Telegraph Act, 1878;[3]

Civil Imprisonment (Scotland) Act, 1882;[4]

Patents and Designs Act, 1907;[5]

Crofters Holdings Act, 1886, and Small Landholders (Scotland) Act, 1911;[6]

Local Government (Scotland) Act, 1889;[7]

Burgh Police (Scotland) Act, 1892;[8]

Regulation of Railways Act, 1873;

Railway and Canal Traffic Act, 1888;

Railway and Canal Traffic Act, 1894;[9]

Licensing (Scotland) Act, 1903;[10]

Friendly Societies Acts, 1896-1908;[11]

Trade Union Act, 1871.[12]

v. Sorn School Board, 1886, 13 R. 768; *cp.* Macfarlane *v.* Mochrum School Board and Others, 1875, 3 R. 88.

[1] 37 & 38 Vict. cap. 42; First Edinburgh, etc., Starr-Bowkett Building Society *v.* Munro, 1883, 11 R. 5; *cp.* Dundee Provident Investment Co. *v.* Macdonald, 1884, 11 R. 537; Galashiels Provident Building Society *v.* Newlands, 1893, 20 R. 821.

[2] 41 & 42 Vict. cap. 74; Calder *v.* Linlithgow Local Authority, 1890, 18 R. 48.

[3] 41 & 42 Vict. cap. 76; Glasgow Corporation *v.* Lord Advocate, 1900, 2 F. 506.

[4] 45 & 46 Vict. cap. 42; Strain *v.* Strain, 1886, 13 R. 1029.

[5] 7 Edw. VII. cap. 29. See also 46 & 47 Vict. cap. 57; Dewar *v.* John Dewar & Sons, Ltd., 1899, 2 F. 249.

[6] 49 & 50 Vict. cap. 29; 1 & 2 Geo. V. cap. 49; M'Dougall *v.* M'Alister, 1890, 17 R. 555; Duke of Sutherland *v.* Reed, 1890, 18 R. 252; Mackenzie *v.* Cameron, 1894, 21 R. 427; Dalgleish *v.* Livingston, 1895, 22 R. 646; Marquess of Breadalbane *v.* Orr, 1896, 4 S. L. T. 75; Balfour *v.* Hutchison, 1899, 7 S. L. T. 82; Sitwell *v.* Macleod, 1899, 1 F. 950.

[7] 52 & 53 Vict. cap. 50; M'Gilp *v.* Kilchoman School Board, 1891, 18 R. 714.

[8] 55 & 56 Vict. cap. 55; Brown *v.* Mags. of Leith, 1896, 23 R. 654; Heddle *v.* Mags. of Leith, 1897, 24 R. 662; 35 S. L. R. 44.

[9] 36 & 37 Vict. cap. 48; 51 & 52 Vict. cap. 25; 57 & 58 Vict. cap. 54. See also Caledonian Rly. Co. *v.* Greenock and Wemyss Bay Rly. Co., 1878, 5 R. 995; North British Rly. Co. *v.* North British Grain Storage, etc., Co., 1897, 24 R. 687; North-Eastern Rly. Co. *v.* North British Rly. Co., 1897, 25 R. 333; Cowan & Sons *v.* North British Rly. Co., 1901, 4 F. 334; Lanarkshire Steel Co. *v.* Caledonian Rly. Co., 1903, 6 F. 47.

[10] 3 Edw. VII. cap. 25, sec. 103. See also Lundie *v.* Falkirk Mags., 1890, 18 R. 60; *cp.* Tennent *v.* Partick Mags., 1894, 21 R. 735.

[11] 59 & 60 Vict. cap. 25; 8 Edw. VII. cap. 32; Leitch *v.* Scottish Legal Burial Society, 1870, 9 M. 40; Davie *v.* Colinton Friendly Society, 1870, 9 M. 96; Smith *v.* Lord Advocate, 1899, 1 F. 741; *cp.* M'Kernan *v.* Greenock Lodge of United Operative Masons' Association, 1873, 11 M. 548; Rombach *v.* M'Cormack and Others, 1896, 4 S. L. T. 174.

[12] 34 Vict. cap. 31; Wilson *v.* Scottish Typographical Association, 1912, S. C. 534.

PART III

CAPACITY, TITLE, AND INTEREST

CHAPTER I

PERSONS ENTITLED TO INVOKE THE JURISDICTION OF THE COURT OF SESSION

The general right of a person to invoke the jurisdiction of the Court must be clearly distinguished from his title to pursue. In the former case the right is dependent upon the *status* of the individual; in the latter the *status* of the individual may be unimpeachable, while his title to sue in a particular case may be defective.

The *general rule* is that all persons may invoke the jurisdiction of the Court of Session. Friendly aliens, among whom may be counted foreign sovereigns,[1] come under the rule, so far at least as actions in a private and individual capacity are concerned,[2] although non-resident aliens are usually bound to sist a mandatary to be responsible for the conduct of the cause and for any expenses which may be awarded against the alien.[3]

Any possible objection to an alien's title to sue is obviated by letters of naturalisation obtained after the action is raised.[4]

[1] Yzquierdo *v.* Clydebank Engineering Co., 1901, 4 F. 319; (H. L.) 31.

[2] Poll *v.* Lord Advocate, 1897, 1 F. 823, per Lord Kyllachy, p. 828; 7 & 8 Vict. cap. 66; 33 & 34 Vict. cap. 14, secs. 2 and 14.

[3] D'Ernesti *v.* D'Ernesti, 1882, 9 R. 655.

[4] Goldston *v.* Young, 1868, 7 M. 188.

CHAPTER II

PERSONS UNDER TOTAL OR PARTIAL DISABILITY

(1) An Alien Enemy.—So long as war lasts between Great Britain and the country of an alien, the latter has no right to institute and pursue an action in the Court of Session.[1] The date from which a state of war is held to exist is the date of the declaration of war, until which an alien is not disqualified from suing.[2] Where an alien was sued in this country, it was held that he was entitled to insist on a counter action even after war with his country had supervened.[3] If an action at the instance of an alien is pending in the Court of Session at the date of the declaration of war with his country, his right to sue is only suspended, and will revive upon peace being declared.[4] Subjects of an enemy who are resident in this country and demean themselves peaceably may be regarded as alien friends.[5] A natural-born British subject does not lose his title to pursue in the Court of Session by residing in a foreign country at war with Britain.[6]

The assignee of an alien is in no better position than the alien himself.[7]

It was held by Lord Hunter in the Outer House that an alien enemy, who has long resided in this country and complied with the provisions of the Aliens Restriction Act, has a good title to sue in the Scottish Courts.[8]

[1] Arnauld *v.* Boick, 1704, Mor. 10159; Johnston and Wight *v.* Goldsmid, 15th February 1809, F. C. See, however, Schulze, Gow & Co. *v.* Bank of Scotland, 1914, 2 S. L. T. 455.

[2] Blomart *v.* Earl of Roxburgh, 1664, Mor. 16091.

[3] Burgess *v.* Guild, 12th January 1813, F. C. See, however, Craig Line Steamship Co. *v.* North British Storage Co., 1914, 2 S. L. T. 326.

[4] Carron *v.* Cowan & Co., 28th November 1809, F. C.; Wright *v.* Hutcheson, 17th January 1810, reported in note to foregoing case; Bell's Prin., secs. 43 and 2135.

[5] Burgess *v.* Guild, 12th January 1813, F. C.; Schulze, Gow & Co. *v.* Bank of Scotland, 1914, 2 S. L. T. 455.

[6] Aitken *v.* Crawford and Martin, 10th June 1813, F. C.

[7] Johnston and Wight *v.* Goldsmid, 15th February 1809, F. C.

[8] Schulze, Gow & Co. *v.* Bank of Scotland, 1914, 2 S. L. T. 455.

Where a pursuer is an alien enemy the procedure is to sist process *hoc statu.*[1]

(2) Outlaws, and Convicts under Sentence of Death.—A person against whom a sentence of fugitation has passed has no right to invoke the jurisdiction of the Court either to sue or defend.[2] Counsel will not be heard on his behalf.[3] In an early case,[4] where the defender stood fugitate by sentence of the Lords of Justiciary, the Court "found that he was debarred *a defendendo*, not having *personam standi*," but, nevertheless, held "that a proof of the facts was still necessary, which were not to be taken for truth upon the pursuer's averment." In a later case[5] the Court decerned against the defender, against whom a sentence of outlawry had been pronounced, as in absence.

When an outlaw has been denounced his moveable estate is escheat, and, in addition, if he continue unrelaxed for the space of year and day, there is an escheat of the life estate to the superior of the fee. There is, however, no escheat of the fee itself, which remains in the outlaw, and the latter can dispose of it as he pleases.[6]

If a sentence of outlawry has not been followed by denunciation, and the outlawry is relaxed, the *status* of the outlaw returns, and the relaxation has a retrospective effect.[7]

Where a person stands convicted of murder, the punishment is death and certification to the Crown of the moveable estate of the convict.[8] In the case of a person convicted of treason, besides the direct punishment of death, the traitor's moveable property and all heritage held by him in fee-simple are confiscated,[9] so that persons convicted of these crimes have no *persona standi in judicio* with regard to such estates respectively.

(3) Unregistered Company.—Under the Companies Act, 1862, it was expressly declared that a company failing to register in terms of sec. 209 of that Act was incapable of suing, but was not incapable of

[1] Orenstein and Koppel *v.* Egyptian Phosphate Co., Ltd., 1915, S. C. 55 ; Craig Line Steamship Co., Ltd. *v.* North British Storage Co., 1915, S. C. 113.

[2] Macrae *v.* Macrae, 1839, M'L. & R. 645, per Lord Chancellor Cottenham, p. 659 ; Stair, iii. 3. 15 ; Erskine's Inst. ii. 5. 60 ; Hume on Crimes, ii. 270.

[3] Cheyne and Mackersy *v.* Anderson, 1828, 6 S. 1061 ; Marshall *v.* Irvine, 1834, 13 S. 179 (note).

[4] Crombie *v.* Duguid, 1749, Mor. 10162.

[5] Cheyne and Mackersy *v.* Anderson, 1828, 6 S. 1061.

[6] Macrae *v.* Macrae, 1839, M'L. & R. 645, per Lord Chancellor Cottenham, pp. 657-659 ; Stair, iv. 47. 10.

[7] Black *v.* Kennedy and Cameron, 1825, 4 S. 124 (N. E. 125).

[8] Hume on Crimes, ii. 482 ; Macdonald's Criminal Law, p. 130.

[9] Ibid. i. 546 to 549 ; ibid., p. 231.

being sued.[1] This Act has been repealed by the Companies (Consolidation) Act, 1908, sec. 1 of which prohibits the formation of any company, association, or partnership formed for the purpose of the business of banking, and consisting of more than ten persons, or formed for the purpose of the business of carrying on any other business that has for its object the acquisition of gain, and consisting of more than twenty persons, unless it is registered as a company under the last-mentioned Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within the stannaries and subject to the jurisdiction of the Stannaries Court.[2] Such unregistered companies are consequently illegal and, it is thought, have no right to sue or be sued by a common name. The remedy of a creditor of such a company, etc., would be by means of a winding-up order, under which the liquidator would be empowered to defend in his official name.[3]

In the Sheriff Court any individual or individuals, or any corporation or association carrying on business under a firm, or trading, or descriptive name, may sue or be sued and summary diligence executed against them under such firm, trading, or descriptive name alone.[4]

(4) Insane Persons.—It is incompetent to raise an action in the name of a fatuous person, although he is not cognosced, and although the object is to have a curator *ad litem* appointed as soon as the cause comes into Court.[5] The proper course, if uncognosced, is to proceed by brieve of cognition under the Court of Session Act, 1868, sec. 101, or to present a petition for the appointment of a *curator bonis*, at whose instance the action proceeds. *If he has been cognosced*, the proper instance is that of his tutor-at-law or tutor-dative.

A charge given in the name of an insane person directing a debtor to pay to the *curator bonis* of the insane person has been sustained.[6] An action against a cognosced lunatic may be brought against his tutor alone. Where, however, the lunatic has not been cognosced, it is imperative that the action should be raised against the insane person and also against his *curator bonis*, but not against the curator alone.[7] Where an action was raised against a person, and there was no appearance for him

[1] 25 & 26 Vict. cap. 89, sec. 210; Findlay *v.* Crabb, 1886, 13 R. (J.) 53, per Lord Justice-Clerk Moncreiff, p. 54.

[2] 8 Edw. VII. cap. 69.

[3] Ibid., secs. 268, iii. (*b*), 272.

[4] Sheriff Courts (Scotland) Act, 1907, sec. 3 (*e*), rules 11 and 151, as amended by Sheriff Courts (Scotland) Act, 1913.

[5] Wallace, Petr., 1830, 9 S. 40; Reid *v.* Duff, 1839, 1 D. 400; Mackenzie, Petr., 1845, 7 D. 283.

[6] Yule *v.* Alexander, 1891, 19 R. 167.

[7] Govan *v.* Thomson, 20th December 1814, F. C.

but friends compeared, who stated that he was of weak intellect, and put in defences on the merits, the Lord Ordinary repelled the defences; but on the compearers advocating and a *curator bonis* being appointed, it was held that the defect was cured.[1]

The mode of cognition instituted by the Court of Session Act, 1868, does not render an application for the appointment of a *curator bonis* incompetent. In a case[2] where the report on a petition for the appointment of a *curator bonis* had been boxed to the Court the petitioners intimated that they had taken out a brieve of cognition, and on their motion the Court superseded the petition pending the result of the brieve. In a later case[3] the Court did not supersede the petition for a *curator bonis*, but appointed the nearest agnate of the *incapax interim curator bonis* pending the result of the brieve.

When a tutor or curator-at-law is served after cognition the appointment of a *curator bonis* ceases.[4]

Where a party to an action becomes insane *during the dependence* of a cause the proper method of procedure is to apply for the appointment of a *curator bonis* in common form, and not, by means of an incidental application, for a curator *ad litem*, and time will be given for a proper application to be made.[5] If the relatives of a party becoming insane *pendente processu* fail to take advantage of the opportunity given by the Court to present a petition for the appointment of a *curator bonis*, the Court may, on the motion of the opposite party,[6] or *ex proprio motu* after the circumstances have been explained by the opposite party,[7] appoint a curator *ad litem*. In a recent special case[8] in the Second Division, however, one of the parties presented a note to the Court stating that another party to the case was insane and had no *curator bonis*. The Court thereupon appointed a curator *ad litem*, who himself pointed out that, so far as he could ascertain, such an appointment was unique; but the Court, without pronouncing any interlocutor, intimated that it did not consider it necessary to appoint a *curator bonis*, and allowed the case to proceed.

Doubts have very recently arisen regarding the practice of appoint-

[1] Lindsay *v.* Watson, 1843, 5 D. 1194.
[2] Irving *v.* Swan, 1868, 7 M. 86.
[3] Simpson *v.* Simpson, 1891, 18 R. 1207.
[4] Young *v.* Rose, 1839, 1 D. 1242.
[5] Anderson's Trs. *v.* Skinner, 1871, 8 S. L. R. 325.
[6] Mitchell *v.* Whitelock, 1864, 3 M. 229. See, however, Mackenzie's Tr. *v.* Mackenzie, 1908, S. C. 995.
[7] Walker *v.* Jones, 1867, 5 M. 358.
[8] Swan's Trs. *v.* Swan, 1912, S. C. 273.

ing curators *ad litem* to persons under incapacity; and Lord Johnston, on the invitation of Lord President Strathclyde, has laid a statement before the Court which shows that there is something radically inconsistent in our law and practice in this matter, and submits the propriety of having the question reconsidered when occasion arises.[1] (See *Curator ad litem*, Chap. iii., *infra*.)

It is quite incompetent for a lunatic to pursue an action of divorce or separation and aliment,[2] although it is not incompetent to sue an action of divorce for adultery against a lunatic spouse.[3]

In actions of divorce on the ground of desertion, where the defender is proved to be insane at the proof and to have been insane during the four years necessary to prove wilful desertion, the case will be dismissed.[4] Where, however, the insanity did not arise until after the lapse of four years' wilful desertion, and the defender was insane at the date of the proof, the right of the pursuer to decree was held not to be affected.[5]

In an early case[6] it was held that persons appointed in England by the Lord Chancellor to manage the affairs of a lunatic were not thereby entitled to maintain action in Scotland upon the lunatic's right. The reason given was that the committeeship granted under the Great Seal was of no force or evidence in Scotland. A power of attorney granted by the alleged *incapax* during the time he was held to be insane in England was produced, however, and was held a sufficient title to enable his attorney to sue. In a subsequent case[7] it was held that the committee of an English party against whom a commission of lunacy had been issued was entitled to sue personal actions on his behalf or with regard to his personal estate in Scotland, and this was followed in a case[8] in the same year, where, moreover, the question arose but was not decided whether this right could be extended to heritage.

(5) Pupils.—The general rule is that neither a male under the age of fourteen years nor a female under the age of twelve years[9] has a *persona standi in judicio*.[10]

[1] Macdonald's Tr. *v.* Medhurst, 1915, S. C. 879.
[2] Thomson *v.* Thomson, 1887, 14 R. 634.
[3] Rossie *v.* Rossie, 1899, 6 S. L. T. 357.
[4] Gilfillan *v.* Gilfillan, 1902, 10 S. L. T. 295.
[5] Scott *v.* Scott, 1908, S. C. 1124.
[6] Baynes, etc. *v.* Earl of Sutherland, 1750, 1 Paton's App. 454.
[7] Grant *v.* Thomson, 1835, 13 S. 878.
[8] Gordon *v.* Earl of Stair, 1835, 13 S. 1073.
[9] Erskine's Inst. i. 7. 1.
[10] Sinclair *v.* Stark, 1828, 6 S. 336, per Lords Craigie and Cringletie, p. 340:

(a) *Where Actions are in Right of Pupils.*—(i.) *Where the Pupil has a Guardian.*—An action in right of a pupil should be brought in the name of the legal guardian, and the conclusion should be for payment to the guardian in that capacity.[1] In a case,[2] however, in which a pupil sued with the concurrence of his father as his administrator-in-law, and also at the instance of his father *nominatim* as such administrator, the Court sustained the instance; and where an action was admittedly raised in name of a pupil by his tutors, who obtained decree in his name, a reduction of the proceedings as inept raised thirty years afterwards by a third party was held to be irrelevant.[3]

The legal guardian of a legitimate pupil child is the father.[4] If the father is dead, the mother is the guardian either alone or in conjunction with a guardian appointed by the father,[5] and failing the mother, tutors-nominate or dative. The fact that a mother enters into a second marriage does not affect her right to be guardian to her children by the first marriage.[6] A mother has no right to sue on behalf of a pupil while the father is alive, even when the action is by the mother with the concurrence of the father.[7] Notwithstanding that a pupil has a guardian, the former may pursue in his own name if the action is against his own administrator,[8] or where his guardian has an adverse interest,[9] or refuses to sue,[10] or is incapacitated mentally or otherwise,[11] in which cases the Court will appoint a curator *ad litem* to the pupil. An action may also be initiated in the name of a pupil alone where his father, who is his legal tutor and administrator-in-law, has disappeared and is unable to be communicated with.[12] The mere fact that a pupil's father is abroad, however, is no reason why a pupil should sue alone;[12] nor can a mother sue as a pupil's tutrix and administratrix-in-law where

Keith *v.* Archer, 1836, 15 S. 116, per Lord Corehouse (Ordinary), p. 118 (note); Bell's Prin., sec. 2067.

[1] Macneil *v.* Macneil, 1798, Mor. 16384.

[2] Keith *v.* Archer, 1836, 16 S. 116.

[3] M'Kenzie *v.* Sinclair, 1834, 12 S. 822.

[4] Cochrane, Petr., 1891, 18 R. 456, per Lord Young, p. 458.

[5] Guardianship of Infants Act, 1886 (49 & 50 Vict. cap. 27), sec. 2.

[6] Campbell *v.* Maquay, 1888, 15 R. 784.

[7] Whitehead *v.* Blaik, 1893, 20 R. 1045; Bell *v.* Laing, 1896, 4 S. L. T. 166.

[8] Macneil *v.* Macneil, 1798, Mor. 16384; Keith *v.* Archer, 1836, 15 S. 116, per Lord Balgray, p. 118.

[9] Bogie *v.* Bogie, 1840, 3 D. 309; Park's Trs. *v.* Park, 1876, 3 R. 850; Ross *v.* Tennant's Trs., 1877, 5 R. 182.

[10] M'Conochie *v.* Binnie, 1847, 9 D. 791.

[11] Rankine and Another, Petrs., 1821, 1 S. 118, 122 (N. E. 117).

[12] Carrigan *v.* Cleland, 1907, 15 S. L. T. 543.

the father has disappeared and is not proved to be dead,[1] even though she has divorced her husband.[2] Where an action for the removal of tutors was raised by the next of kin of two pupils, and the next of kin and one of the pupils who had attained minority subsequently disclaimed the action, it was held competent for the other pupil, along with a curator *ad litem* appointed by the Court, to carry on the action.[3]

It may be advisable to point out here that the whole question of appointing curators *ad litem* to persons under disability is likely to be reconsidered.[4]

A father, as tutor and administrator-in-law to a pupil, can compromise an action in his own terms without the authority of the Court being obtained,[5] and is entitled to demand payment of any sum due to his pupil child under the compromise and to grant a sufficient discharge therefor.[6] A mother, as tutor to her pupil children, can, under sec. 2 of the Guardianship of Infants Act, 1886, grant a valid discharge for sums recovered by the children in an action of damages for the death of their father.[7]

Where an action has been carried on in name of a pupil, with a curator *ad litem*, and damages have been awarded to the pupil, it is necessary that the pupil should have a tutor or factor *loco tutoris* appointed in order to grant a sufficient discharge to the defender.[8]

A tutor and administrator-in-law who raises an action in the interest of a pupil, and is unsuccessful, is personally liable in expenses.[9]

Illegitimate Pupil.—An illegitimate pupil has no administrator-in-law or tutor-at-law,[10] and the Guardianship of Infants Act, 1886, applies to legitimate children only.[11] An action in right of an illegitimate

[1] Bell *v.* Laing, 1896, 4 S. L. T. 166; Barrett *v.* North British Rly. Co., 1899, 1 F. 1139. See also Whitehead *v.* Blaik, 1883, 20 R. 1045.

[2] Aitken *v.* Gourlay and M'Nab, 1903, 5 F. 585.

[3] Austins *v.* Wallace and Dunn, 1826, 5 S. 177 (N. E. 164).

[4] Macdonald's Tr. *v.* Medhurst, 1915, S. C. 879.

[5] Gow *v.* Henry, 1899, 2 F. 48.

[6] Dumbreck *v.* Stevenson, 1861, 23 D. (H. L.) 1; 4 Macq. 86; Murray's Trs. *v.* Bloxsom's Trs., 1887, 15 R. 233.

[7] Jack *v.* North British Rly. Co., 1886, 14 R. 263.

[8] Pratt and Others *v.* Knox, 1855, 17 D. 1006; Collins *v.* Eglinton Iron Co., 1882, 9 R. 500; Connolly *v.* Bent Colliery Co., 1897, 24 R. 1172. See Stephenson *v.* Lorimer, 1844, 6 D. 377.

[9] White *v.* Steel, 1894, 21 R. 649; Wilkinson *v.* Kinneil Cannel and Coking Coal Co., Ltd., 1897, 24 R. 1001.

[10] Cunningham *v.* Smith, 1880, 7 R. 424.

[11] Brand *v.* Shaw, 1888, 16 R. 315.

pupil should therefore be raised in the name of the pupil alone, to whom, after the case comes into Court, a curator *ad litem* may be appointed.[1] For such a purpose a factor *loco tutoris* is not an appropriate person,[1] although it may be necessary at the end of the case, if there has been an award of money, for a factor *loco tutoris* to be appointed in order to grant a good discharge.[2]

The mother of an illegitimate pupil child has no title to raise an action for damages and *solatium* in respect of the pupil's death;[3] nor, if the mother and pupil are domiciled in England, will a rule of English pleading, that "infants" may sue by their "next friends," make the instance of an action by the mother of an illegitimate child good.[4] An illegitimate pupil child may, however, claim compensation for the death of his father under the Workmen's Compensation Act, 1906.[5] Where the father of an illegitimate pupil child, which had met its death by accident, subsequently married the mother of the child and raised an action of damages in respect of its death, it was held that the father had no title to sue.[6]

(ii.) *Where the Pupil has no Guardian.*—Where there is no legal guardian the action is brought in the name of the pupil, and the Judge, after the case is brought into Court, will appoint a curator *ad litem*, with whose concurrence the action proceeds.[7]

The foregoing practice must be reconsidered in view of the recent statement laid before the Court by Lord Johnston on the invitation of Lord President Strathclyde, which shows that there is something radically inconsistent in our law and practice in this matter.[8]

(b) *Where Pupils are Called as Defenders.*—(i.) *Where the pupil has a guardian,* and the guardian is known, both the pupil and the guardian should be called as defenders, and the conclusion should be against the pupil and his guardian *nominatim*. Where the guardian is

[1] Saunders, Petr., 1821, 1 S. 115, 119 (N. E. 113); Jackson Walton, Petr., 1850, 12 D. 912. See, however, Macdonald's Tr. *v.* Medhurst, 1915, S. C. 879, per Lord Johnston.

[2] Pratt and Others *v.* Knox, 1855, 17 D. 1006; Collins *v.* Eglinton Iron Co., 1882, 9 R. 500; Connolly *v.* Bent Colliery Co., 1897, 24 R. 1172.

[3] Renton *v.* North British Rly. Co., 1869, 6 S. L. R. 255; Weir *v.* Coltness Iron Co., 1889, 16 R. 614; Clarke *v.* Carfin Coal Co., 1891, 18 R. (H. L.) 63.

[4] Jones *v.* Somervell's Tr., 1907, S. C. 545.

[5] 6 Edw. VII. cap. 58, sec. 13.

[6] M'Neill *v.* M'Gregor, 1901, 4 F. 123.

[7] Johnston *v.* Johnston, 1740, Mor. 16346; Macneil *v.* Macneil, 1798, Mor. 16384; Sinclair *v.* Stark, 1828, 6 S. 336, per Lord Balgray, p. 338; J. & M. Young, Petrs., 1828, 7 S. 220; Calderhead's Trs. *v.* Fyfe, 1832, 10 S. 582; Keith *v.* Archer, 1836, 15 S. 116, per Lord Corehouse, p. 118 (note); Ferguson's Trs. *v.* Hamilton, 1861, 23 D. 1290; Hamilton, Petr., 1861, 24 D. 31.

[8] Macdonald's Tr. *v.* Medhurst, 1915, S. C. 879.

not known, the action should be raised against the pupil and against his tutors generally.[1]

Where a pupil has tutors and they are not *called*, the decree is null,[2] even though tutors are *cited* and appearance is entered for the pupil,[3] and even where a curator *ad litem* has been appointed to him.[4] A supplementary summons calling tutors will, however, cure the defect.[4]

The pupil should be cited personally or at his residence. Although his tutors are known, it is not necessary to cite them personally or at their dwelling-places; a general edictal citation is quite sufficient.[5] They may, however, be cited personally or at their residences, and if they are so cited it is unnecessary for them to be also cited edictally.[6] If there are tutors who are called but not cited, the decree is null.[7]

Where tutors are called, cited, and appear in a process, a decree against the defenders is binding on the pupil. Where tutors are called and cited, and no appearance is made for them, but appearance is made for the pupil, and a curator *ad litem* for the latter is appointed by the Court, a decree against the pupil would be valid.[8] If in such circumstances no curator *ad litem* is appointed, a decree would be invalid.[8]

Where tutors have been called and cited, and appearance has been made for the pupil and one of two tutors, a decree against them cannot be treated as a decree in absence against the other tutor who did not appear.[9]

Where a father or tutor brings an action against a pupil, the action is raised against the pupil alone, and a curator *ad litem* is appointed after the case is brought into Court.[10]

Where there is a guardian or tutor-at-law who is under no disability, and intends to enter appearance and defend on behalf of the

[1] Fraser, Parent and Child, p. 211 *et seq.*

[2] Crighton *v.* Rossie, 1573, Mor. 2178; Dalgleish *v.* Hamilton, 1752, Mor. 2184.

[3] Earl of Craven *v.* Lord Elibank's Trs., 1854, 16 D. 811.

[4] Thomson's Trs. *v.* Livingston, 1863, 2 M. 114.

[5] Kinghorn *v.* Collace, 1626, Mor. 2180; Buchanan *v.* Gray, 1801, Mor. *vide* Adjudication, Appendix No. 12; Sinclair *v.* Stark, 1828, 6 S. 336, per Lord Balgray, p. 338.

[6] Cairnoussie *v.* Techmurie, 1629, Mor. 2181; Lie *v.* Porteous, 1630, Mor. 2182; Erskine *v.* Erskine, 1852, 14 D. 766.

[7] MacTurk *v.* Marshall, 7th February 1815, F. C.

[8] Agnew *v.* Earl of Stair, 1822, 1 Shaw's App. 333. See, however, Macdonald's Tr. *v.* Medhurst, 1915, S. C. 879.

[9] Wallace *v.* Anderson, 1826, 5 S. 179 (N. E. 165).

[10] Paterson *v.* Sandilands, 1617, Mor. 8968; Donaldson, 1629, Mor. 16253; Calderhead's Trs. *v.* Fyfe, 1832, 10 S. 582 (note); Studd *v.* Studd, 1880, 8 R. 249; aff'd. 1883, 10 R. (H. L.) 53. See, however, Macdonald's Tr. *v.* Medhurst, 1915, S. C. 879.

pupil, the Court will not supersede him and appoint a curator *ad litem*.[1]

(ii.) *Where the pupil has no guardian* the pupil must be called in the summons and cited personally, and a conclusion must be inserted against "his tutors and curators, if he any has," and an edictal citation of the latter must be made.[2]

At an early date,[3] where a pupil was sued who had no tutors, but where the summons concluded against "his tutors and curators, if he any has," followed by edictal citation, it was the duty of the pursuer not to take a decree in absence, but to have a curator *ad litem* appointed to the pupil and to take a decree *in foro*, and if this was not done the decree could be reduced as null and void. This, however, was overruled, and the law now is that, where a pupil has no tutors and there has been a summons regularly called and executed against "his tutors and curators, if he any has," and no appearance is entered for the pupil and no curator *ad litem* appointed, the decree is not null and void, but merely subject to be opened up as a decree in absence,[4] and the *onus* lies upon the pursuer of the reduction of the decree in absence to show that the decree was erroneous on its merits.[5]

Where a pupil who has no tutors does not make an appearance, the Court has no power to appoint a curator *ad litem* to him, as the law cannot compel a party to appear *in judicio*.[6] Where, however, a father was sequestrated, and his children were his creditors under a marriage contract, the Court *ex proprio motu* appointed a curator *ad litem* to them in the sequestration process.[7]

In entail petitions, where the petitioner is in the position of tutor, the petition is served upon the pupil alone, and the Court at any time in the course of the proceedings may appoint a curator *ad litem* to the pupil.[8] The usual time for such appointment is after intimation of the

[1] Stuart *v.* Moore, 1861, 23 D. 595.

[2] Crighton *v.* Rossie, 1573, Mor. 2178; Thomson's Trs. *v.* Livingston, 1863, 2 M. 114.

[3] Bannatine, Petr., 1814, 14th December 1814, F. C.; Agnew *v.* Earl of Stair, 1822, 1 Shaw's App. 333.

[4] Sinclair *v.* Stark, 1828, 6 S. 336; Dick *v.* M'Ilwham, 1828, 6 S. 798; Sinclair *v.* Brown, 1835, 13 S. 594; 1837, 15 S. 770; 2 S. & M'L. 103; Grieve *v.* Burns, 1871, 9 M. 582.

[5] Anderson *v.* Ferguson, 1828, 6 S. 1145; Macdonald *v.* Brown, 1838, 14 Fac. 206; Grieve *v.* Burns, 1871, 9 M. 582.

[6] Sinclair *v.* Stark, 1828, 6 S. 336; Earl of Craven *v.* Lord Elibank's Trs., 1854, 16 D. 811, per Lord Justice-Clerk Hope, p. 818. See also Mackenzie's Tr. *v.* Mackenzie, 1908, S. C. 995.

[7] Saunders, Petr., 1821, 1 S. 115, 119 (N. E. 113).

[8] A. S., 23rd December 1848, sec. 4; Kerr *v.* Marquis of Ailsa, 1854, 1 Macq. 736, per Lord Chancellor Cranworth, p. 740.

petition,[1] but in one case,[2] owing to special circumstances, a curator *ad litem* was appointed before intimation.

A pupil without tutors or a curator *ad litem* cannot prorogate jurisdiction.[3]

In petitions for the custody of pupil children it is the practice for the Court to appoint a curator *ad litem* to the children, and from him to obtain an independent report of the circumstances and the wishes of the children.[4]

The whole question of our practice of appointing curators *ad litem* to persons under incapacity has been brought before the Court by a statement prepared by Lord Johnston, on the invitation of Lord President Strathclyde, which shows that there is something radically inconsistent in our law and practice in this matter, and submits the propriety of having the question practically reconsidered when occasion arises.[5]

(6) MINORS.—(a) *Where a Minor is Pursuer.*—(i.) *Where the Minor has a Guardian.*—A minor *pubes* has no legal incapacity, although if he has curators he requires their consent to do certain acts.[6] A minor may sue an action alone. The defender, however, is entitled to object *in limine* to the procedure till the minor's guardians concur or a curator *ad litem* is appointed. The latter appointment is made by the Court, and if the fact appears *in judicio*, it is perhaps *pars judicis* to apply the remedy. If, however, the defender makes no objection, and chooses to go on, and decree is pronounced in favour of the minor, the defender cannot contend thereafter that the decree is null and void; he is barred *personali exceptione*. If the decree is against the minor and there has been no concurrence of the guardian or an appointment of a curator *ad litem*, the minor may set aside the proceedings[7] on the ground of minority and lesion within the *quadriennium utile*.[8] There is no difference between a judicial act and any other act of a minor.[9] If the guardian refuses to concur[10] or has an adverse interest,[11] or is

[1] Inglis, Petr., 1855, 17 D. 1005.

[2] Stewart, Petr., 1857, reported in Duncan's Entail Procedure, p. 212.

[3] Rankine *v.* Rankine, 1821, 1 S. 41 (N. E. 47).

[4] Morrison *v.* Quarrier, 1894, 21 R. 889; Fisher *v.* Edgar, 1894, 21 R. 1076.

[5] Macdonald's Tr. *v.* Medhurst, 1915, S. C. 879.

[6] Harvey *v.* Harvey, 1860, 22 D. 1198; Hill *v.* City of Glasgow Bank, 1879, 7 R. 68.

[7] Sinclair *v.* Stark, 1828, 6 S. 336, per Lord Balgray, p. 338.

[8] Erskine's Inst. i. 7. 35, 38; Hill *v.* City of Glasgow Bank, 1879, 7 R. 68, per Lord President Inglis, p. 75; Cunningham *v.* Smith, 1880, 7 R. 424, per Lord President Inglis, p. 425.

[9] Lord Balgray in Sinclair *v.* Stark, 1828, 6 S. 336, at p. 338; Cunningham *v.* Smith, 1880, 7 R. 424, per Lord President Inglis, p. 425.

[10] M'Conochie *v.* Binnie, 1847, 9 D. 791.

[11] Saunders, Petr., 1821, 1 S. 115, 119 (N. E. 113).

incapacitated,[1] the Court will appoint a curator *ad litem*. A curator to a minor cannot bring an action without the minor's consent.[2]

(ii.) *Where the minor has no guardian* the former may sue alone, "and the circumstance that he has no curators will not make his acts one bit the less effectual in law than if they had been done with the consent of curators."[3] The defender may, however, object and insist upon a curator *ad litem* being appointed.[4] The minor himself may also ask for a curator *ad litem* to be appointed to him, but this cannot be done until the action is in Court.[5]

Where a minor recovers a sum of money in name of damages the manner in which the sum has been disposed of has differed. In one case[6] the Court insisted upon a formal application for the appointment of a *curator bonis* who could give a valid discharge. In another case[7] the Court directed the sum to be paid to a person named by the Court, to be held in trust, and the interest applied for behoof of the minor until she attained the age of twenty-one years; and in another case[8] the Court directed the money to be paid directly to the minors.

(b) *Where a Minor is Called as Defender.*—(i.) *Where the minor has a guardian* it is in accordance with practice that the curator should be called as a defender *nominatim* if known. The minor, however, must be called.[9] If the curator is not known, the practice is to call him as a defender in these terms "and his tutors and curators, if he any has."

The minor and his curator, if known, should be cited personally or at their respective dwelling-places *ob majorem cautelam*. The citation of the curator personally, however, is not necessary.[10] Where it is done edictal citation is superseded.[11] If the minor is a female and married, it is sufficient to call her husband as her curator.[12] If the curator is not known,

[1] Rankine and Another, Petr., 1821, 1 S. 118, 122 (N. E. 117).

[2] Allan *v.* Walker, 1812, Hume's Dec. 586; Bell's Prin., sec. 2096.

[3] Lord President Inglis in Hill *v.* City of Glasgow Bank, 1879, 7 R. 68, at pp. 74, 75.

[4] Sinclair *v.* Stark, 1828, 6 S. 336, per Lord Balgray, p. 338; Christie and Others, 1873, 1 R. 237. See, however, Mackenzie's Tr. *v.* Mackenzie, 1908, S. C. 995; Macdonald's Tr. *v.* Medhurst, 1915, S. C. 879.

[5] Youngs, Petrs., 1828, 7 S. 220.

[6] Anderson *v.* Muirhead, 1884, 11 R. 870. See also Kirkman *v.* Pym, 1782, Mor. 8977; Pratt *v.* Knox, 1855, 17 D. 1006.

[7] Sharp *v.* Pathhead Spinning Co., 1885, 12 R. 574. See also Spring *v.* Blackall, 1901, 9 S. L. T. 162.

[8] Jack *v.* North British Rly. Co., 1886, 14 R. 263.

[9] King's Trs. *v.* M'Lay, 1901, 8 S. L. T. 413.

[10] Buchanan *v.* Gray, 20th January 1801, Morison, *voce* Adjudication, Appendix, No. 12; Sinclair *v.* Stark, 1828, 6 S. 336, at p. 338.

[11] Cairnoussie *v.* Techmurie, 1629, Mor. 2181; Lie *v.* Porteous, 1630, Mor. 2182.

[12] French *v.* Frenches and Cranston, 1622, Mor. 2179.

he should be cited edictally in the terms "tutors and curators, if he any has."[1]

If, in addition to the minor, the curator is not called as a defender *nominatim* or otherwise as above mentioned, or cited personally or edictally, the action is not null.[2] If the Court thinks it advisable the curator may be called by supplementary summons and corresponding citation,[3] though not by diligence alone.[4] Under Act of Sederunt, 20th March 1907 (C. A. S., B, ii.), an amendment of the instance with corresponding citation will be sufficient.

If the minor does not appear and his curator is not called and cited as a defender, the decree will be in absence, against which the minor may be reponed, or which may be reduced within the *quadriennium utile*. If the minor does appear and states that his curator has not been called, the Court may sist process until the curator is called, or, if the latter refuses, until a curator *ad litem* is appointed.[5] If either the curator or the curator *ad litem*, as the case may be, appears in the process and defends the action unsuccessfully, the decree will be *in foro*, but still liable to reduction during the *quadriennium utile* upon proof of lesion. If, however, the curator when called and cited does not appear, or the curator *ad litem* when appointed does not proceed to defend, the decree is in absence.[1] A minor and his curator, or either of them, cannot be compelled by the pursuer to appear and defend a process.[6] Where for any reason a curator cannot or should not act, the Court will appoint a curator *ad litem* to the minor.[7] Where a minor and his curator are abroad, the Court will direct that intimation of the action is made to them.[8]

A curator who gives his consent to an action at the instance of a minor merely to make the action competent, and who neither promotes the action nor interferes with its conduct, is not liable in expenses to

[1] Anderson *v.* Ferguson, 1828, 6 S. 1145.

[2] Cunningham *v.* Smith, 1880, 7 R. 424.

[3] Anderson *v.* Ferguson, 1828, 6 S. 1145 ; Thomson's Trs. *v.* Livingston, 1863, 2 M. 114.

[4] Dalgleish *v.* Hamilton, 1752, Mor. 2184.

[5] Cunningham *v.* Smith, 1880, 7 R. 424. See, however, Macdonald's Tr. *v.* Medhurst, 1915, S. C. 879.

[6] Sinclair *v.* Stark, 1828, 6 S. 336, per Lord Balgray, p. 338 ; Mackenzie's Tr. *v.* Mackenzie, 1908, S. C. 995.

[7] Saunders, Petr., 1821, 1 S. 115, 119 (N. E. 113) ; Rankine and Another, Petrs., 1821, 1 S. 118, 122 (N. E. 117) ; M'Conochie *v.* Binnie, 1847, 9 D. 791 ; Stirling, Petr., 1851, 14 D. 206 ; Ross *v.* Tennant's Trs., 1877, 5 R. 182. See also Macdonald's Tr. *v.* Medhurst, 1915, S. C. 879.

[8] Frizell *v.* Thomson, 1860, 22 D. 1176.

the successful defender.[1] If, however, he takes a prominent and leading part in the litigation, he will be held liable in expenses along with the minor.[2]

(ii.) *Where the Minor has no Guardian.*—In such a case the distinction between what is expedient and prudent and what is legal should be kept in view. While there is no necessity to call as defenders "tutors and curators, if he any has" and to cite them edictally, it may be prudent and expedient to do so. In a case where a minor who had no curators and who alone was called as a defender appeared and pleaded that the whole proceedings were null and void, in respect that tutors and curators had not been called and cited, Lord President Inglis said:[3] "No doubt the Court, in the exercise of its high equitable jurisdiction, has appointed curators to minors who had no relatives whom they could call; but that has been done only when the minor was possessed of estate which could not otherwise be protected. Here it is plain that the defender has no such estate, and therefore as he has neither father nor tutors or curators, I think his plea that they should have been called is bad. It was contended by the counsel for the defender that because the Sheriff had neglected to appoint a curator *ad litem* to him the whole proceedings are void and null and must be quashed. Now, I do not doubt that when the Sheriff's attention was called to the fact that the defender was a minor *indefensus* he ought to have appointed a curator *ad litem*. But it is a totally different matter to hold that the whole of these proceedings are null, and I am clearly of opinion that they are not. A minor may do a great many things without his curator, and a minor who has no curator may do a great many things subject only to this condition, that the minor is entitled to have what he has done set aside within the *quadriennium utile* on the ground of lesion; and I do not doubt that judicial proceedings, like other actings by a minor, may be set aside *ex capite lesionis* within the *quadriennium utile*. Nor do I doubt that the defender would be entitled even in this process to show that in consequence of having had no curator *ad litem* he had suffered lesion, and that the proceedings should be set aside and a trial of new ordered. But that is not what he asks for. He asks that the action be dismissed. I do not think that we could possibly entertain his request without, in the first place, remedying the defect of which he has so vehemently complained, by giving him a curator *ad litem*. Our first duty will therefore be to appoint a curator

[1] Armstrong *v.* Thompson, 1895, 2 S. L. T. 537.

[2] Fraser *v.* Cameron, 1892, 19 R. 564; Docherty *v.* Glasgow Tramway and Omnibus Co., 1895, 2 S. L. T. 406.

[3] Cunningham *v.* Smith, 1880, 7 R. 425, at p. 425.

ad litem, and if he and the minor can show that the minor has been prejudiced by the want of a curator, we shall then consider what ought to be done. But at present we can do nothing more than appoint a curator." This judgment was unanimously concurred in.

A minor who does not enter appearance cannot be compelled to have a curator *ad litem* appointed to him on the motion of the pursuer.[1]

(7) Married Women.—In order to understand the *persona standi in judicio* of a married woman, it is necessary to have a clear conception of the *jus mariti* and right of administration of a husband.

(a) *Distinction between Jus Mariti and Right of Administration.*—*Jus mariti* is the absolute right which a husband has to the moveable estate of his wife,[2] and the legal effect is to transfer from the wife to the husband all the personal property which belongs to the wife at the time of marriage, or which she may acquire *stante matrimonio*. The wife's heritage remains her own property, but the rents as they accrue become the property of the husband.[3]

The right of administration is a separate right, quite distinct from the *jus mariti*. It is not a right of property, but merely of management arising from the husband's curatorial power. It is in virtue of this right that the consent of a husband is necessary to every act of his wife dealing with her heritage, or with that portion of her moveable estate from which the *jus mariti* is excluded.[4]

(b) *Old Rule.*—In early times the law was absolute that in all actions brought by a married woman the consent of her husband as her curator was necessary. This arose from the opinion of the legal authorities of those times that the exclusion or renunciation of a husband's *jus mariti* and right of administration, or either of them, was incompetent.[5]

[1] Sinclair *v.* Stark, 1828, 6 S. 336, per Lord Balgray, pp. 338, 339; Calderhead's Trs. *v.* Fyfe, 1832, 10 S. 582 (note); M'Lagan *v.* Wallace, 1829, 2 Jurist, 96; Swan, Petr., 1866, 1 S. L. R. 100; Grieve *v.* Burns, 1871, 9 M. 582; Mackenzie's Tr. *v.* Mackenzie, 1908, S. C. 995. See also Macdonald's Tr. *v.* Medhurst, 1915, S. C. 879.

[2] Fraser, Husband and Wife, i. 676; Shearer *v.* Christie, 1842, 5 D. 132; Wight *v.* Brown, 1849, 11 D. 459, per Lord Justice-Clerk Hope, p. 464; Muirhead *v.* Muirhead's Factor, 1867, 6 M. 95, per Lord Curriehill, p. 99; Fraser *v.* Walker, 1872, 10 M. 837, per Lord Kinloch, p. 847; Ferguson *v.* Jack's Exrs., 1877, 4 R. 393.

[3] Reid *v.* M'Walter, 1878, 5 R. 630; *cp.* Taylor *v.* Taylor, 1871, 9 M. 893.

[4] Dick and Dunbar *v.* Lady Pinkhill, 1709, Mor. 5999; Wight *v.* Dewar, 1827, 5 S. 549 (N. E. 516); Bryce's Tr., 1878, 5 R. 722.

[5] Stair, i. 4. 9; Erskine's Inst. i. 6. 14; Fraser, Husband and Wife, i. 566; Foulis and Collington *v.* Lady Collington and Others, 1667, Mor. 5828; Nicolson *v.* Inglis, 1678, Mor. 5834; Campbell *v.* Sandilands; or Trotter *v.* Campbell, 1682, Mor. 5836.

(c) *New Rule.*—The old rule has long since been exploded, and its place taken by the rule that the *jus mariti* and right of administration of the husband could be excluded by antenuptial settlement[1] or by the terms of succession,[2] and that the exclusion of either of these rights did not necessarily involve the exclusion of the other right.[3] This rule of law still exists with this qualification, that whereas before the year 1861 the exclusion only operated in consequence of antenuptial agreement or succession, since that date the exclusion of both rights, or either of them, has in certain circumstances been made imperative by Act of Parliament. Accordingly, it may be advisable to divide the investigation into the operation of the new rule, so far at least as it has a bearing upon the *persona standi in judicio* of a married woman, into two parts—*first*, prior to the Conjugal Rights (Scotland) Amendment Act of 1861, and *second*, since that Act.

(i.) *Prior to the Conjugal Rights (Scotland) Amendment Act*, 1861.—Where the *jus mariti* and right of administration of a husband was not excluded by antenuptial contract or succession from a third party, his wife had no *legitimam personam in judicio* without the consent and concurrence of her husband. Accordingly, a married woman could not raise an action[4] or give a charge for payment of money[5] in respect of any property from which her husband's *jus mariti* and right of administration was not excluded, without the concurrence of her husband. This rule held good where the *jus mariti* but not the right of administration had been excluded, as it was in virtue of the latter that the consent of the husband required to be obtained.[6] It also held good where the husband was a bankrupt.[7] Of course, if the husband subsequently sisted himself as a pursuer[8] or subsequently gave his concurrence,[9] the instance was cured.

[1] Stair, i. iv. 9 (More's ed.), note (1), p. 29; Shearer *v.* Christie, 1842, 5 D. 132, at pp. 134 and 140; Reliance Mutual Life Assurance Society *v.* Halkett's Factor, 1891, 18 R. 615.

[2] Erskine's Inst. i. 6. 14; Young *v.* Loudoun, 1855, 17 D. 998; Hogg's Trs. *v.* Wilson's Trs., 1868, 41 Jur. 70.

[3] Annand and Colhoun *v.* Chessels, 1774, Mor. 5844; 1775, 2 Paton's App. 369; Keggie *v.* Christie, 25th May 1815, F. C.; Bryce's Tr., 1878, 5 R. 722; Biggart *v.* City of Glasgow Bank, 1879, 6 R. 470.

[4] Erskine's Inst. i. 6. 21; Napier *v.* Rollock, 1631, Mor. 6047; Fraser, Husband and Wife, i. 566.

[5] Borthwick *v.* Urquhart, 1827, 5 S. 242 (N. E. 225); Wight *v.* Dewar, 1827, 5 S. 549 (N. E. 516).

[6] Ibid.; Bryce's Tr., 1878, 5 R. 722.

[7] Borthwick *v.* M'Farlane, 1844, 6 D. 1290, per Lord Mackenzie, p. 1295; Horn *v.* Sanderson and Muirhead, 1872, 10 M. 295.

[8] Slowey *v.* Robertson and Moir, 1865, 4 M. 1; Lynch *v.* Stewart, 1871, 9 M. 860.

[9] Hepburn *v.* Blair's Children, 1702, Mor. 6047; Borthwick *v.* Urquhart, 1829,

To the general statement that a married woman could not sue alone where there was no exclusion of *jus mariti* and right of administration there were many exceptions. Thus, where the husband refused to concur,[1] was incapacitated, by being an outlaw,[2] insane,[3] or abroad and outwith communication,[4] or had an adverse interest,[5] a wife was allowed to sue alone, and whenever the case was brought into Court a curator *ad litem* was appointed to her as a first step in process.[6] If a married woman proceeded alone without a curator *ad litem* being appointed to her the case was not null, as a curator *ad litem* could always be subsequently appointed, in which case he was allowed to open up the record and add anything thereto that he thought right or lead additional proof.[7] Although at one time a curator *ad litem* was appointed to a wife in consistorial causes, the practice was long since departed from, and in these causes no curator *ad litem* is required.[8]

Another exception was where a married woman, who was legally, voluntarily or actually, separated from her husband, carried on a business on her own behoof.[9]

With regard to actions of damages by a married woman for personal wrongs or injuries, in an early case [10] the Court allowed an inhibition on a summons at the instance of a married woman for damages without the concurrence of her husband, but in a later case [11] a married woman was only allowed to sue an action for slander without her husband's concurrence in respect that she was separated from him, maintained

7 S. 420; Ross *v.* Fisher, 1833, 11 S. 467; Lyle *v.* Mackay, 1849, 11 D. 404; Bartholomew *v.* Houston, 1881, 18 S. L. R. 568.

[1] Blair *v.* Burns, 1829, 8 S. 264; M'Kenzie *v.* Ewing, 1830, 9 S. 31. See also Gaffney *v.* Connerton, 1909, S. C. 1009.

[2] Farquhar *v.* H.M. Advocate, 1753, Mor. 4669; Dall *v.* Countess of Southesk, 1733, Elchies, Appendix ii. *voce* Husband and Wife, No. 1.

[3] Duncan *v.* Forbes, 1705, Mor. 5966; Bold *v.* Montgomerie, 1729, Mor. 6002.

[4] Anderson *v.* Shand, 1833, 11 S. 688; Paul *v.* Gibson, 1834, 12 S. 431; Gale *v.* Bennett, 1857, 19 D. 665; M'Quillan *v.* Smith, 1892, 19 R. 375; *cp.* Wilkinson *v.* Bain, 1880, 8 R. 72.

[5] Inglis *v.* Aikit, 1642, Mor. 6049; Graham *v.* Hunter's Trs., 1831, 9 S. 543; Wilson *v.* Wishart, 1844, 7 D. 125; Smith *v.* Smith, 1866, 4 M. 279.

[6] Jobson *v.* Reid, 1832, 10 S. 594; Alcock, Petr., 1840, 2 D. 1001; Hogg *v.* Landles, 1845, 7 D. 594; Primrose, Petr., 1850, 12 D. 916; Davidson, Petr., 1857, 19 D. 862.

[7] A. B. *v.* C. D., 1853, 15 D. 431.

[8] Fraser, Husband and Wife, i. 571.

[9] Erskine's Inst. i. 6. 25; Russel *v.* Paterson, 1629, Mor. 5955; Hay *v.* Corstorphin, 1663, Mor. 5956; Churnside *v.* Currie, 1789, Mor. 6082; Orme *v.* Diffors, 1833, 12 S. 149; Gray *v.* Wylie, 1840, 2 D. 1205; Ritchie *v.* Barclay, 1845, 7 D. 819.

[10] Gilfillan *v.* Monkhouse, 1824, 3 S. 24 (N. E. 16).

[11] M'Kenzie *v.* Ewing, 1830, 9 S. 31; affd. 6 W. & S. 566.

herself, and her husband refused his consent to pursue. The *ratio* of this judgment was that as the woman kept boarders to support herself, her income did not fall within the *jus mariti*, nor would the damages, if awarded. Later, it was held that a claim for damages in respect of wrongous imprisonment sustained by a married woman while her husband was alive fell under her husband's *jus mariti* and that she could not sue after his death, her husband's representatives being the proper pursuers.[1] This judgment was canvassed in an action[2] raised by a widow in similar circumstances, the only difference being that whereas the former case was one of damages for wrongous imprisonment, the latter case was for damages for slander. But the difference was sufficient to enable the Judges to come to a different conclusion, and it was laid down that a married woman could raise an action in order to clear her character without her husband's concurrence, and this judgment was accepted as authoritative in a subsequent case.[3] In a more recent case,[4] where there was a universal renunciation by the husband of his *jus mariti* and right of administration, and an action was raised at the instance of his wife for damages for personal injury with the concurrence of the husband who became bankrupt *pendente processu* and his trustee refused to sist himself, and he and the husband assigned all their claims to the wife, she was allowed to proceed with her husband as administrator-in-law. From these cases it may be concluded that a married woman could raise an action to clear her character without the concurrence of her husband, but that this privilege did not extend to other personal actions.

In actions against a married woman in respect of delict or *quasi*-delict, it seems to have been the law from an early date that a husband was not liable in damages for his wife's delict[5] or *quasi*-delict.[6] In a couple of old cases[7] on the question of delict it was held that the husband should be called as a defender as well as his wife, and this seems to have been the practice with regard to actions founded on *quasi*-delict.[8] The husband in such cases was sued for his interest, and where this was done it was held to be unnecessary for him to be called

[1] Milne *v.* Gauld's Trs., 1841, 3 D. 345.
[2] Smith *v.* Stoddart, 1850, 12 D. 1185.
[3] Gale *v.* Bennett, 1857, 19 D. 665.
[4] Horn *v.* Sanderson and Muirhead, 1872, 10 M. 295.
[5] Murray *v.* Graham, 1724, Mor. 6079.
[6] Martin *v.* Murray, 1803, Hume's Dec. 619; Barr *v.* Neilsons, 1868, 6 M. 651; Mullen *v.* White, 1881, 18 S. L. R. 493; Milne *v.* Smiths, 1892, 20 R. 95.
[7] Spence *v.* Thomson, 1739, Mor. 6080; Freebairn *v.* Grant, 1749, Mor. 6080.
[8] Martin *v.* Murray, 1803, Hume's Dec. 619.

as his wife's administrator.[1] He must also have been duly cited for his interest by a regular citation and not edictally.[2]

It was no objection to the title of a woman to pursue that there was an action of declarator of marriage pending against her[3] or at her instance.[4]

In an action at the instance of a married woman and her husband for his interest she was allowed, on his bankruptcy, to insist with a curator *ad litem*.[5]

It is still a question whether a married woman who is a trustee can sue *qua* trustee without her husband's consent. In the only reported case[6] the Lord Ordinary—Lord Medwyn—inclined to the opinion that the husband must concur for his interest. It has been decided, however, that an executrix may so sue.[7] It is also a question whether a married woman pursuer with a curator *ad litem* can abandon without his concurrence.[8]

A husband could sue alone in respect of any property acquired through his wife and falling under his *jus mariti*,[9] but where the property did not so fall a husband could not sue as curator for his wife without her consent.[10]

Where a married woman raised an action with her husband's concurrence, or was defender in an action in which her husband was called for his interest in respect of property excluded from the *jus mariti*, and her husband died *pendente processu*, it was unnecessary to have the representatives of the husband sisted in his place.[11]

A married woman might raise an action in her own name with regard to any property which she possessed exclusive of the *jus mariti* and right of administration of her husband, secured to her by antenuptial contract or succession from a third party, but in such cases it was the practice for the Court to appoint a curator *ad litem* at the beginning of the process.[12]

[1] Clark *v.* M'Ilwhannel, 23rd June 1829, 1 Jur. 302.
[2] Ferrier *v.* Rose, 9th March 1833, 5 Jur. 338.
[3] Brown *v.* Brown, 1830, 4 W. & S. 28.
[4] Hogg *v.* Landles, 1845, 7 D. 594.
[5] Willox *v.* Farrell, 1849, 11 D. 1206.
[6] Laird *v.* Miln, 1833, 12 S. 54.
[7] Wilson *v.* Scott, 1908, 15 S. L. T. 948.
[8] Campbell *v.* Graham, 1843, 5 D. 497.
[9] Macdougal *v.* Wilson, 1858, 20 D. 658; Ferguson *v.* Jack's Exrs., 1877, 4 R. 393.
[10] Wedderburn's Trs. *v.* Colville, 1789, Mor. 10426; Aitkins *v.* Orr, 1802, Mor. 16140; Ferguson *v.* Cowan, 1819, Hume's Dec. 222; also reported in note, 20 D. 662.
[11] Slowey *v.* Robertson and Moir, 1865, 4 M. 1; Murray *v.* Philp, 1843, 6 D. 159.
[12] Waddell *v.* Waddell, 1837, 16 S. 79; Primrose, Petr., 1850, 12 D. 917; Standard

The same general considerations applied to a married woman defending an action as to her suing. If her husband should have been called and is not, a decree against a married woman is a decree in absence. If, however, the decree is of absolvitor, the decree is quite valid.[1]

(ii.) *Since the Conjugal Rights (Scotland) Amendment Act*, 1861.—We have already seen that, prior to the year 1861, a wife's personal property and the rents of her heritable property vested in her husband absolutely unless excluded by antenuptial settlement or by succession from a third party. In that year, however, Parliament interposed, and passed an Act which proved to be the precursor of several Acts limiting the *jus mariti* and right of administration of a husband. By the Conjugal Rights (Scotland) Amendment Act, 1861,[2] a deserted wife was empowered to apply to the Court for an order of protection of property which she had acquired or might acquire by her own industry, or which she had succeeded to or might succeed to, or acquire, after such desertion, and the order of protection, if granted, operated as a separation *a mensa et thoro*. It was further enacted that after a separation *a mensa et thoro* obtained at the instance of a wife all property she might acquire or which might devolve upon her was to be held as property exclusive of the *jus mariti* and right of administration of her husband, and she was capable of suing and being sued as if she were not married.[3] Accordingly, in regard to property falling under such a protection order she could sue and be sued alone.[4] The Act also provided that where a married woman succeeded to property or acquired right to it by donation, bequest, or any other means than by the exercise of her own industry, her husband or his creditors could not claim the same as under the *jus mariti* and right of administration without making a reasonable provision for the wife's support and maintenance.[5]

This Act was succeeded by the Married Women's Property (Scotland) Act, 1877,[6] which excluded the *jus mariti* and right of administration of a husband from the wages and earnings of any married woman acquired in any employment or in any business carried on in her own name, and from any money or property acquired by her through the

Property Investment Co. *v.* Cowe, 1877, 4 R. 695, per Lord Gifford, pp. 703, 704; Biggart *v.* City of Glasgow Bank, 1879, 6 R. 470, per Lord President Inglis, p. 481; Smith *v.* Davidson, 1900, 8 S. L. T. 354.

[1] Fraser, Husband and Wife, i. 582, 583.

[2] 24 & 25 Vict. cap. 86.

[3] Ibid., secs. 4, 5, 6.

[4] Skinner *v.* Anderson's Trs., 1870, 7 S. L. R. 397.

[5] Jack *v.* Ferguson, 1878, 5 R. 624; Reid *v.* M'Walter, 1878, 5 R. 630; Conjugal Rights (Scotland) Amendment Act, 1861, sec. 16.

[6] 40 & 41 Vict. cap. 29.

exercise of any literary, artistic, or scientific skill after the commencement of that Act.[1]

In 1881 another Act was passed[2] which provided, with regard to a marriage contracted after the passing of the Act, that the whole moveable or personal estate of the wife, whether acquired before or during the marriage, should by operation of law be vested in the wife as her separate estate, exclusive of *jus mariti*. The income of such estate was directed to be payable to the wife on her individual receipt or to her order, and to this extent the husband's right of administration was excluded; but the wife was not entitled to assign the prospective income thereof, or, unless with the husband's consent, to dispose of such estate.[3] The rents of heritable estate belonging to the wife were no longer to be subject to the *jus mariti* and right of administration of the husband. With regard to marriages contracted before the passing of the Act, if the husband has by irrevocable deed or deeds made a reasonable provision for his wife the Act does not apply.

In other cases the Act does not apply, except that the *jus mariti* and right of administration is excluded from all estate, moveable or heritable, and income thereof to which the wife may acquire right after the passing of the Act to the same extent as is provided for in marriages contracted after the passing of the Act. Where heritable estate is vested in the wife prior to the passing of the Act, the *jus mariti* and right of administration is not excluded.[4]

(d) *Persona Standi in Judicio at the Present Time.*—From the foregoing investigation the following conclusions may be arrived at regarding the *persona standi in judicio* of a married woman at the present time:—

(i.) *If married after the passing of the Married Women's Property (Scotland) Act*, 1881, she can sue and be sued alone regarding (*a*) the income of her separate moveable estate acquired before or during marriage, so long as it does not involve a question regarding its assignation; and (*b*) the rents and produce of her separate heritable estate. She cannot, however, sue or be sued without the concurrence of her husband regarding (*a*) her separate heritable estate; or (*b*) her separate moveable estate acquired as aforementioned.

[1] Ferguson's Tr. *v.* Willis, Nelson & Co., 1883, 11 R. 261; Morrison *v.* Tawse's Exrx., 1888, 16 R. 247; M'Ginty *v.* M'Alpine, 1892, 19 R. 935; Dryden *v.* M'Gibbon, 1907, S. C. 1131.

[2] Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. cap. 21).

[3] Miller *v.* Galbraith's Trs., 1886, 13 R. 764; Dick *v.* General Life Assurance Co., 1900, 7 S. L. T. 446.

[4] Scott's Tr. *v.* Scotts, 1889, 16 R. 507.

(ii.) *If married before the passing of the last-mentioned Act*, the same considerations apply as in No. (i.), but only with regard to property acquired after the passing of the Act, where, prior to its passing, the husband has not made a reasonable provision for his wife by irrevocable deed or deeds. If such a provision has been made, these considerations do not apply.

(iii.) In addition to the above instances, a married woman may sue and be sued alone—

(1) With regard to property excluded from *jus mariti* and right of administration of her husband by antenuptial contract or by succession from a third party.

(2) Where her husband refuses to concur, is an outlaw, is insane, is abroad and cannot be communicated with, or where he has an adverse interest, as in consistorial causes.

(3) If she has obtained a protection order.

(4) With regard to her wages and earnings acquired in any employment, or in any business carried on in her own name, and with regard to any money and property acquired through the exercise of any literary, artistic, or scientific skill.

(iv.) She may also sue alone in actions of damages for slander, but in actions against her in respect of her delict or *quasi*-delict the husband should still be called. The only manner in which such last-mentioned damages can be recovered is from her separate estate—her husband not being liable therefor—and as the right of administration of both her heritable and moveable estate has not been withdrawn from her husband by the Married Women's Property Act, the necessity for calling the husband as a defender still exists.

As a general rule, a curator *ad litem* is still appointed to a married woman who sues or is sued alone, but in a case [1] where a married woman sued an action of damages for personal injury in the year 1894, and whose antenuptial contract of marriage excluded the *jus mariti* and right of administration of her husband, who refused to concur, she was allowed to proceed with the action alone without a curator *ad litem*.

The concurrence of a husband does not *per se* render him liable in expenses if his wife is unsuccessful.[2] If, however, he promotes the litigation or takes a leading part, he is liable conjunctly and severally with his wife.[3] Where a husband is called for his interest, this will not

[1] Smith *v.* Turnbull, 1894, 2 S. L. T. 354.

[2] Picken *v.* Caledonian Rly. Co., 1901, 4 F. 39; Kerr *v.* Malcolm, 1906, 14 S. L. T. 358.

[3] Scott *v.* Maxwell, 1851, 13 D. 503; Lindsay *v.* Kerr, 1891, 28 S. L. R. 267;

subject him in expenses if his wife is unsuccessful, except he lodges defences and causes additional trouble and expense.[1]

Where a woman marries *pendente processu*, intimation of the dependence of the action should be made to the husband in order that he may sist himself if he chooses.[2]

Macgown *v.* Cramb, 1898, 25 R. 634 ; Maxwell *v.* Young, 1901, 3 F. 638 ; Schmidt *v.* Caledonian Rly. Co., 1903, 5 F. 648.

[1] Baillie *v.* Chalmers, 1791, 3 Paton's App. 213 ; Herriot *v.* Jacobsen, 1909, S. C. 1228.

[2] Herriot *v.* Jacobsen, 1909, S. C. 1228.

CHAPTER III

CURATOR AD LITEM

A CURATOR *ad litem* is an officer appointed by the Court to an action in which a pupil, a minor, or other person under legal disability is either a pursuer or defender, in order that the Court may be satisfied that the case is properly conducted. If a pupil or minor is called and does not appear in an action, the pursuer has no right to compel his appearance by moving for the appointment of a curator *ad litem*.[1] A curator *ad litem* is only appointed for a particular case,[2] and is never appointed until the action is in Court.[3] He must exercise his judgment independently of the Court which appoints him.[4] A curator *ad litem* to a pupil has complete control of the conduct of the case, and can compromise it.[5] He is thus *verus dominus litis*.[6] A curator *ad litem* to a minor, however, cannot compromise an action if his ward is capable of concurring and refuses to do so.[7] He is thus not *dominus litis*, and accordingly cannot continue an action against the wish of his ward.[8]

The foregoing was written prior to the case of *Macdonald's Tr.* v. *Medhurst*,[9] in which doubts arose as to the practice of appointing curators *ad litem* to persons under incapacity. In that case Lord Johnston, on the invitation of Lord President Strathclyde, laid before the Court a statement which showed that in his opinion there was something not merely anomalous but radically inconsistent in our law and practice in this matter, and submitted the propriety of having the question practically reconsidered when occasion occurs.

[1] Sinclair *v.* Stark, 1828, 6 S. 336; Earl of Craven *v.* Lord Elibank's Trs., 1854, 16 D. 811, per Lord Justice-Clerk Hope, p. 818; Swan, Petr., 1866, 1 S. L. R. 100; Mackenzie's Tr. *v.* Mackenzie, 1908, S. C. 995.

[2] Baird and Others, Petrs., 1741, Mor. 16346; Youngs, Petrs., 1828, 7 S. 220.

[3] Pyper, Supplicant, 1711, Mor. 16330; Johnston *v.* Johnston, 1740, Mor. 16346; Sinclair *v.* Stark, 1828, 6 S. 336; Youngs, Petrs., 1828, 7 S. 220; Calderhead's Trs. *v.* Fyfe, 1832, 10 S. 582; Ferguson's Trs. *v.* Hamilton, 1861, 23 D. 1290; Hamilton Petr., 1861, 24 D. 31.

[4] Dewar *v.* Dewar's Trs., 1906, 14 S. L. T. 238. See also Hepburn's Tutor, 1866, 4 M. 1089.

[5] Dewar *v.* Dewar's Trs., 1906, 14 S. L. T. 238.

[6] M'Cuaig *v.* M'Cuaig, 1909, S. C. 355, per Lord President Dunedin, p. 357.

[7] Stephenson *v.* Lorimer, 1844, 6 D. 377.

[8] Graham *v.* Graham, 1843, 5 D. 497.

[9] 1915, S. C. 879.

Where a pupil or a minor recovers from the opposite party a sum of money in name of damages or otherwise, the curator *ad litem* cannot grant good and sufficient discharges of these sums to the unsuccessful litigants. In the case of a pupil a factor *loco tutoris* will require to be appointed for that purpose.[1] In the case of a minor the Court has adopted different methods. In one case[2] the First Division, following an unreported precedent, insisted upon a formal application for the appointment of a *curator bonis*. In a later case[3] the Second Division directed the sum recovered to be paid to a person named by the Court to be held in trust, and the interest applied for behoof of the minor until she attained the age of twenty-one years; and this method was adopted in a case in the Outer House.[4] In a still later case[5] the First Division, in respect that the sum was a small one and was to be spent in maintenance, directed the sum to be paid directly to the minors.

A curator *ad litem* cannot be made personally responsible for the expenses of any litigation in which he has been unsuccessful.[6] His right to expenses is construed as favourably as is consistent with the rights of those with whom he has been litigating, and while not entitled in every case where he is unsuccessful to get his expenses, he is in a more favourable position than the ordinary litigant.[7] Where he has been appointed to children who have conflicting interests to their father, the expenses of the curator *ad litem* have been ordered to be paid by the father, or out of the estate, in order to enable the litigation to proceed.[8] Where appointed to minor beneficiaries in actions regarding trust matters, it is a general rule that he is entitled to his expenses out of the trust funds, even if unsuccessful.[9] The Court will always make an endeavour to secure his expenses out of any available fund if at all possible.[10]

The term tutor *ad litem* is sometimes used to denote an officer of Court appointed to a person under age in an action. It is so used in

[1] Pratt *v.* Knox, 1855, 17 D. 1006; Collins *v.* Eglinton Iron Co., 1882, 9 R. 500; Connolly *v.* Bent Colliery Co., 1897, 24 R. 1172.

[2] Anderson *v.* Muirhead, 1884, 11 R. 870.

[3] Sharp *v.* Pathhead Spinning Co., 1885, 12 R. 574.

[4] Spring *v.* Blackall, 1901, 9 S. L. T. 162.

[5] Jack *v.* North British Rly. Co., 1886, 14 R. 263.

[6] Fraser *v.* Pattie, 1847, 9 D. 903; White *v.* Steel, 1894, 21 R. 649.

[7] Dunlop *v.* Brown and Others, 1903, 11 S. L. T. 522.

[8] Studd *v.* Cook, 1883, 10 R. (H. L.) 53; 8 A. C. 577; Crum Ewing's Trs. *v.* Bayly's Trs., 1910, S. C. 994. See also Cathcart *v.* Cathcart's Trs., 1906, 13 S. L. T. 909; Walker *v.* Whitwell, 1914, S. C. 560.

[9] Smith *v.* Smith's Tr., 1900, 8 S. L. T. 226; Dunlop *v.* Brown and Others, 1903, 11 S. L. T. 522.

[10] Rooney *v.* Cormack, 1895, 23 R. 11; Walker *v.* Walker, 1903, 5 F. 320.

the Entail Amendment Act, 1848, sec. 31, in respect of an heir of entail under age whose consent is required, where the petitioner is father of such heir.[1] Such a designation does not seem appropriate, as the term tutor is purely personal, whereas the appointment is to the *lis*. It is thought, therefore, that the proper designation should be curator *ad litem*. Such an appointment is not made until after intimation and service of the petition,[2] although in an exceptional case[3] an appointment was made before intimation. The curator is entitled to recover from the petitioner the expenses of his appointment and any other expenses properly incurred by him in the discharge of his duty.[4] Moreover, in every case a curator *ad litem* is entitled to receive professional remuneration for examining and superintending the proceedings in a cause, even though no separate appearance is made by him.[5]

Where a curator *ad litem* to a wife and the wife herself appeared by counsel in a case at her instance against her husband, the expenses of the curator were allowed, but her expenses were disallowed.[6]

Where a married woman, after granting a mandate to raise an action at her instance, with the consent of her husband, became insane before the action was actually raised, the Court held that a curator *ad litem* was unnecessary to be appointed to her.[7]

[1] A. S., 23rd December 1848, sec. 4; C. A. S., C, v. 1 (*d*). See also Kerr *v.* Marquis of Ailsa, 1854, 1 Macq. 736, at p. 740.
[2] Inglis, Petr., 1855, 17 D. 1005.
[3] Stewart, Petr., 1857, 19 D. 430, reported in Duncan's Entail Procedure, p. 212.
[4] Johnstone, Petr., 1884, 12 R. 468.
[5] Rennie, Petr., 1849, 11 D. 1201; Collie *v.* Collie and Others, 1851, 13 D. 841.
[6] M'Farlane *v.* M'Farlane, 1847, 9 D. 793.
[7] Hutchison *v.* Dougall's Trs., 1912, 2 S. L. T. 516.

CHAPTER IV

TITLE AND INTEREST IN GENERAL

(1) General Rule.—It is a general rule that before being allowed to enter upon the merits of his case, a pursuer, if called upon by the defender, must satisfy the Court that he is not only the proper person to pursue the particular action, but also that he has a real interest, either as an individual or in a representative capacity, in its result.[1] An exception to this rule exists in the case of pupils and minors where kinsmen are allowed to sue actions of suspect tutory, or insist on reduction of deeds granted by a minor to his hurt and ratified by his oath.[2] In an early case,[3] it would seem as if a title without interest had been sustained, but on examination of the circumstances it is clear that the complainers had an undoubted interest, although not a pecuniary one, to have the irregularity redressed.

(2) Procedure.—The pursuer's title must be correctly set forth in the record, otherwise the action will be dismissed.[4] Formerly it was necessary to set forth the title in the summons.[5] In a case,[6] however, raised in terms of the Court of Session Act of 1850, where the title to sue was correctly set forth in the condescendence, but not in the summons, an amendment of the latter was allowed, and Lord Justice-Clerk Inglis, in giving judgment, observed: "It may be doubted whether there was any need for this minute of amendment. It is not absolutely necessary that the pursuer's title should be set forth in the commencement of the summons. Under the old practice, and especially in reductions, the setting forth of the pursuer's title in the formal writ was a matter requiring strict accuracy, but I know of no rule under which it is now necessary to set forth the pursuer's title in

[1] Paterson *v.* Marquis of Ailsa, 1846, 8 D. 752.

[2] Erskine's Inst. iv. 1. 17 ; Stair, i. 6. 26.

[3] Bryson *v.* Burnet, 18th December 1813, F. C.

[4] Pollock *v.* Mather, 1829, 7 S. 675 ; Mackintosh *v.* Mackintosh, 1835, 13 S. 884 ; Hutchison *v.* Ferrier, 1846, 8 D. 1228 ; Young *v.* Tennant & Co., 1860, 22 D. 1415 ; Levett *v.* London and North-Western Rly. Co., 1866, 38 Jur. 563 ; Traill *v.* Traill, 1873, 1 R. 61.

[5] Shand's Practice, p. 217; M'Indoe *v.* Lyon, 1826, 5 S. 92 (N. E. 85) ; Gillies *v.* Hunter, 1831, 9 S. 257.

[6] Anderson *v.* Duncan, 1861, 23 D. 258.

the formal writ." In any event, should it be necessary to make any addition to or alteration of the instance, this can now be done in virtue of Act of Sederunt, 20th March 1907 (C. A. S., B, i.).

If at the date of raising an action the pursuer has no title to sue, the defect cannot be cured by a subsequent assignation.[1] Should, however, the pursuer have a right which is not completed until after the raising of the action, as where he only completes his title by infeftment after the action is brought,[2] or where he has previously paid money to a person who was *in titulo* to sue, but whose assignation was only given *pendente processu*,[3] the title will be good. Where the pursuer has a right and interest of his own, but so qualified by or dependent on some *jus tertii*, or some limitation or condition that prevents him from suing separately, his defect may be cured by the consent and concurrence of the person required to complete his title; but a person who has no right or title whatever cannot sue an action although he obtains the consent and concurrence of the party to whom alone such a right or title belongs.[4] It has been held that a bye-law prohibiting members of a police force from raising actions of damages against members of the public or the police establishment without the chief constable's consent cannot prevent a constable from suing, although it may be a good ground for dismissal that he sued without such consent.[5]

An executor must complete his title, otherwise he has no title to sue.[6] (See *Executors*, p. 204 *et seq.*)

Where a party libels upon letters of administration to a deceased person as his title to sue, the Court will supersede procedure until the title is produced.[7] If the title is a written document which has been lost, destroyed, etc., a proving of the tenor must be brought.[8]

An assignation of a claim in security to the extent of a debt does not bar the cedent from recovery where the assignee is notified and does not object.[9]

A bounding charter without a clause of part and pertinents will

[1] Symington *v.* Campbell, 1894, 21 R. 434.

[2] Welsh *v.* Rose, 1857, 19 D. 404; Cranston & Elliot, Ltd. *v.* Dobson, 1899, 2 F. 271. See also Donald *v.* Nicol, 1866, 5 M. 146.

[3] The Doughty Shipping Co., Ltd. *v.* North British Rly. Co., 1909, 1 S. L. T. 267.

[4] Hislop *v.* MacRitchie's Trs., 1881, 8 R. (H. L.) 95; Yzquierdo y Castaneda *v.* Clydebank Engineering and Shipbuilding Co., Ltd., 1901, 4 F. 319; revd. 4 F. (H. L.) 31; M'Douall *v.* Irvine, 1908, S. C. 60.

[5] A. *v.* B., 1907, S. C. 1154.

[6] Park's Creditors *v.* Maxwell, 1785, Mor. 14382; Arbuthnot *v.* Cockburn, 1789, Mor. 14383; Malcolm *v.* Dick, 1866, 5 M. 18; Mackay *v.* Mackay, 1914, S. C. 200.

[7] Horne and Rose *v.* Ram, 1848, 11 D. 141.

[8] Shaw *v.* Shaw's Trs., 1876, 3 R. 813.

[9] Robertson & Co. *v.* Exley & Co., 1832, 11 S. 91.

not exclude a party from having a title to sue a declarator of servitude over adjoining lands in respect of alleged prescriptive possession.[1]

A pursuer can sue under an assumed name, although he has no Royal or judicial authority to do so.[2]

Even where a defender has no title, a pursuer who raises an action and does not qualify a title, either by express grant or by prescription, has no title to sue.[3]

Any objection to the pursuer's title must be set forth before the record is closed, and a preliminary plea of "no title to sue" must be added, and the latter can only be held to apply to the objections specified in the record, and cannot embrace objections the knowledge of which has admittedly emerged only after the record has been closed.[4] Where a record was made up without a plea of "no title to sue" being stated and a proof was allowed of consent to each party and taken, the Court held that by going to proof the defenders had waived the objection, and that it was also incompetent for them to plead the objection in respect that they had stated no plea against the pursuer's title.[5]

The plea of "no title" to sue is a preliminary plea, and when upheld generally results in the dismissal of the action; but when the plea is so bound up with the merits that the latter require to be inquired into before the plea can be upheld, the result is a decree not of dismissal but of absolvitor.[6]

Where a preliminary defence of "no title to sue" in a reduction was reserved, it was held that, notwithstanding the satisfying of the production and pleading on the merits, the plea was not foreclosed.[7]

A principal's right to pursue cannot be questioned by the agent who has derived his right to act from him.[8]

Where there is a common author, the defender cannot challenge the pursuer's title.[9]

Where there is a preliminary objection to the pursuer's title the plea is either that the pursuer has no title or interest to sue or that the defender has a title to exclude. The latter, which imports that the defender has a preferable title, is most common in reductions.[10]

[1] Beaumont *v.* Lord Glenlyon, 1843, 5 D. 1337.
[2] Kinloch *v.* Lourie, 1853, 16 D. 197.
[3] Ogston *v.* Stewart's Trs., 1893, 21 R. 282.
[4] North British Rly. Co. *v.* Brown, Gordon & Co., 1857, 19 D. 840.
[5] Lade *v.* Largs Baking Co., 1863, 2 M. 17.
[6] Baird & Co. *v.* Feuars of Kilsyth, 1878, 6 R. 116.
[7] Lord Advocate *v.* Lord Dunglas, 1836, 15 S. 314.
[8] Arbouin *v.* Sime, 1824, 3 S. 184 (N. E. 125).
[9] Livingston *v.* Warrock, 1768, Mor. 7847; affd. 1773, 6 Paton's App. 790.
[10] Robertson *v.* Duke of Atholl, 1815, 6 Paton's App. 116; Robertson *v.* Megget,

A contractor has a title to sue upon his contract if he has fulfilled it substantially although he has not implemented it to the letter *modo et forma*.[1]

(3) TITLE WITHOUT INTEREST.—Provided there is a title, the interest need not be pecuniary [2] nor need it be large.[3] As Lord Justice-Clerk Inglis said [4] in an action of declarator regarding a march fence: "When two gentlemen, such as the parties before us, finding no better or more agreeable way of disposing of their superfluous wealth, conspire to lay before the Court a difficult and intricate question of law and fact, in which they have some, though but a very small, interest, we may regret it as leading to a great waste of judicial time, but it is our duty to dispose of the question by judgment. We are not indeed bound to adjudicate *de lana caprina;* but if there be a pecuniary or patrimonial interest, however small, depending on the determination of the question, the parties have a right to invoke the aid of a Court of law to decide their difference." Accordingly, there are not many cases where the pursuer has a title but where the case has been dismissed from want of interest. There are, however, such cases, as where a co-feuar fails to establish his interest to enforce a real burden;[5] where the pursuer, even if successful, can recover nothing;[6] and where the maxim *frustra petis quod mox es restituturus* applies.[7] The interest may be too remote.[8]

(4) INTEREST AND NO TITLE.—The most commonly cited examples of cases in which the pursuer has an interest and no title are actions raised by beneficiaries against debtors to the trust estate, or by creditors against debtors to the sequestrated estate. It is thought, however, that even these examples fall more appropriately under the succeeding head (*q.v.*)

See also *Beneficiaries, infra,* p. 207; *Creditors,* Chap. v. (25) 4, *infra.*

1822, 1 S. 364 (N. E. 342); Bellenden *v.* Earl of Winchelsea, 1825, 3 S. 530 (N. E. 367).

[1] Forrest *v.* Scottish County Investment Co., 1915, S. C. 115.

[2] Mags. of Edinburgh *v.* Macfarlane, 1857, 20 D. 156; Earl of Zetland *v.* Hislop, 1882, 9 R. (H. L.) 40; Duncan *v.* Duncan, 1892, 20 R. 200.

[3] Browne *v.* Orr and Others, 1872, 10 M. 397, per Lord Deas, p. 398.

[4] Strang *v.* Steuart, 1864, 2 M. 1015, at p. 1029.

[5] Mactaggart & Co. *v.* Roemmele, 1907, S. C. 1318; Maguire *v.* Burges, 1909, S. C. 1283.

[6] Smith *v.* Shields, 1830, 8 S. 553.

[7] Steele *v.* Young, 1823, 2 S. 146 (N. E. 134); Burke and Carmichael *v.* Mackay, 1865, 3 M. 799; Ker's Trs. *v.* Justice, 1866, 5 M. 4; Liquidators of City of Glasgow Bank *v.* Mackinnon, 1881, 9 R. 535, per Lord President Inglis, p. 586.

[8] School Boards of Dunlop and Stewarton *v.* Patrons of Cunninghame Graham Bursaries, etc., 1910, S. C. 945.

(5) No Title in Respect that there is no Interest which the Law Recognises.—A person has no title to sue in respect of a wrong done to another;[1] nor in respect that he was prevented from doing a thing which it was ultimately found he had no right to do;[2] nor for eviction from premises regarding which there was no averment of a title to possess;[3] nor has a person a title to sue for damages for being prevented from carrying out a personal agreement which the law cannot enforce.[4]

A right to sue for damages does not pass with the property.[5] Accordingly, it has been held that the purchaser of a ship has no claim of damages for an injury to the ship sustained before its purchase;[6] and a conveyance of shares in a company does not carry with it a claim of damages for depreciation of their value.[7] The same holds good in heritable subjects; and the fact that a bondholder was in possession under an *ex facie* irredeemable title at the time of the injury to the property does not prevent the owner, when reinvested, from having a title to sue in respect of such injury.[8] Again, a superior who had entered into possession of his vassal's land on a decree of irritancy was held to have no title to sue for compensation from a railway company for injury done to the land while the vassal was in possession.[9]

A superior has no title to pursue an action of maills and duties for recovery of a feu-duty;[10] nor can he sue a reduction of a decree of adjudication of his own vassal's right;[11] nor, where he has divested himself of his superiority in favour of a third party, has he a title to sue an action of poinding of the ground for recovery of arrears of feu-duties due prior to his divestiture.[12]

A person has no title to sue for declarator and implement of a

[1] M'Lachlan *v.* Bell, 1895, 23 R. 126; Kilwinning Parish Council *v.* Board of Management of Cunninghame Combination Poorhouse, 1909, S. C. 829, per Lord President Dunedin, p. 837.

[2] Jack *v.* Begg, 1875, 3 R. 35.

[3] Macdonald *v.* Chisholm, 1860, 22 D. 1075; Macdonald *v.* Watson, 1883, 10 R. 1079.

[4] Murdison *v.* Scottish Football Union, 1896, 23 R. 449, per Lord Kinnear, pp. 466, 467.

[5] Burrell *v.* Simpson & Co., 1876, 4 R. 177, per Lord President Inglis, p. 180; Simpson & Co. *v.* Thomson, 1877, 5 R. (H. L.) 40; Dawson *v.* Great Northern and City Rly. Co., [1904] 1 K. B. 277, at p. 282.

[6] Symington *v.* Campbell, 1894, 21 R. 434.

[7] Gordon *v.* Davidson, 1864, 2 M. 758; *cp.* Carron Co. *v.* Hunter, 1868, 6 M. (H. L.) 106.

[8] M'Bride *v.* Caledonian Rly. Co., 1894, 21 R. 620.

[9] Caledonian Rly. Co. *v.* Watt, 1875, 2 R. 917.

[10] Prudential Assurance Co. *v.* Cheyne, 1884, 11 R. 871.

[11] Monteith *v.* Ingels, 1869, 7 M. 523.

[12] Scottish Heritages Co. *v.* North British Property Investment Co., 1885, 12 R. 550.

contract or a reduction of a contract, or for loss suffered through the breach of a contract to which he was not a party notwithstanding his interest therein.[1] (See also *Jus Quæsitum Tertio, infra,* p. 194 *et seq.*)

A person who is not a law agent or a member of any law agents' society has no title to sue for the removal of the name of a law agent from the roll,[2] though a legal body has such a title with respect to one of its members.[3]

An unsuccessful candidate for a bursary has no title to sue a declarator that he was elected owing to the elected candidate being ineligible, although he may have a good action for damages *ex delicto,* if relevantly averred.[4]

A claim of damages for *solatium* and pecuniary loss can only be maintained by a wife for the death of her husband, a husband for the death of his wife, a parent for the death of his child, and a child for the death of its parent, when the death has been caused by delict or *culpa.* Accordingly, a claim by collaterals or by anyone except the above mentioned for damages or *solatium* for the death of a person cannot be maintained.[5]

A father who does not appear as administrator for his son has no title to suspend a poinding and diligence of his son's goods.[6]

Where a prior deed has to be reduced before the pursuer has an interest, he has no title to sue.[7]

Where the title of two parties is derived from a common author, neither party has a title to object to the other's right.[8]

A pursuer has no title to pursue the reduction of a will, the effect

[1] Finnie *v.* Glasgow and South-Western Rly. Co., 1853, 15 D. 523; 1857, 3 Macq. 75, per Lord Chancellor Cranworth, p. 88; Fleming *v.* Robertson, 1859, 21 D. 982; 1861, 4 Macq. 167; Blumer & Co. *v.* Scott & Sons, 1874, 1 R. 379; Downie *v.* Mags. of Annan, 1879, 6 R. 457; Tully *v.* Ingram, 1891, 19 R. 65; Campbell *v.* Morrison, 1891, 19 R. 282; Edinburgh United Breweries, Ltd. *v.* Molleson, 1894, 21 R. (H. L.) 10; Burr *v.* Commissioners of Bo'ness, 1896, 24 R. 148; Ransohoff and Wissler *v.* Burrell, 1897, 25 R. 284.

[2] A. B. *v.* C. D., 1899, 2 F. 67.

[3] Procurators of Glasgow *v.* Colquhoun, 1900, 2 F. 1192.

[4] Ramsay *v.* United Colleges of St. Andrews, 1860, 22 D. 1328; 1861, 23 D. (H. L.) 8; Martins *v.* Macdougall's Trs., 1885, 13 R. 274; M'Donald *v.* M'Coll, 1890, 17 R. 951.

[5] Eisten *v.* North British Rly. Co., 1870, 8 M. 980, per Lord President Inglis, pp. 984, 985. See also Greenhorn *v.* Addie, 1855, 17 D. 860.

[6] M'Laren *v.* Ramsay, 1834, 12 S. 515.

[7] Robertson *v.* Megget, 1822, 1 S. 364 (N. E. 342); Bellenden *v.* Earl of Winchelsea, 1825, 3 S. 530 (N. E. 367); Earl of Strathmore *v.* Earl of Strathmore's Trs., 1830, 8 S. 530; Ker *v.* Ker's Trs., 1830, 8 S. 694.

[8] Livingston *v.* Warrock, 1773, 6 Paton's App. 790; Irving *v.* Irving, 1837, 15 S. 993.

of which would be to set up a prior will in which he was excluded, although he averred that if the later will were reduced he had an agreement with the beneficiaries of the same that he would get a share of the estate.[1]

A person who was a party to a cause to the extent only of giving his consent and concurrence has no title to present a reclaiming note against an interlocutor pronounced in the cause.[2]

A party has no title to pursue a proving of the tenor of a deed unless he can connect himself with the grantee.[3]

Although beneficiaries have a title to set aside a sale on the ground that the trustees were purchasers, an opposing bidder who was not a beneficiary had no such title.[4]

In the following cases the pursuer seems to have had no legal interest, and accordingly no title:—

Where a pursuer raised an action of reduction of a matriculation of arms, and did not aver that he himself had any right to them;[5]

Where a lady raised an action to find and declare that in virtue of a marriage contract a right to certain property vested in her children;[6]

Where hypothetical questions were asked by a pursuer who had not, and might never have, an interest;[7]

Where an action of declarator was raised that another person was not the heir of a person deceased;[8] and

Where a person conveyed all his interest in the subject of a contract to a third party.[9]

(6) Jus Quæsitum Tertio.—Although a person has no title to sue in respect of a contract to which he is not a party,[10] where there is a

[1] Swanson *v.* Manson, 1907, S. C. 426.

[2] Martin *v.* Lindsay, 1894, 21 R. 759.

[3] Alexander *v.* King's Advocate, 1830, 8 S. 634.

[4] Aberdein *v.* Stratton's Trs., 1867, 5 M. 726. See also Learmonth *v.* Paterson, 1858, 20 D. 564.

[5] Macdonell *v.* Macdonald, 1826, 4 S. 371 (N. E. 374).

[6] Baillie *v.* Seton, 1853, 16 D. 216, per Lord Justice-Clerk Hope, p. 224.

[7] Harveys *v.* Harvey's Trs., 1860, 22 D. 1310.

[8] Officers of State *v.* Alexander, 1866, 4 M. 741.

[9] Edinburgh United Breweries, Ltd. *v.* Molleson, 1894, 21 R. (H. L.) 10.

[10] Peddie *v.* Brown, 1857, 3 Macq. 65; Finnie *v.* Glasgow and South-Western Rly. Co., 1853, 15 D. 523; 1857, 3 Macq. 75, per Lord Chancellor Cranworth, p. 88; Fleming *v.* Robertson, 1859, 21 D. 982; 1861, 4 Macq. 167; Blumer & Co. *v.* Scott & Sons, 1874, 1 R. 379; Downie *v.* Mags. of Annan, 1879, 6 R. 457; Raes *v.* Meek, 1889, 16 R. (H. L.) 31; Tully *v.* Ingram, 1891, 19 R. 65; Campbell *v.* Morrison, 1891, 19 R. 282; Edinburgh United Breweries, Ltd. *v.* Molleson, 1894, 21 R. (H. L.) 10; Burr *v.* Commissioners of Bo'ness, 1896, 24 R. 148; Lennie's Trs. *v.* Johnstone, 1914, 1 S. L. T. 47.

contract containing a stipulation in favour of a third party, who is named or clearly indicated, and which has become irrevocable, the right as stated in the third party vests in him, and upon it he may found and sue. Thus, where in a marriage contract a husband provided his widow with an annuity, burdened with a small annuity to his stepmother, it was held that the stepmother had acquired a *jus quæsitum* which could not be defeated by the husband's will.[1] In the same way an antenuptial[2] or postnuptial[3] contract of marriage in which there is a destination in favour of the children of the marriage may confer a *jus quæsitum* in such children, entitling them to sue on the contract.

Again, where an association of underwriters before admitting a new member were in the practice of inquiring into his financial position, and in certain cases of requiring a guarantee for underwriting obligations to be contracted by him, it was held that a guarantee so granted conferred a *jus quæsitum* on any person subsequently assured by such underwriter;[4] and where police commissioners granted, quite legally, to the children of a constable a gratuity by a cheque which they countermanded, the children were held entitled to the gratuity.[5] In a case[6] where a person wrote to the provisional committee which was promoting a charitable society offering to help with money on certain conditions, and the conditions were complied with, it was held that the charitable society had acquired a *jus quæsitum*. A person who averred that a charitable donation intended for her had by mistake been sent to the defender was held to have a title to sue the latter for recovery of the donation.[7]

Perhaps the most common examples of *jus quæsitum tertio* are to be found in feu-contracts, where a feuar holding of a common superior may have a *jus quæsitum* to enforce the conditions in the feu-charters of co-feuars to which he is not a party. The cases in which it has been held that a co-feuar has an implied right to enforce a common condition appear "to fall under one or other of two categories, either (1) where the superior feus out his land in separate lots for the erection

[1] Warnoch *v.* Murdoch, 1759, Mor. 7730.

[2] M'Gowan *v.* Robb, 1862, 1 M. 141; Earl of Glasgow's Tr. *v.* Earl of Glasgow, 1872, 11 M. 218; Gillon's Trs. *v.* Gillon, 1890, 17 R. 435; Hughes *v.* Edwards, 1892, 19 R. (H. L.) 33; Macdonald *v.* Hall, 1893, 20 R. (H. L.) 88.

[3] Allan *v.* Kerr, 1869, 8 M. 34.

[4] Rose, Murison, and Thomson *v.* Wingate, Birrell & Co.'s Tr., 1889, 16 R. 1132.

[5] Campbell *v.* Glasgow Police Commissioners, 1895, 22 R. 621.

[6] Morton's Trs. *v.* The Aged Christian Friend Society of Scotland, 1899, 2 F. 82; *cp.* Drummond *v.* Farquhar, 6th July 1809, F. C.; Cambuslang West Church Committee *v.* Bryce, 1897, 25 R. 322.

[7] Costin *v.* Hume, 1914, S. C. 134.

of houses, in streets or squares, upon a uniform plan; or (2) where the superior feus out a considerable area with a view to its being sub-divided and built upon, without prescribing any definite plan, but imposing certain general restrictions which the feuar is taken bound to insert in all sub-feus or dispositions to be granted by him."[1] There is a difference in the right of a superior in such feu-charters and that of a co-feuar to enforce the conditions. In the case of the superior the feuar *primâ facie* concedes the interest,[2] whereas in the case of a feuar he must show that he has an interest to enforce the conditions upon his co-feuars before he is allowed to do so.[3]

The same right may be conferred on co-disponees as on co-feuars.[4]

A *jus quæsitum* may be given by a public statute, but in order to be able to sue, the pursuer or objector, as the case may be, must qualify an interest. Accordingly, where in a statute restrictions were imposed on the height of new buildings without the consent of the local authority, neighbouring proprietors who had an interest to object to the statutory height being exceeded were held to have a title to plead the contravention of the statutory restrictions.[5] Where they have no such interest they have no title.[6]

[1] Hislop *v.* MacRitchie's Trs., 1881, 8 R. (H. L.) 95, per Lord Watson, p. 103. See also Glasgow Jute Co. *v.* Carrick, 1869, 8 M. 93; M'Neill *v.* Mackenzie, 1870, 8 M. 520; M'Gibbon *v.* Rankin, 1871, 9 M. 423; Alexander *v.* Stobo, 1871, 9 M. 599; Robertson *v.* North British Rly. Co., 1874, 1 R. 1213; Beattie *v.* Ures, 1876, 3 R. 634; Ewing *v.* Hastie, 1878, 5 R. 439; Dalrymple *v.* Herdman, 1878, 5 R. 847; Stevenson *v.* Steel Co. of Scotland, 1896, 23 R. 1079, per Lord Kinnear, p. 1088; Johnston *v.* The Walker Trs., 1897, 24 R. 1061, per Lord Kyllachy (Ordinary), p. 1067; Nicholson *v.* Glasgow Asylum for the Blind, 1911, S. C. 391.

[2] Earl of Zetland *v.* Hislop, 1882, 9 R. (H. L.) 40.

[3] Hislop *v.* MacRitchie's Trs., 1881, 8 R. (H. L.) 95, per Lord Watson, p. 102; Mactaggart & Co. *v.* Roemmele, 1907, S. C. 1318; Maguire *v.* Burges, 1909, S. C. 1283.

[4] Braid Hills Hotel Co. *v.* Manuels, 1909, S. C. 120.

[5] Summerlee Iron Co., Ltd. *v.* Lindsay, 1907, S. C. 1161.

[6] Pitman *v.* Burnett's Trs., 1882, 9 R. 444; Scott's Trs. *v.* Shaw, 1892, 19 R. 895.

CHAPTER V

TITLE AND INTEREST IN PARTICULAR

(1) Lord Advocate.—(a) *Generally.*—The Lord Advocate is the proper person to sue and be sued on behalf of the Crown and the Public Departments of the State,[1] except in the case of the Admiralty,[2] provided that before instituting or defending any such action he shall have the authority of His Majesty or of the Public Department respectively on whose behalf, or against whom, such action shall be instituted, to the institution or defence thereof;[3] provided also that it is not competent to any private party in any action instituted as aforesaid to challenge or impugn the instance of or the title to defend such action, or the right or title of the Lord Advocate to raise and prosecute or to defend the same upon any allegation that such authority (as aforesaid) has not been granted, or that evidence of such authority is not produced[4] or averred.[5] A change in the person holding the office of Lord Advocate does not affect any action instituted by or against a Lord Advocate.[6]

The Lord Advocate may sue reductions of patents,[7] or prosecute for wilful falsehood in any oath emitted in connection with the Bankruptcy (Scotland) Act, 1913.[8] He may either sue or defend, on behalf of the public, actions regarding encroachments by private or public bodies upon the shores of the realm,[9] and with regard to peerages and grants of lands.[10] In raising such actions the Lord Advocate should set forth the particular interest of the Crown involved—whether a right of property or of some other kind.[11] He may sue an action of declarator

[1] 19 & 20 Vict. cap. 56, sec. 22; 20 & 21 Vict. cap. 44, sec. 1.
[2] 31 & 32 Vict. cap. 78, sec. 4.
[3] 20 & 21 Vict. cap. 44, sec. 2.
[4] Ibid., sec. 3.
[5] Commissioners of Woods and Forests *v.* Maitland, 1860, 23 D. 216.
[6] 20 & 21 Vict. cap. 44, sec. 5.
[7] The Patents and Designs Act, 1907 (7 Edw. VII. cap. 29), sec. 94 (3).
[8] Sec. 186.
[9] Officers of State *v.* Smith, 1846, 8 D. 711; affd. 1849, 6 Bell's App. 487; Cameron and Gunn *v.* Ainslie, 1848, 10 D. 446; Agnew *v.* Lord Advocate, 1873, 11 M. 309; Young *v.* North British Rly. Co., 1887, 14 R. (H. L.) 53.
[10] Alexander *v.* Officers of State, 1868, 6 M. (H. L.) 54, per Lord Westbury, p. 67.
[11] Lord Advocate *v.* Raynes, Lupton & Co., 1859, 21 D. 717.

of bastardy or *ultimus hæres*. In a multiplepoinding regarding the residue of a testator's estate left to his two natural children "equally betwixt them, share and share alike, and their heirs and assignees," not payable till marriage or majority, and one of them died, it was held that the Crown could not take as included under the conditional institution to "heirs."[1]

The Lord Advocate has a title to appear in actions of nullity of marriage and divorce;[2] and in cases where it is necessary to settle a scheme for the administration of any charitable or other permanent endowment, intimation must be made to the Lord Advocate, who may appear and intervene for the interests of the charity or any object of the trust or the public interest.[3]

The Lord Advocate may apply to the Court for the appointment of a judicial factor to a lunatic whose property is not duly protected.[4]

Where it appears in a process that the Crown has a *primâ facie* interest in the subjects in dispute, the Court should order intimation to be made to the Lord Advocate, and sist the action pending his decision to appear or bring a separate action.[5]

There is now no distinction between the Lord Advocate, acting for the Crown, and a subject in the matter of expenses.[6]

(b) *Concurrence of the Lord Advocate.*—There are certain causes involving penal consequences which cannot be pursued without the concurrence of the Lord Advocate. The best known are petitions and complaints at common law for breach of interdict,[7] and against inferior Judges or officials for malversation or irregularities, so far at least as the crave is for punishment[8] and not for a fine to be paid to the complainer personally,[9] or for damages and expenses.[10] Concourse of

[1] Torrie *v.* Munsie, 1832, 10 S. 597.

[2] Conjugal Rights (Scotland) Act, 1861 (24 & 25 Vict. cap. 86), sec. 8; Paul *v.* Paul, 1896, 4 S. L. T. 124, 171.

[3] The Trusts (Scotland) Act, 1867 (30 & 31 Vict. cap. 97), sec. 16.

[4] The Lunacy Act, 1857 (20 & 21 Vict. cap. 71), sec. 81.

[5] Earl of Breadalbane *v.* Menzies, 1735, 1 Paton's App. 146; Earl of Galloway *v.* Mags. of Wigtown, 1870, 8 M. 959; Ogston *v.* Stewart, 1896, 23 R. (H. L.) 16.

[6] 19 & 20 Vict. cap. 56, sec. 24; Edinburgh Life Assurance Co. *v.* Lord Advocate, [1910] A. C. 143; S. C. (H. L.) 13; Macleod's Judicial Factor *v.* Busfield, 1914, 2 S. L. T. 268. See also Lord Advocate *v.* Matheson, 1866, 1 S. L. R. 174; Lord Advocate *v.* Stewart, 1899, 36 S. L. R. 945.

[7] Duke of Northumberland *v.* Harris, 1832, 10 S. 366; Usher *v.* Mags. of Edinburgh, 1839, 1 D. 639. See also Menzies *v.* Macdonald, 1864, 2 M. 652; Stark's Trs. *v.* Duncan, 1906, 8 F. 429.

[8] Syme *v.* Murray, 19th January 1810, F. C.; Mackintosh *v.* Mackenzie, 1819, 1 Bligh s App. 272; M'Aulay *v.* M'Kenzie, 1830, 9 S. 48; Harvey *v.* Swan, 1837 16 S. 249.

[9] Syme *v.* Murray, 19th January 1810, F. C.

[10] Baillie *v.* Waddell, 1822, 1 S. 368 (N. E. 345).

the Lord Advocate is also required in actions of declarator of contravention of law burrows.[1] In this case the Lord Advocate sues for his interest and the petitory conclusion of the summons is for payment of a fine, one-half to the Lord Advocate and one-half to the other pursuer or pursuers. By statute[2] an action of reduction of a patent may be sued by the Lord Advocate alone or by a party having interest with the concurrence of the Lord Advocate, and the concurrence is only given for just cause shown.[3] In petitions and complaints for fraudulent bankruptcy,[4] or against a trustee in bankruptcy for improperly employing trust funds,[5] the Lord Advocate must concur. He may also prosecute any person guilty of wilful falsehood in any oath made in pursuance of the Bankruptcy (Scotland) Act, 1913, or the prosecution may take place at the instance of the trustee with the concurrence of the Lord Advocate.[6] His concurrence, however, is not required where the petition is with regard to irregularities under that Act.[7]

The concurrence must be properly obtained. Thus a concurrence signed by the Lord Advocate's first clerk in an action of reduction of letters-patent under 15 & 16 Vict. cap. 83, sec. 43, his Lordship not having applied his mind to the case, was insufficient, and the action was dismissed.[8]

Where it was stated, in a petition and complaint against a town clerk for violating an Act of Sederunt, that the concurrence of the Lord Advocate had been obtained and the Solicitor-General denied this, the action was simply dismissed.[9] In a subsequent case,[10] however, where an agent in an action of declarator of a contravention of law burrows used the Lord Advocate's name as a party without his authority, he was found liable personally to the defenders in expenses.

It is still a question whether the concurrence of the Lord Advocate is conclusive on the question of title to sue.[11]

If a private party, suing with concurrence of the public prosecutor, abandons his case before a fine is awarded, the public prosecutor cannot

[1] Robertson *v.* Ross, 1873, 11 M. 910; Stair, i. 9. 30; 45 & 46 Vict. cap. 42, sec. 6.
[2] The Patents and Designs Act, 1907 (7 Edw. VII. cap. 29), sec. 94 (3).
[3] Melville *v.* Cummings, 1912, S. C. 1185.
[4] Darby *v.* Love, 1796, Mor. 7907.
[5] Paterson *v.* Robson, 1872, 11 M. 76.
[6] Sec. 186.
[7] Bell *v.* Gow, 1862, 1 M. 84.
[8] Gillespie *v.* Young, 1861, 23 D. 1357.
[9] Mackenzie *v.* Thomson, 1843, 5 D. 771.
[10] Robertson *v.* Ross, 1873, 11 M. 910.
[11] Melville *v.* Cummings, 1912, S. C. 1185.

insist for it.[1] If, however, the private party obtains judgment for a fine, and then withdraws his instance or comes to an agreement with the defender, the case is different.[2]

Where the concurrence of the Lord Advocate has been asked and refused, the Court may allow the complainer to present a petition craving that the Lord Advocate be ordained to grant his concourse, or otherwise that leave be given to the petitioner to proceed at his own instance;[3] or the complainer may proceed by a Bill for Criminal Letters.[4] The judgment of the Lord Advocate is only interfered with on good cause shown and in extreme cases.

In a petition and complaint against a messenger-at-arms for illegal and oppressive conduct, it was held that the concurrence of the Lord Advocate was unnecessary, although concluding for imprisonment.[5]

In a petition and complaint averring malversation in office in respect of the violation of Act of Sederunt, 6th March 1783, the concourse of the Lord Advocate was not considered necessary;[6] nor is it any longer necessary in actions of reduction-improbation or ranking and sale.[7]

(2) Advocates.—Although an advocate has no title to sue either the agent who instructs him, or his client, for fees,[8] it has been held quite competent for an advocate to sue an agent for fees recovered by the agent from his client, or from the opposite party, and not paid over to counsel.[9] It is also competent for an advocate to sue for the recovery of a salary as a standing counsel.[10]

(3) Trustees.—If the truster has not specified a quorum, a majority, as well as all the trustees, may sue an action.[11] In arriving at what constitutes a majority, trustees who do not accept are not to be taken into consideration, nor are trustees whose interests are adverse to the trust and who are called as defenders.[12] In ordinary circumstances one

[1] Procurator-Fiscal of Edinburgh *v.* Mann, 1805, Hume's Dec. 503.

[2] Procurator-Fiscal of Edinburgh *v.* Philips, 24th February 1820, reported in the previous case, Hume's Dec. 504.

[3] Mackintosh *v.* H.M. Advocate, 1872, 2 Couper, 236.

[4] Robertson *v.* H.M. Advocate, 1887, 1 White, 468; J. & P. Coats, Ltd. *v.* Brown, 1909, 6 Adam, 19.

[5] M'Lachlan *v.* Black, 1821, 1 S. 217 (N. E. 206).

[6] Macfarlanes *v.* A. B., 1827, 5 S. 537 (N. E. 504).

[7] Court of Session Act, 1868 (31 & 32 Vict. cap. 100), sec. 17.

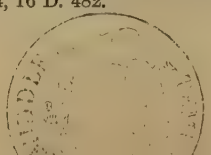
[8] Batchelor *v.* Pattison and Mackersy's Exr., 1876, 3 R. 914 and 1086.

[9] James Keay and Others *v.* A. B., W.S., 1837, 15 S. 748 (note); 9 Jur. 353; Bell and Moncrieff *v.* Jameson, 1848, 10 D. 1413; Cullen *v.* Buchanan, 1862, 24 D. 1132.

[10] Mackenzie *v.* Town of Burntisland, 1728, Mor. 11421.

[11] M'Culloch *v.* Wallace, 1846, 9 D. 32; Blisset's Trs. *v.* Hope's Trs., 1854, 16 D. 482.

[12] Shanks *v.* Aitken, 1830, 8 S. 639; Freen *v.* Beveridge, 1833, 12 S. 141; Blisset's Trs. *v.* Hope's Trs., 1854, 16 D. 482.



of two trustees has no title to raise an action.[1] In one case[2] where one of three trustees sued another of the trustees, and the remaining trustee refused to concur in the action, the Court appointed a judicial factor, who was sisted not as a pursuer but as a party concurring with the pursuing trustee. In another case,[3] where one of three trustees raised an action to reduce a subsequent will and averred that of the other two trustees one was of unsound mind and the other was a defender in the case, the Court, while not deciding the point, indicated that the pursuer had a good title, as trustee, to sue alone. One trustee, however, has a title to raise an action to prevent a nuisance or encroachment upon the estate,[4] to raise an action for exoneration,[5] or to sue his co-trustees for repayment to the estate of a sum illegally lent by them and lost;[6] and a minority has a title to interdict a majority of trustees from carrying out a resolution obtained by unfair means and concealment.[7]

Where after a verdict reducing a trust deed, six out of eight trustees resigned, the two remaining trustees were held to have a title to move for a new trial.[8] Where, however, the majority of the trustees who pursued an action settled the case, it was held that a minority could not use the instance and proceed, but must begin *de novo*.[9]

Trustees incompetently assumed have been held to have no title to pursue an action although they had acted for several years without challenge.[10] In a similar case, however, where such trustees were holders of a fund, they were held entitled to raise a multiplepoinding.[11]

Trustees have a title, by virtue of their general mandate, to sue a division and sale;[12] to sue a declarator of the validity of the trust;[13] to raise an action in defence of the trust estate;[14] but not to sue a division of commonty.[15]

[1] Neilson *v.* Mossend Iron Co., 1884, 12 R. 499, at p. 525; Neilson *v.* Neilson's Trs., 1885, 12 R. 670, at p. 673; Campbell *v.* Campbell, 1894, 1 S. L. T. 563.

[2] Morison *v.* Gowans, 1873, 1 R. 116.

[3] Duncan *v.* Duncan, 1892, 20 R. 200.

[4] M'Culloch *v.* Wallace, 1846, 9 D. 32, per Lord Cuninghame (Ordinary), p. 34; Johnston *v.* Craufurd, 1855, 17 D. 1023; Laird *v.* Reid, *et e contra*, 1871, 9 M. 699, per Lord Ormidale (Ordinary), p. 701.

[5] Taylor *v.* Noble, 1836, 14 S. 817; Blair's Trs. *v.* Blair, 1863, 2 M. 284.

[6] Ross *v.* Allan's Trs., 1850, 13 D. 44.

[7] Reid *v.* Maxwell, 1852, 14 D. 449.

[8] Morrison *v.* Maclean's Trs., 1865, 3 M. (H. L.) 42.

[9] Coulter *v.* Forrester, 1823, 2 S. 387 (N. E. 343).

[10] Davidson *v.* Mackenzie, 1835, 13 S. 1082.

[11] Kelland *v.* Douglas, 1863, 2 M. 150.

[12] Craig *v.* Fleming, 1863, 1 M. 612.

[13] Robb's Trs. *v.* Robb, 1872, 10 M. 692.

[14] Elgin County Road Trs. *v.* Innes, 1886, 14 R. 48, per Lord President Inglis, p. 51.

[15] Graham's Tr. *v.* Boswell, 1830, 9 S. 121.

Where a trust is as much an English trust as a Scottish trust, a title conferred on the trustees by the Court of Chancery is recognised as valid in Scotland, at least until set aside in a competent process.[1]

"The trustees of *A. B.*," without specification of individual names and designations, is not a *nomen juris* under which parties can sue or defend or use diligence.[2]

Trustees who hold the feudal title to a church building conform to a trust deed have a title to sue for possession of the church against a person whose *status* has been declared at an end.[3]

Where a person gratuitously bound himself by holograph letter to endow an Episcopal establishment and to render the endowment a real burden on his estate, the person to whom the letter was addressed was held to have a good title, as trustee, to sue the heirs of the granter for implement of his obligation.[4]

Disclamation on the part of a granter of an onerous trust will not affect the title to sue of the trustees.[5] (See *Executors, infra*, p. 204 *et seq.*)

(4) Heirs.—In the early history of the Court questions regarding the title to sue of heirs whose titles had not been completed were frequently the subject of decision. Since the Conveyancing (Scotland) Act, 1874,[6] however, the necessity for the consideration of such questions has practically ceased, as a personal right now vests in the heir without service, and the real or feudal right can be, and almost always is, acquired without delay by the registration of the appropriate deed. Should, however, a case occur of an heir raising an action when his title has not been completed, similar considerations to those that applied prior to the Act of 1874 with regard to the question of title to sue would most likely still obtain. Thus an heir in such a position would have no title to sue an action which required infeftment as its ground, such as actions of removing of persons holding from the heir's predecessor,[7] or reductions of infeftments of a former proprietor by an heir of provision under previous investitures.[8] He

[1] Rossmore's Trs. *v.* Brownlie, 1877, 5 R. 201.

[2] Bell *v.* Trotter's Trs., 1841, 3 D. 380.

[3] Brown *v.* M'Dougall, 1901, 4 F. 297.

[4] Drummond *v.* Farquhar, 6th July 1809, F. C.

[5] Pitcairn *v.* Pitcairn's Trs., 1834, 12 S. 769; Carrick *v.* Hutchison, 1844, 6 D. 1148.

[6] 37 & 38 Vict. cap. 94, sec. 9.

[7] Paton *v.* Macintosh, 1757, Mor. 5273; Sutherland *v.* Graham, 1759, Mor. 5276; Grahame *v.* Grahame, 1779, Mor. 3186; Campbell *v.* M'Kellar, 2nd March 1808, F. C.; Scott *v.* Fisher, 1832, 10 S. 284; Mackenzie *v.* Gillanders, 1853, 16 D. 158.

[8] Bell's Prin., sec. 1683; Cochrane *v.* Ramsay, 1828, 6 S. 751; revd. 1830, 4 W. & S. 128; Rutherfurd *v.* Nisbet's Trs., 1830, 9 S. 3, per Lord Moncreiff, p. 6.

would, however, have a good title to eject an intruder;[1] to raise an action for rents;[2] to reduce deeds contravening an entail or contrary to the obligations of a marriage contract;[3] or the service of another which would exclude his own service.[4] Moreover, it is thought that an heir who had not completed his title would be allowed to complete it *pendente processu*. This was allowed to be done prior to 1874 in an action at the instance of the heir of a granter of a disposition *ex facie* absolute to declare that the disposition was only in security;[5] in an action of reduction of a service and brief of terce;[6] and a reduction and improbation.[7] It has also been done in removings where the service was prior to raising the action,[8] and it is thought that there is nothing in the present practice of the Court which is likely to prevent the extension of this rule to all cases of heirs raising actions without having completed their titles,[9] provided the title is completed before extract.

The heir of the granter of a charitable fund has a title to sue the administrators in order to have the funds duly administered.[10] An heir at law has a title to sue the reduction of a deed granted by his father burdening the estate as having been fraudulently impetrated.[11]

A person who was generally charged to enter as heir to a debtor in a heritable bond, and against whom an action was raised on the passive titles, was held to have a good title to sue for reduction of the bond, for count and reckoning, and for repetition of bygone interest.[12]

An heir at law has a title to sue a reduction of a will of a deceased person on the ground of facility and circumvention.[13]

[1] Stair, iv. 28. 4; Steel *v.* Hay, 1666, Mor. 16092.

[2] Hamilton *v.* Hamilton, 1760, Mor. 5253; revd. 1767, 2 Paton's App. 137; Lord Banff *v.* Joass, 1763, Mor. 5257; Spalding *v.* Spalding, 1792, Mor. 5257; Earl of Wemyss *v.* Campbell, 1864, 2 M. 461.

[3] Grahame *v.* Grahame, 1829, 8 S. 231; Rutherfurd *v.* Nisbet's Trs., 1830, 9 S. 3, at p. 6.

[4] Cochrane *v.* Ramsay, 1828, 6 S. 751; revd. 1830, 4 W. & S. 128; Rutherfurd *v.* Nisbet's Trs., 1830, 9 S. 3.

[5] M'Andrew *v.* Reid, 1868, 6 M. 1063.

[6] Cunningham *v.* Semple, 1624, Mor. 13269.

[7] M'Callum *v.* Campbell, 1793, Mor. 16135.

[8] Erskine's Inst. ii. 6. 51, 52; Brown *v.* Lang, 1802, Hume's Dec. 565; Campbell *v.* M'Kellar, 2nd March 1808, F. C.; Mackintosh *v.* Munro, 1854, 17 D. 99.

[9] Welsh *v.* Rose, 1857, 19 D. 404; Cranston & Elliot, Ltd. *v.* Dobson, 1899, 2 F. 271.

[10] Campbell *v.* M'Intyres, 1824, 3 S. 126 (N. E. 85).

[11] Anderson *v.* Blair, 1836, 14 S. 972; Cleland *v.* Morrison, 1878, 6 R. 156.

[12] Boswell *v.* Notman, 1833, 11 S. 853.

[13] Gilchrist *v.* Morrison, 1891, 18 R. 599.

While an heir has a title to reduce a deed on the ground that it is prejudicial to his character as heir, this does not extend to the case of a person who has only a possible fee in the event of another person dying without executing a deed by which he would be deprived of the fee.[1]

In a recent case the heirs *ab intestato* of a truster were held to have a good title to sue for repetition to the trustees of a sum which the latter had improperly paid, the parties to whom the money had been paid and the trustees being sued as defenders.[2]

(5) Executors.—As executors hold the estate of the deceased *pro indiviso* they must all concur in suing with regard to the estate.[3] Where, however, any of the executors refuse to accept office,[4] or to concur,[5] or are called as defenders,[6] their consent is dispensed with.

An executor-nominate or dative has a title to sue previous to confirmation, it being only necessary for him to confirm before extract.[7] He may also waken a depending cause before confirmation.[8] Although a reduction of the will appointing the executor is brought, the executor-nominate has a title to sue for a debt admittedly due to the estate, at least to the extent of getting an order for consignation.[9] The executor of the granter of a fund for charitable purposes has a title to sue the administrators of the fund in order that the fund may be properly administered.[10]

The executors of a law agent who was granted expenses as agent-disburser during his lifetime have a title to crave the Court to apply the judgment of the House of Lords to enable the said expenses to be paid.[11]

A majority of executors have a right to compromise a case so as to prevent a minority from opening it up and pursuing it.[12]

Where a testator by his will gifted certain shares on which there

[1] Wyllie *v.* M'Bride, 1890, 18 R. 218.

[2] Armour *v.* Glasgow Royal Infirmary, 1909, S. C. 916.

[3] Stair, iii. 8. 59; Erskine's Inst. iii. 9. 40; Lag, 1634, Mor. 14689; Inglis *v.* Mirrie, 1738, Mor. 16115.

[4] M'Target *v.* Monteith, 1829, 7 S. 591.

[5] Rogerson *v.* Barker, 1833, 11 S. 563; Torrance *v.* Bryson, 1841, 4 D. 71.

[6] M'Target *v.* Monteith, 1829, 7 S. 591; Torrance *v.* Bryson, 1841, 4 D. 71; Ballantyne *v.* Ballantyne, 1899, 7 S. L. T. 3.

[7] Fyffe *v.* Fergusson, 1842, 4 D. 1482; Chalmer's Trs. *v.* Watson, 1860, 22 D. 1060, per Lord Ivory, p. 1064; Malcolm *v.* Dick, 1866, 5 M. 18. See also Alison *v.* Scollay's Creditors, 1802, Mor. 3922; Mackay *v.* Mackay, 1914, S. C. 200.

[8] Flowerdew *v.* Crichton, 1849, 11 D. 563. See 31 & 32 Vict. cap. 100, sec. 95.

[9] Rolfe *v.* Drummond, 1862, 1 M. 39.

[10] Campbell *v.* M'Intyres, 1824, 3 S. 126 (N. E. 85).

[11] Anderson *v.* Clark, 1834, 12 S. 526.

[12] Scott *v.* Craig's Representatives, 1897, 24 R. 462.

were certain undivided profits, it was held that the executor of the deceased had no title to sue for said profits, as the profits went with the shares.[1]

In certain circumstances it was held that presumptive executors to a fatuous person had a title to sue, although their interests were contingent.[2]

An executor cannot raise an action of damages in respect of the death of a person whom he represents arising out of a legal wrong,[3] unless the deceased person, prior to his death, has intimated a claim for damages for personal injury.[4]

The case of *Auld* v. *Shairp*[5] has been quoted as an authority for the proposition that an executor has a title to sue where he avers a patrimonial loss in respect of an injury done to the deceased during the lifetime of the deceased, but this interpretation of the case has been severely criticised by Lord President Dunedin,[6] and may no longer be relied upon as establishing such a proposition.

Where a deceased person has raised an action in respect of a personal injury and there is litiscontestation, his executor may carry on the action.[7] The executor has a right to be sisted in room of a deceased, but not for carrying on the action where he has only a title to sue for expenses and not on the merits.[8] In cases arising out of the Workmen's Compensation Act, 1906, the right to compensation of a dependant of a deceased workman vests in the dependant on the workman's death, and transmits to the representatives of the dependant, although the dependant may have made no claim for compensation during his lifetime.[9]

An executor has no title to raise an action of divorce or declarator of marriage in name of a deceased person whom he represents;[10] but where such actions have been raised during the lifetime of the deceased person, the executor may, after the death of the deceased, sist himself in order either to defend a judgment pronounced in favour of the deceased

[1] Carron Co. *v.* Hunter, 1868, 6 M. (H. L.) 106.

[2] Viscountess of Strathallan *v.* Duke of Northumberland, 1837, 15 S. 971.

[3] Bern's Exr. *v.* Montrose Asylum, 1893, 20 R. 859.

[4] Leigh's Exrx. *v.* Caledonian Rly. Co., 1913, S. C. 838; *cp.* Boyce's Exr. *v.* M'Dougall, 1903, 5 F. 452.

[5] 1874, 2 R. 191. See also Wights *v.* Burns, 1883, 11 R. 217, per Lord Adam (Ordinary).

[6] Riley *v.* Ellis, 1910, S. C. 934, at p. 943.

[7] Neilson *v.* Rodger, 1853, 16 D. 325; Darling *v.* Gray & Sons, 1892, 19 R. (H. L.) 31.

[8] Martin's Exrx. *v.* M'Ghee, 1914, S. C. 628.

[9] Hendry *v.* United Collieries, Ltd., 1908, S. C. 1215; 1909, S. C. (H. L.) 19.

[10] Fraser, Husband and Wife, pp. 1145 and 1241.

which has been reclaimed against,[1] or to pursue it *quoad* an alternative conclusion for damages,[2] or even to get an unfavourable judgment reversed.[3]

Where an executor refuses to sue, the beneficiaries may compel him to give the use of his name and prosecute the action themselves, giving the executor an indemnity for expenses.[4]

An executor-creditor, though not confirmed, has a good tentative title to sue, it being only necessary to confirm before extract.[5] The decision establishing this proposition has been canvassed, however, in a subsequent case by Lord Ivory.[6] Confirmation of itself without producing the documents of debt has been held sufficient title for an executor-creditor to sue the cautioners of a bankrupt for a composition contract entered into between the bankrupt and a deceased creditor.[7] Where an executor-creditor has confirmed, though not specially to the subjects of the action, the Court will sist procedure in order that the executor-creditor may confirm to them also.[8] It has been held that the executors-creditors of a seller who has been granted a bond for part of the price have a title to insist upon a reduction of a bond of corroboration in so far as erroneously granted to the heir of the seller.[9] An executor-creditor may sue on a confirmation obtained on an inventory in which he has entered the assets sued for at no value, subject to his augmenting his title before extract by giving up the asset at its ascertained value and paying duty on it.[10] In the same way an executrix under letters of administration granted by the Irish Courts produced in the Edinburgh Commissary Court and certified, but on which no duty was paid, was held to have a title to sue, subject, in the event of success, to payment of duty on the ascertained value of the estate before extract.[11]

The executor-creditor of a deceased partner has no title to sue for a company debt, even where the other partner disclaimed all right therein.[12]

[1] Ritchie *v.* Ritchie, 1874, 1 R. 826.
[2] Green or Borthwick *v.* Borthwick, 1896, 24 R. 211.
[3] Fenton *v.* Livingstone, referred to in Fraser, Husband and Wife, p. 1146.
[4] Blair *v.* Stirling, 1894, 1 S. L. T. 599; Morrison *v.* Morrison's Exrx., 1912, S. C. 892.
[5] Maitland *v.* Cockerell, 1827, 6 S. 109.
[6] Balfour *v.* Baxter Bros. & Co., 1852, 24 Jur. 290, at p. 295.
[7] Dickson *v.* Barbour, 1828, 6 S. 856.
[8] Bridges *v.* Ewing, 1836, 15 S. 8.
[9] Thomson *v.* Campbell, 1837, 15 S. 1133.
[10] Williamson *v.* Fraser, 1832, 11 S. 7.
[11] Blackwood *v.* Blackwood, 1913, 2 S. L. T. 255.
[12] Roger *v.* Jamieson, 1838, 16 S. 418.

It has been held that the next of kin of a deceased intestate have a title to sue the executor-dative for a count and reckoning with regard to a part of the estate intromitted with by him but not given up in the inventory, the next of kin being in the position of creditors and not requiring to confirm as executors *ad omissa*.[1]

(6) BENEFICIARIES.—Where there are trustees or executors under the will of a deceased person a general legatee or beneficiary has no title to sue a debtor of the deceased;[2] nor can he raise an action of damages against the law agent of the estate.[3] A beneficiary may, however, compel a trustee to give the use of his name on security being found for expenses, or to grant an assignation of his claim.[4] A beneficiary may sue the debtor of a deceased person where he also calls the trustees as defenders, averring that the defenders are in league to enable the debtor to evade his obligation.[5] A special legatee may, however, bring an action directly against the holder of the subject specially bequeathed to the former, provided that he makes the executor a party to the action.[6] The executor himself has no title to charge for payment of a special legacy.[7]

A beneficiary has a title to sue trustees for breach of trust, and it is competent to call one or more of the trustees without convening all the trustees.[8] If there is more than one beneficiary it is quite competent for one beneficiary to raise an action for breach of trust, but as a decision in such an action would be *res judicata* with the other beneficiaries, it is proper that intimation should be given to the other beneficiaries in order that, if so advised, they may sist themselves as pursuers.[9]

[1] Smith *v.* Smith, 1880, 7 R. 1013.

[2] Peock *v.* Glasgow, 1824, 2 S. 769 (N. E. 639); Young *v.* Ramage, 1838, 16 S. 572, per Lord Corehouse, p. 578; Hinton *v.* Connell's Trs., 1883, 10 R. 1110; Hannah *v.* Sharp, 1901, 9 S. L. T. 333; Crammond *v.* Gordon, 1902, 10 S. L. T. 12; Morrison *v.* Morrison's Exrx., 1912, S. C. 892.

[3] Rae *v.* Meek, 1888, 15 R. 1033, per Lord Shand, p. 1050.

[4] Brown's Trs. *v.* Brown, 1888, 15 R. 581; Raes *v.* Meek, 1889, 16 R. (H. L.) 31, per Lord Herschell, p. 33; Henderson *v.* Robb, 1889, 16 R. 341, per Lord Shand, p. 345; *cp.* Duke, etc., of Buckingham *v.* Breadalbane, etc., Trs., 1844, 6 D. 403; Blair *v.* Stirling, 1894, 1 S. L. T. 599; Morrison *v.* Morrison's Exrx., 1912, S. C. 892.

[5] Watt *v.* Roger's Trs., 1890, 17 R. 1201; Armour *v.* Glasgow Royal Infirmary, 1909, S. C. 916. See also Teulon *v.* Seaton, 1885, 12 R. 971; Costin *v.* Hume, 1914, S. C. 134.

[6] Bell *v.* Willison, 1831, 9 S. 266; Young *v.* Ramage, 1838, 16 S. 572, per Lord Corehouse, p. 578; Lyle *v.* Falconer, 1842, 5 D. 236.

[7] Gray *v.* Cockburn, 1711, Mor. 8062.

[8] Croskery *v.* Gilmour's Trs., 1890, 17 R. 697.

[9] Allen *v.* M'Combie's Trs., 1909, S. C. 710; *cp.* Pollok *v.* Workman, 1900, 2 F. 354.

In some early cases [1] beneficiaries under a trust settlement were held to have no title to raise an action of reduction of a subsequent settlement, but in a comparatively recent case a beneficiary *nominatim* under what he alleged to be the only valid settlement of a testator was held to have a good title to sue a subsequent settlement.[2]

In a recent case the donee of a charitable fund was found entitled to sue a person into whose hands the committee of the charitable fund had placed money for behoof of said donee.[3]

(7) Corporate Bodies.—Corporations alone, and not their individual members, have a title to sue in respect of matters affecting them as a body, and the decision of the question whether they will sue or defend rests with the majority of their members. Averments of *ultra vires*, illegality, and fraud, however, qualify the general rule, and in certain cases individual members have a title to sue.

The majority of a corporation, company, etc., alone has a title to sue in respect of an act, not illegal or *ultra vires*, done irregularly and without their approval, and the action must be raised in the name of the corporation or corporate company.[4] If, however, the act complained of is an act done by the majority, or if the scale has been turned by the majority, the minority has a title to sue by a single member or shareholder on his own behalf or others.[5]

Where an action is brought to redress a wrong done to a company or to recover its property or enforce its rights, the company alone has a title to sue.[6] Where, however, a single member restrains the company from carrying out a contract, illegal or *ultra vires*, with a third party, and the third party is called, the Court may direct the property or money to be restored to the corporation or company.[7]

[1] Addison and Others *v.* Whyte, 1870, 8 M. 909. See also Rodger *v.* Darroch, 1831, 9 S. 671.

[2] Duncan *v.* Duncan, 1892, 20 R. 200.

[3] Costin *v.* Hume, 1914, S. C. 134.

[4] Orr *v.* Glasgow, Airdrie, and Monklands Junction Rly. Co., 1857, 20 D. 327; affd. 1860, 3 Macq. 799; Fraser *v.* City of Glasgow Bank, 1879, 6 R. 1259; Lee *v.* Crawford, 1890, 17 R. 1094; Brown *v.* Stewart, 1898, 1 F. 316; Young *v.* Brownlee & Co., Ltd., 1911, S. C. 677. See also Foss *v.* Harbottle, 1843, 2 Hare, 461; Mozley *v.* Alston, 1847, 1 Ph. 790; Macdougall *v.* Gardiner, 1875, 1 Ch. Div. 13; Burland *v.* Earle, [1902] A. C. 83.

[5] Atwool *v.* Merryweather, 1868, 5 Eq. 464 (note); Menier *v.* Hooper's Telegraph Works, 1874, 9 Ch. 350; Russell *v.* Wakefield Waterworks Co., 1875, 20 Eq. 474, at p. 482; Mason *v.* Harris, 1879, 11 Ch. Div. 97; Alexander *v.* Automatic Telephone Co., [1900] 2 Ch. 56, at p. 69; Burland *v.* Earle, [1902] A. C. 83.

[6] Gray *v.* Lewis, 1873, 8 Ch. 1035, at p. 1050; Russell *v.* Wakefield Waterworks Co., 1875, 20 Eq. 474, at p. 479; Duckett *v.* Gover, 1877, 6 Ch. Div. 82; Burland *v.* Earle, [1902] A. C. 83.

[7] Russell *v.* Wakefield Waterworks Co., 1875, 20 Eq. 474, at p. 481.

A single member or shareholder, either suing alone or on behalf of others, may sue the incorporation and restrain it and its directors from doing an illegal or criminal act or an act *ultra vires* which the majority have no power to affirm.[1] He may sue any director for fraudulent mismanagement, and does not require to call the company, the other directors, or shareholders.[2] He may also sue to compel the company to implement an agreement which has been fraudulently departed from.[3] If the claims of justice require it, an action will be allowed to be raised by a single shareholder in other circumstances than have been described.[4]

In every case, however, the shareholder must exhaust all reasonable means of obtaining the sanction of the company to the use of its name before instituting proceedings in his own name.[5]

It may sometimes happen that delay in raising an action would amount to a denial of justice and that some time would elapse before ascertaining the opinion of the company. In such circumstances the intending pursuers may use the name of the company to raise an action and do diligence, but they do so *periculo petentis*. If it should afterwards appear that the company's name has been used improperly, the person or persons so using the name will be ordained to pay the company's expenses as between agent and client, and the defender's expenses as between party and party, in addition to having the action dismissed.[6]

[1] Bow *v.* Patrons of Cowan's Hospital, 1825, 4 S. 276 (N. E. 280); Rodgers *v.* Tailors of Edinburgh, 1842, 5 D. 295; Morrison *v.* Fleshers of Edinburgh, 1853, 16 D. 86; Baird *v.* Mags. of Dundee, 1865, 4 M. 69; Rixon *v.* Edinburgh Northern Tramways Co., 1889, 16 R. 653; 18 R. 264, per Lord Kincairney, p. 271; 20 R. (H. L.) 53; Smyth *v.* Muir, 1891, 19 R. 81, per Lord Kinnear, p. 90; Smith *v.* Glasgow and South-Western Rly. Co., 1897, 4 S. L. T. 327; Hannay *v.* Muir, 1898, 1 F. 306, per Lord Low (Ordinary), p. 310. See also Christie *v.* Mags. of Stirling, 1774, Mor. 5755; Thorburn *v.* Martin, 1853, 15 D. 845; Simpson *v.* Westminster Palace Hotel Co., 1860, 8 H. of L. Cases, 712; Hoole *v.* Great Western Rly. Co., 1867, 3 Ch. 262; Russell *v.* Wakefield Waterworks Co., 1875, 20 Eq. 474, at p. 481; Holmes *v.* Newcastle, etc., Abattoir Co., 1875, 1 Ch. D. 682; Hope *v.* International Financial Society, 1876, 4 Ch. D. 327; Powell *v.* Kempton Park Racecourse Co., [1897] 2 Q. B. 242, at pp. 260 and 268; Howden *v.* Yorkshire Miners, [1903] 1 K. B. 308, at p. 336; *cp.* Young *v.* Brownlee & Co., 1911, S. C. 677.

[2] Leslie's Representatives *v.* Lumsden, 1851, 14 D. 213; Tulloch *v.* Davidson, 1858, 20 D. 1045; 1860, 22 D. (H. L.) 7.

[3] Ewing *v.* Airdrie and Bathgate Rly. Co., 1852, 1 Stuart, 528.

[4] Russell *v.* Wakefield Waterworks Co., 1875, 20 Eq. 474, per Jessel, M.R., p. 482.

[5] Morris *v.* Morris, 1877, W. N. 6.

[6] Silber Light Co. *v.* Silber, 1879, 12 Ch. D. 717; Oystermouth Railway, etc., Co. *v.* Morris, 1876, W. N. 129, 192; Morris *v.* Morris, 1877, W. N. 6; Newbiggin-by-the-Sea Gas Co. *v.* Armstrong, 1879, 13 Ch. D. 310; John Morley Building Co. *v.*

An incorporate body has no feelings, and consequently has no title to sue for *solatium*, but it has a title to sue where the credit and character of the corporation is attacked. Thus, a bank,[1] a society of solicitors,[2] and an incorporation of fleshers[3] was each held entitled to sue an action of damages for slander. It must be clear, however, that the injury has been done to the corporate body and not merely to its individuals as members.[4] Members of an incorporation may sue on account of an injury directed against the corporate body as such, but which may affect them individually whether mentioned by name or not.[5]

In the same way a corporation may be sued for the wrongful use of diligence or for slander.[6]

It has been held that a debenture holder or other person lending money to a company has a title to sue the promoter for damages on the ground that he was induced to do so by the false and fraudulent representations of the promoter,[7] although after a proof had been led the Court were of opinion, in the peculiar circumstances of the case, that the pursuer had no title to sue.[8] In the former of these two reports the Court did not decide whether an individual shareholder had such a title. In an earlier case, however, it was held in the House of Lords that a single shareholder could sue the representatives of a deceased director of a company whose false and fraudulent representations had induced the pursuer to take shares in the company.[9]

A single shareholder has a title to enforce his individual right, such as to have his vote recorded,[10] or to restrain his co-directors from excluding him from the board.[11]

Barras, [1891] 2 Ch. 386, at p. 394; La Compganie de Mayville *v.* Whitley, [1896] 1 Ch. 788, at p. 804; Fricker *v.* Van Grutten, [1896] 2 Ch. 649; Western Australia Gold Reefs *v.* Dawson, [1897] 1 Ch. 115; Geilinger *v.* Gibbs, [1897] 1 Ch. 479.

[1] North of Scotland Banking Co. *v.* Duncan, 1857, 19 D. 881. See also British Legal Life Assurance and Loan Co., Ltd. *v.* Pearl Life Assurance Co., Ltd., 1887, 14 R. 818.

[2] Solicitors of Edinburgh *v.* Robertson, 1781, Mor. 13935.

[3] Dumfries Fleshers *v.* Rankine, 10th December 1816, F. C.

[4] Manchester Corporation *v.* Williams, 1890, L. R. 1 Q. B. 94.

[5] Hustler *v.* Watson, 1841, 3 D. 366; Williams *v.* Allan, 1841, 3 D. 600.

[6] Gordon *v.* British and Foreign Metaline Co., 1886, 14 R. 75, per Lord Justice-Clerk Moncreiff, pp. 83, 84. See also Macaulay *v.* North Uist School Board, 1887, 15 R. 99, per Lord Rutherfurd Clark.

[7] Dunnett *v.* Mitchell, 1885, 12 R. 400.

[8] Dunnett *v.* Mitchell, 1887, 15 R. 131.

[9] Davidson *v.* Tulloch, 1860, 3 Macq. 783.

[10] Pender *v.* Lushington, 1877, 6 Ch. D. 70, at p. 81.

[11] Pulbrook *v.* Richmond, etc., Mining Co., 1878, 9 Ch. D. 610; Harben *v.* Phillips, 1882, 23 Ch. D. 14.

A creditor of a public company which is being wound up voluntarily has no title as of right to obtain a supervision order, but must show cause why such an order should be granted.[1]

Testamentary trustees who were contributories but not members of a company in which the deceased held shares at the time of his death were held to have a good title to challenge the validity, on the ground of non-compliance with the articles of association, of a special resolution for voluntary liquidation and appointment of a liquidator.[2]

A limited company cannot sue for damages in respect of a contract entered into on its behalf before it came into existence.[3]

Where a corporation is a statutory creation it may sue for penalties for the violation of any of the rules prescribed by the statutes which it is appointed to administer, but it cannot sue for penalties at common law.[4]

A corporation must set forth in the record its title to sue in each particular case.[5]

See *Members of the Public, Ratepayers, etc., infra*, para. (19).

(8) Mercantile Firms.—(a) *Proper Firm.*—A proper firm is one whose firm name consists of personal names, as "Walker, Fraser & Steele." An individual partner of such a firm has an implied mandate to sue in name of the firm for firm debts, and accordingly may sue for such debts notwithstanding that the other partner disclaims.[6] Where a partnership is dissolved by death, the surviving partners have a title to sue in their own names for the firm's debts.[7] In the same way, when a partnership is mutually dissolved, and, before winding-up is completed, one of the partners dies, the surviving partners have the same right.[8] Where a partnership is dissolved but not wound up, and one of the partners pays a partnership debt under diligence and takes an assignation thereto, it is competent for him to proceed with the diligence against his co-partner for his proportion.[9] Where a partner-

[1] Crawford *v.* A. R. Cowper, Ltd., 1902, 4 F. 849.

[2] Howling's Trs. *v.* Smith, 1905, 7 F. 390.

[3] Tinnevelley Sugar Refining Co., Ltd. *v.* Mirrlees, Watson & Yaryan Co., Ltd., 1894, 21 R. 1009; *In re* Johannesburg Hotel Co., [1891] 1 Ch. 119; North Sydney Investment, etc., Co. *v.* Higgins, [1899] A. C. 263.

[4] Tay District Fishery Board *v.* Robertson, 1887, 15 R. 40.

[5] Mags. of Kilmarnock *v.* Mather, 1869, 7 M. 548.

[6] Kinnes *v.* Adam & Sons, 1882, 9 R. 698, per Lord M'Laren (Ordinary), pp. 699, 700.

[7] Royds *v.* Fraser's Trs., 1822, 1 S. 244 (N. E. 231); Nicoll *v.* Reid, 1877, 5 R. 137.

[8] Nicoll *v.* Reid, 1877, 5 R. 137.

[9] Caven *v.* Mackie, 1832, 10 S. 550.

ship is dissolved and reconstituted there must be some assignation by the old to the new firm in order that the latter may have a title to sue for the accounts of the former.[1]

A single individual who trades under the name of a proper firm may sue either in the name of the firm or as an individual.[2] A partner of a firm has a title and interest to interdict a third person from using a patent contrary to the interests of his firm.[3]

See *How Corporate and Unincorporate Bodies Sue and are Sued, infra*, Chap. vi.

(b) *Descriptive Firm.*—A descriptive firm is one which trades by a descriptive name, such as "The Shotts Iron Co." An individual partner of such a company has a title to sue in the firm's name although the other partner has not given his consent or is abroad.[4] Where such a firm sues, or does diligence, in its descriptive name without the names of its partners, the addition to the descriptive name of a party as agent for, or for behoof of, the firm, will not remove the objection to the instance.[5] A manager of such a firm has no title to sue or be sued in the name of the firm,[6] nor has a procurator of the firm.[7] Where a firm with a descriptive name is sued, it may be that the pursuer does not know the names of the individual partners. In such a case the Court will sustain the action and give the pursuer the means of obtaining the names of such partners.[8]

Where a number of persons sue individually and the condescendence discloses that they are suing in respect of a descriptive partnership, the instance should show that there is such a partnership.[9]

A provisional committee is not a partnership.[10]

See *How Corporate and Unincorporate Bodies Sue and are Sued, infra*, Chap. vi.; *Voluntary Associations, infra*, Chap. vi.; ii. (2) (d).

(9) Joint Adventure.—The distinction between a proper copartnery and a joint adventure is that in the case of the copartnery

[1] A. & A. Campbell *v.* Campbell's Exrs., 1910, 47 S. L. R. 837, per Lord Dunedin. See also Nelmes & Co. *v.* Montgomery & Co. and Loudon, 1883, 10 R. 974.

[2] Booth *v.* Commercial Banking Co., 1823, 2 S. 311 (N. E. 273); Mills *v.* Hamilton, 1830, 9 S. 111; Rose *v.* Moore & Son, 1833, 11 S. 344; Young *v.* Livingston, 1860, 22 D. 983.

[3] Melville *v.* Cummings, 1912, S. C. 1185.

[4] Antermony Coal Co. *v.* Wingate & Co., 1866, 4 M. 1017.

[5] Kerr *v.* Clyde Shipping Co., 1839, 1 D. 901.

[6] Robertson *v.* Anderson, 1841, 3 D. 986; M'Millan *v.* M'Culloch, 1842, 4 D. 492.

[7] Fleming *v.* Ballantyne, 1842, 5 D. 305.

[8] Mitchell *v.* Grangemouth Coal Co., 1894, 2 S. L. T. 104.

[9] Plotzker *v.* Lucas, 1907, S. C. 315.

[10] M'Ewan *v.* Campbell, 1857, 2 Macq. 499.

the company is a separate *persona* and subsists in that capacity for the purpose of winding up, while a joint adventure, when completed, is resolved into its elements, and each joint adventurer may maintain his own interests in the common fund by direct action in his own name without the co-operation of the rest. Accordingly, two out of five parties to a joint adventure, the purpose of which had been accomplished, were held to have a title to sue one of the co-adventurers, who acted as treasurer, for count and reckoning of his intromissions, and for payment to them of their shares of the balance in their hands.[1] In the same way, a single joint adventurer was held entitled to sue a ship's-husband for rebates.[2] Where two joint adventurers sued a third, and one of the pursuers became bankrupt before the calling of the summons, and the summons was called in name of the solvent pursuer, the latter was held to have a title to pursue for his share of the profit of the joint adventure.[3] The above cases are actions *inter socios*. In actions against third parties it has been held that the solvent partner of a joint adventure is entitled to recover and discharge debts due to the joint adventure.[4]

(10) Landlord and Tenant.—A landlord who has not completed his title by infeftment when he brings an action of removing into Court may make his title good by infeftment before decree.[5] If a landlord is infeft, his title cannot be objected to by his tenant.[6] A lady who was infeft on her marriage contract in the liferent of lands, but whose sasine was not duly recorded, was held to have a title to pursue a reduction of a lease granted by her husband *in fraudem* of the contract and in collusion with the tenant.[7] A landlord who grants a liferent lease under reservation of certain leases has a title to sue an action of removing of any of the tenants under the latter leases without consent of the liferent tenant.[8] A liferent tenant has a title to pursue alone

[1] Pyper *v.* Christie, 1878, 6 R. 143.

[2] Manners *v.* Raeburn and Verel, 1884, 11 R. 899.

[3] Shaw *v.* Gibb's Trs., 1893, 20 R. 718.

[4] Thom *v.* North British Banking Co., 1850, 13 D. 134.

[5] Mackintosh *v.* Munro, 1854, 17 D. 99. See also Brown *v.* Lang, 10th February 1802, Hume's Dec. 565; Ferguson *v.* Morrison, 24th June 1802, F. C.; Finlayson *v.* Innes, 1803, 4 Paton's App. 443; Milne *v.* Petrie, 21st November 1807, Hume's Dec. 581; Campbell *v.* M'Kellar, 2nd March 1808, F. C.; Johnston *v.* Martin, 3rd March 1810, F. C.; Scott *v.* Fisher, 1832, 10 S. 284; Tennent *v.* Macdonald, 1836, 14 S. 976.

[6] Chisholm *v.* Macdonald, 27th February 1800, F. C.; Stewart *v.* Burns, 18th December 1802, Hume's Dec. 568. See also Dunlop & Co. *v.* Meiklem, 1876, 4 R. 11.

[7] Davie *v.* Dennie, 2nd June 1814, F. C.

[8] Wilson *v.* Wilson, 1859, 21 D. 309.

an action of removing,[1] even where the lease has been granted by the liferenter and the fiar jointly.[2] A fiar, however, has no title to remove a tenant without the consent of the liferenter,[3] although he may sue a sequestration for payment of rent against a tenant without the liferenter's consent.[4] A house factor has no title to sue a removing without special authority.[5]

Where a lease was assigned to a party without mention of heirs and the assignee granted a verbal lease of part of it, the Court held that the assignee's heir had a good title to sue a removing against the party holding the verbal lease.[6]

A tenant of an hotel was sequestrated and the trustee sold to a third party the tenant's right. The tenant continued to occupy the hotel until his death, when his widow succeeded him. The party to whom the trustee sold the tenant's right then sued an action of removing against the tenant's widow, and it was held that he had no title to sue.[7]

A landlord who is in possession when the date arrives for payment of rent has a good title to sue for removal and to enforce payment of rent, notwithstanding that he may be liable to account for the rent recovered to the representatives of his predecessor.[8]

A principal lessee can sue an action of removing against subtenants and the latter have no right to impugn the former's title.[9]

A *pro indiviso* proprietor is not entitled to pursue an action of removing unless he have the concurrence of the other parties interested in the property,[10] although it is still a question whether a *pro indiviso* proprietor of an estate let under lease has a title to sue for his share of the rents of the estate without the concurrence of the other *pro indiviso* proprietors.[11] A person who, on behalf of herself and sister, granted a lease was held to have a good title to remove a tenant after her sister's death.[12] A joint tenant who averred that he had the whole real interest and lodged *pendente processu* an assignation in his favour

[1] Wilson *v.* Wilson, 1859, 21 D. 309.
[2] M'Christie *v.* Kea or Fisher, 1825, 4 S. 11.
[3] Buchanan *v.* Yuille, 1831, 9 S. 843.
[4] Zuill *v.* Buchanan, 1833, 11 S. 682.
[5] Slowey *v.* Robertson and Moir, 1865, 4 M. 1.
[6] Tailfer *v.* M'Dougal, 23rd May 1811, Hume's Dec. 857.
[7] Sinclair *v.* Leslie, 1887, 14 R. 792.
[8] Lennox *v.* Reid, 1893, 21 R. 77.
[9] Dunlop & Co. *v.* Meiklem, 1876, 4 R. 11.
[10] Bruce *v.* Hunter and Leisk, 16th November 1808, F. C.; Grozier *v.* Downie, 1871, 9 M. 826.
[11] Schaw *v.* Black, 1889, 16 R. 336.
[12] Paxton *v.* Slack, 26th May 1803, Hume's Dec. 568.

by the other tenant setting forth the fact was held to have a good title to sue for compensation.[1]

A tenant has a title to reduce decrees of removing on the ground of desertion and irritancy, although he has subsequently been removed for non-payment of rent.[2] A tenant who removed along with all the other tenants when leases similar to his own were reduced was held to have a good title to sue for damages for eviction although there was no decree of removal against him, his summons having been wrongly addressed.[3] A person suing for unwarrantable ejection must set forth his title, as a proprietor does not require a warrant to eject a person who has no title to possess.[4]

A tenant whose lease has been reduced, but who is in possession and the decree is under appeal, can interdict a party shooting over his ground.[5]

A tenant has no title to sue an action against feuars of the proprietor regarding property let by the proprietor to the tenant.[6]

A tenant's heir has no title to object to an assignation excluded by the lease, the landlord alone having the title.[7]

An ingoing tenant who has paid to the outgoing tenant a sum in excess of his contract with the landlord has a good title to sue the outgoing tenant directly for repayment.[8]

A subtenant who had entered into possession without a regular missive was held to have no title to sue the landlord for damages under the warrandice of the principal lease where the latter has been reduced by the landlord's heir as being contrary to the entail.[9]

A heritable creditor who has obtained a decree of maills and duties against the tenants of an estate, the landlord not entering appearance, has a good title to use sequestration for rent against a tenant not called in the action of maills and duties.[10]

Where a proprietor disponed heritable subjects qualified by a back bond, and the disposition was recorded but not the back bond, the

[1] District Committee of the Middle Ward of Lanark *v.* Marshall, 1896, 24 R. 139.

[2] Mackenzie *v.* Mackenzie, 1823, 2 S. 149 (N. E. 137).

[3] Menzies *v.* Queensberry Exrs., 1832, 11 S. 18.

[4] Macdonald *v.* Watson, 1883, 10 R. 1079.

[5] Innes *v.* Allardyce, 1822, 2 S. 93 (N. E. 85); Innes *v.* Partridge and Hepburn, 1826, 4 S. 761 (N. E. 769).

[6] Baird & Co. *v.* Feuars of Kilsyth, 1878, 6 R. 116.

[7] Hay and Wood, Petrs., 8th December 1801, F. C.; M'Coag *v.* M'Sporan, 12th May 1803, Hume's Dec. 813.

[8] Dawson *v.* Stirton, 1863, 2 M. 196.

[9] Hutchison *v.* Queensberry Exrs., 1828, 6 S. 849.

[10] Robertson's Trs. *v.* Gardner, 1889, 16 R. 705.

original proprietor continued in possession and granted a lease to his son. The original proprietor and his disponee were then sequestrated, and the trustee of the latter challenged the son's right as lessee. The son raised an action of declarator that the lease was valid, and the Court held that he had a good title to sue.[1]

The wife and children of a tenant have no title to sue an action of damages against the landlord in respect of the insanitary condition of the house, so far at least as founded on contract.[2] The tenant, himself, however, has a title to sue in respect of any loss to himself resulting from the illness of his wife and children occasioned by the insanitary condition of the premises.[3] A housekeeper of a tenant has been found entitled to sue a landlord for negligence in respect of injuries received through the fall of a ceiling, though it was held that she had no title to sue in respect of contract.[4]

A landlord[5] and a tenant[6] have each a title to sue an action to put down a nuisance caused by a third party, and, where their interests are both affected, they may sue in the same action.[7]

A landlord may sue for interdict where complaint is made to him by his tenant of a nuisance and where the letting value of the property is calculated to be lowered.[8]

(11) Liferenter and Fiar.—A liferenter may competently sue and be sued in questions relating to the right of ownership and the mode of its enjoyment,[9] but the judgment will not, unless in very exceptional circumstances, be *res judicata* against the fiar.[10]

In actions of removing, where the lease has been granted by the common author of a liferenter and fiar, or by the latter parties together, the concurrence of both the liferenter and fiar is necessary.[11] If an action

[1] Abbott *v.* Mitchell, 1869, 8 M. 268.

[2] Cameron *v.* Young, 1907, S. C. 475; affd. 1908, S. C. (H. L.) 7. See also Shields *v.* Dalziel, 1897, 24 R. 849; Hall *v.* Hubner, 1897, 24 R. 875; Hamilton *v.* Nimmo, 1902, 10 S. L. T. 394; M'Kinlay *v.* M'Clymont, 1905, 43 S. L. R. 9; Grant *v.* M'Clafferty, 1907, S. C. 201.

[3] Soutar *v.* Mulhern, 1907, S. C. 723.

[4] Kennedy *v.* Bruce, 1907, S. C. 845.

[5] Fleming *v.* Ure, 1750, Mor. 13159; Fraser's Trs. *v.* Cran, 1877, 4 R. 794; 5 R. 290; 6 R. 451.

[6] Hamilton *v.* Tennant, 1839, 1 D. 502; Fleming *v.* Gemmill, 1908, S. C. 340.

[7] Jolly *v.* Brown, 1828, 6 S. 872; Young *v.* Cunningham, 1830, 8 S. 959.

[8] M'Ewan *v.* Steedman and M'Alister, 1912, S. C. 156.

[9] Hardie *v.* Mags. of Port-Glasgow, 1864, 2 M. 746; Wemyss *v.* Stuart, 1633, Mor. 2197.

[10] Rankine on Land-Ownership, 4th ed. p. 735; Denovan *v.* Johnstone, 1832, 10 S. 206.

[11] Buchanan *v.* Yuille, 1831, 9 S. 843. See also Collart *v.* Lady Annandale, 1610, Mor. 13266; M'Christie *v.* Fisher, 1825, 4 S. 11.

is raised by both, and the liferenter dies *pendente processu*, the fiar can carry it on alone.[1]

A liferenter may sue an action for the restoration of the subject of the liferent to its original condition, but he cannot do so if he only possesses on a personal title.[2]

Where an estate was conveyed in fee to a party subject to a liferent of certain parks in favour of another party under declaration that if at the time of the granter's death the parks were let the fiar should pay the liferenter an annuity until the liferenter should obtain natural possession, the rents meanwhile falling to the fiar, it was held that the fiar was entitled, without the concurrence of the liferenter, to sue an action of sequestration for rent.[3]

Where a liferent was left to a lady allenarly and to her children in fee as a real burden on an estate, and the lady enjoyed the liferent during her lifetime, her children on her death served and retoured and were held to have a good title to raise an action of poinding of the ground in order to obtain the fee, Lord Justice-Clerk Hope remarking that he did not consider the service of the children to be necessary.[4]

In a peculiar action of declarator and for damages by a fiar against a liferenter in possession for the protection from injury by game and rabbits of young trees planted by the fiar on the estate during the liferenter's possession, a proof before answer was allowed of the averments.[5]

(12) Assignee.—An assignee may sue in his own name as assignee, or in the name of the cedent, for any subject or right clearly indicated in the assignation.[6] Where the action is raised in the name of the cedent, any objection thereto by the defender may be obviated by the assignee coming forward and sisting himself.[7] An assignee may be sisted without the consent of the defender.[8] In one case[9] the assignee of the representative of a deceased pursuer was allowed to sist himself

[1] Stair, ii. 9. 41; Bankton, ii. 9. 54; Ramsay *v.* Hume, 1629, Mor. 3173.

[2] Hardie *v.* Mags. of Port-Glasgow, 1864, 2 M. 746.

[3] Zuill *v.* Buchanan, 1833, 11 S. 682.

[4] Andrews *v.* Laurie, 1849, 12 D. 344.

[5] Ewing *v.* Ewing, 1881, 19 S. L. R. 20.

[6] Fraser *v.* Duguid, 1838, 16 S. 1130; Traill & Sons *v.* Actieselskabat Dalbeattie, Ltd., 1904, 6 F. 798; Methven Simpson, Ltd. *v.* Jones, 1910, 2 S. L. T. 14. See also Simpson & Co. *v.* Thomson & Co., 1877, 5 R. (H. L.) 40; Edinburgh United Breweries, Ltd. *v.* Nicolson's Tr., 1893, 20 R. 581.

[7] Fraser *v.* Duguid, 1838, 16 S. 1130.

[8] Ibid.; Parker *v.* Welsh, 1894, 2 S. L. T. 122; Mavor *v.* The Governors of Aberdeen Educational Trust, 1902, 10 S. L. T. 156.

[9] Fearn *v.* Cowper, 1899, 7 S. L. T. 68. See also Mackay *v.* Mackay, 1914, S. C. 200.

although the representative had not made up his title. In another case,[1] where a party was sisted as an assignee *pendente processu*, and the case was dismissed in so far as the pursuer was concerned, the assignee was held entitled to insist for his own interest although the assignation did not contain an assignation of the action.

An assignee in a personal obligation is subject to all the exceptions and pleas pleadable against the original creditor.[2] Accordingly, where a person after his sequestration granted an assignation to a sum of money, the assignee had no title to sue.[3]

A general assignation, either by a person who subsequently becomes bankrupt,[4] or by a trustee in a sequestration,[5] does not carry a right to challenge illegal preferences.

An assignation in the form of a mutual contract, but signed by the cedent alone, is sufficient title to the assignee to sue.[6] An absolute assignation of a right, which the cedent holds only for a term of years, is sufficient to enable the assignee to sue during such a term.[7]

Where a pursuer's title is *ab initio* defective, a subsequent assignation to the pursuer will not cure his title.[8] Where, however, there is a good title, but it only requires to be formally made absolute, an assignation *pendente processu* will make the pursuer's title good.[9]

A claim for damages and *solatium* arising *ex delicto* is assignable, and the assignee has a title to sue in his own name.[10]

In order that an assignee may be able to sue on a breach of contract with his cedent, the action must contain a statement of the damage done to the cedent, and the assignee's title to sue;[11] and there must be no *delectus personæ*.[12]

[1] Watt *v.* Scottish North-Eastern Rly. Co., 1866, 4 M. 318.

[2] Scottish Widows' Fund *v.* Buist, 1876, 3 R. 1078.

[3] Richards *v.* Cuthbert, 1866, 5 M. 1. See also Browne's Trs. *v.* Browne, 1901, 9 S. L. T. 128.

[4] Smith & Co. *v.* Smyth, 1889, 16 R. 392.

[5] Glen *v.* Glen, 1826, 5 S. 11 (N. E. 10).

[6] Grover, Baker & Co. *v.* Hunter and Barr, 1854, 26 Jur. 543.

[7] Siddons *v.* Ryder, 1825, 3 S. 576 (N. E. 397).

[8] Symington *v.* Campbell, 1894, 21 R. 434. See also Hislop *v.* MacRitchie's Trs., 1881, 8 R. (H. L.) 95.

[9] The Doughty Shipping Co., Ltd. *v.* North British Rly. Co., 1909, 1 S. L. T. 267. See also District Committee of the Middle Ward of Lanark *v.* Marshall, 1896, 24 R. 139.

[10] Traill & Sons *v.* Actieselskabat Dalbeattie, Ltd., 1904, 6 F. 798.

[11] Levett *v.* London and North-Western Rly. Co., 1866, 2 S. L. R. 207.

[12] Cole *v.* Handasyde & Co., 1910, S. C. 68. See also Grierson, Oldham & Co., Ltd. *v.* Forbes, Maxwell & Co., Ltd., 1895, 22 R. 812; International Fibre Syndicate, Ltd. *v.* Dawson, 1900, 2 F. 636; affd. 1901, 3 F. (H. L.) 32; Tolhurst *v.* Associated Portland Cement Manufacturers, [1903] A. C. 414; Asphaltic Limestone Concrete Co., Ltd. *v.* Glasgow Corporation, 1907, S. C. 463, per Lord M'Laren, p. 475.

An assignation giving a contract right is valid although the cedent dies before intimation of the assignation has been made.[1]

An assignee of a decree for expenses was held not to have a title to sue a third party not named in the decree as *dominus litis* in the action in which the expenses had been awarded.[2]

An assignation carries all the rights incidental to the thing assigned. Accordingly, an assignation to a decree in a suspension finding the letters orderly proceeded carries right to the bond of caution lodged in the suspension, and the assignee may after the death of the cedent sue without confirmation.[3] In the same way, an assignation to a lease has been held to carry right to a depending action of removing from the subjects comprehended under it, and also to a claim for violent profits for subsequent retention of possession, and to a bond of caution for the same lodged in the process of removing.[4]

Special assignations or dispositions by a deceased person give a good title to sue notwithstanding the interposition of trustees and executors.[5] An executor in such circumstances has no right to sue.[6]

The assignation of a claim in security of a debt due to the assignee does not preclude the cedent from suing for the claim, so long as there is a surplus for which the assignee must account, or so long as the assignee does not object.[7] Where, however, the true interest lies with the assignee and not with the cedent, the latter will only be allowed to proceed in an action provided he finds caution for the expenses of process, or sists the assignee as *dominus litis*.[8] A party who has granted an assignation and then raises an action has a good title to carry it on if he obtains a retrocession *pendente processu*.[9]

The title of an assignee cannot be objected to by a party who has been employed by the assignee and who is being sued in regard to such employment.[10]

(13) CAUTIONERS.—A cautioner after having made payment in full

[1] Brownlee *v.* Robb, 1907, S. C. 1302.

[2] Rose *v.* Stevenson, 1888, 15 R. 336.

[3] Lyell *v.* Christie, 1823, 2 S. 288 (N. E. 253).

[4] Underwood's Tr. *v.* Bell, 1831, 9 S. 334.

[5] Bell *v.* Willison, 1831, 9 S. 266; Young *v.* Ramage, 1838, 16 S. 572, per Lord Corehouse, p. 578; Lyle *v.* Falconer, 1842, 5 D. 236.

[6] Gray *v.* Cockburn, 1711, Mor. 8062.

[7] Robertson *v.* Exley, Dimsdale & Co., 1832, 11 S. 91; Fraser *v.* Duguid, 1838, 16 S. 1130; Manson *v.* Baillie, 1850, 12 D. 775; M'Cuaig *v.* M'Cuaig, 1909, S. C. 355.

[8] Fraser *v.* Dunbar, 1839, 1 D. 882; Walker *v.* Kelty's Tr., 1839, 1 D. 1066; affd. 1843, 2 Bell's App. 57.

[9] Barry *v.* Geddes, 1829, 8 S. 53; Fraser *v.* Duguid, 1838, 16 S. 1130.

[10] Arbouin *v.* Sime, 1824, 3 S. 184 (N. E. 125).

is entitled to an assignation of the debt and diligence and all collateral securities, and has then a title as principal creditor to sue the principal debtor.[1] In addition, he has a title to sue his co-cautioners, if any, to the extent of their contributions which he has paid.[2] Even before paying the debt to the creditor the cautioner has a title to sue the principal debtor, *first*, where the latter is *vergens ad inopiam; second*, where the date of the obligation to pay is past and the debt is unpaid by the principal debtor; and *third*, if the cautionary obligation is conditional and may be long pendent, the cautioner has a title to adjudge in security under the qualification that no execution shall follow on the decree until distress.[3]

Where a letter of guarantee was to remain in operation until recalled, and it was recalled, the cautioner was held entitled to sue the debtor for relief.[4]

(14) Agent and Principal.—An agent who contracts as principal or as an agent for an undisclosed principal may sue in his own name. The principal may, however, come forward and disclose himself and sue the third party. If he does so, he will be affected by all the counter claims that might have been pleaded against his agent.[5] Once an election has been made, the agent cannot sue after the principal has sued, or *vice versâ*.[6]

If an agent is a buyer for a foreign principal there is a presumption that the agent buys on his own account, and therefore may sue in his own name, but this may be rebutted by evidence that he is only an agent.[7]

Where the principal is disclosed an agent has no title to sue, except where there is a clause in the contract in favour of the agent, in which case the latter may sue.[8]

[1] Ewart *v.* Latta, 1863, 1 M. 905; revd. 1865, 4 Macq. 983.

[2] Rig *v.* Broomhall's Cautioners, 1676, Mor. 3353; Ewart *v.* Latta, 1865, 4 Macq. 983; Anderson *v.* Dayton, 1884, 21 S. L. R. 787; Buchanan *v.* Main, 1900, 3 F. 215.

[3] Erskine's Inst. iii. 3. 65; Kinloch *v.* M'Intosh, 1822, 1 S. 491 (N. E. 457); Spence *v.* Brownlee, 1834, 13 S. 199; M'Pherson *v.* Wright, 1885, 12 R. 942, per Lord Young.

[4] Doig *v.* Lawrie, 1903, 5 F. 295; Gray *v.* Phillips, 1905, 13 S. L. T. 145.

[5] Bennett *v.* Inveresk Paper Co., 1891, 18 R. 975, per Lord M'Laren, p. 983.

[6] Thomson *v.* Davenport, 1829, 2 Smith's Leading Cases (1915 ed.), 355; 9 B. & C. 78; Priestley *v.* Fernie, etc., 1865, 34 L. J. Ex. 172.

[7] Bennett *v.* Inveresk Paper Co., 1891, 18 R. 975, per Lord M'Laren, pp. 984, 985. See also Millar *v.* Mitchell, 1860, 22 D. 833; Ireland *v.* Livingston, 1872, 5 E. & I. App. Cases, 395, per Lord Blackburn, p. 408; Athya *v.* Buchanan, 1872, 45 Jur. 16; Delaurier *v.* Wyllie, 1889, 17 R. 167, per Lord Kyllachy, p. 191.

[8] Fisher and Hepburn *v.* Syme and Stewart, 1827, 6 S. 216; Bonar *v.* Liddell, 1841, 3 D. 830; Levy & Co. *v.* Thomsons, 1883, 10 R. 1134.

An agent of a disclosed principal has a title to sue a third party where he has become liable to his principal to relieve him of any obligation under a contract. Thus, an agent may sue a reduction on the ground of misrepresentation and fraud of a contract which he entered into on behalf of his principal, who was disclosed, where the principal got a decree against him in relief;[1] and an auctioneer who, on behalf of a disclosed principal, sold by auction a horse to a purchaser without receiving the price in cash, as he should have done, was held entitled to sue the purchaser for the price.[2]

A master of a vessel who sued as "master and part owner" was held entitled to sue an action on behalf of the owners for damages for failure to implement a charter-party entered into between charterers for the owners and the defenders.[3]

A limited company has no title to sue upon a contract said to have been entered into by agents on its behalf before the company came into existence.[4]

A person sometimes receives a mandate in general terms to sue actions on behalf of another person. Much depends upon the terms of such a mandate whether the mandatary can sue particular actions and follow them to the Court of Appeal. Care should therefore be taken to make such mandates quite explicit, as it has been found that a mandate to sue in the Sheriff Court does not extend to the Court of Session;[5] and a mandate to make objections in the Licensing Court does not cover an appeal to the Court of Appeal.[6]

(15) Factor.—A private factor and commissioner requires express power in writing to sue an action of removing,[7] and if he has not had such power the decree of removing may be reduced.[8] Where, however, the factor has a power to grant leases in the absence of the landlord, as the tenant has no power to challenge the title of his lessor,[9] the factor has presumably a title to sue for a removing.[10] In a case[11] where

[1] Milne *v.* Ritchie, 1882, 10 R. 365.

[2] Macdonald and Fraser *v.* Henderson, 1882, 10 R. 95.

[3] Larsen *v.* Ireland & Co., 1892, 20 R. 228.

[4] Tinnevelley Sugar Refining Co., Ltd. *v.* Mirrlees, Watson & Yaryan Co., Ltd., 1894, 21 R. 1009. See also *In re* Northumberland Avenue Hotel Co., 1886, L. R. 33 Ch. D. 16; James Young & Sons, Ltd., etc. *v.* Gowans, 1902, 10 S. L. T. 85; North Sydney Investment and Tramway Co., Ltd. *v.* Higgins, [1899] A. C. 263.

[5] Bonny *v.* Gillies, 1829, 8 S. 13.

[6] Goodall *v.* Bilsland and Others, 1909, S. C. 1152.

[7] York Building Co. *v.* Carnegie, 1764, Mor. 4054; Slowey *v.* Robertson and Moir, 1865, 4 M. 1, per Lord Mackenzie (Ordinary), p. 3.

[8] Johnstone *v.* Dickson, 1831, 9 S. 452.

[9] Dunlop & Co. *v.* Meiklem, 1876, 4 R. 11.

[10] Thomson *v.* Handyside, 1833, 12 S. 557.

[11] Grozier *v.* Downie, 1871, 9 M. 826.

the factor who granted the lease was dead, and one of several *pro indiviso* proprietors assumed the factorship in his place without the consent of the other *pro indiviso* proprietors, an action of removing at the instance of the unauthorised factor was held to be incompetent.

In a case where a farm bailiff sold on behalf of a proprietor a bullock and had accounted to his employer for the price, it was held that after the bailiff had left his employment he had still a good title to sue for the unpaid price of the bullock.[1]

(16) Joint or Pro Indiviso Proprietors and Part Owners. — As a general rule an action in respect of the *pro indiviso* or joint proprietorship of heritable property can only be sued with the concurrence of all the proprietors.[2] Accordingly, one of several *pro indiviso* proprietors has no title to remove [3] or sequestrate [4] tenants; nor can he, if not *de damnum vitando*, pursue a declarator of marches.[5] There is, however, a great and manifest difference between a right to do anything and a right to prevent,[6] and so a single *pro indiviso* heritable proprietor has a good title to protect his property from encroachment,[7] or nuisance,[8] or to eject an intruder without a title.[9] He may also sue alone if the encroacher is the other *pro indiviso* proprietor or proprietors.[10] A heritor of a parish has these rights with regard to the parish churchyard.[11]

In the same way one of several parties having a joint right to a patent, although he has a title to prevent injury being done to the patent, has no title to sue alone regarding an agreement entered into with regard to the patent.[12]

It is still an open question whether a *pro indiviso* proprietor of an estate let under lease has a title to sue for his share of the

[1] Graham *v.* Tait, 1885, 12 R. 588.

[2] Lawson *v.* Leith and Newcastle Steam Packet Co., 1850, 13 D. 175, per Lord Moncreiff, p. 180; Millar *v.* Cathcart, 1861, 23 D. 743, per Lord Deas, p. 746.

[3] Erskine's Inst. ii. 6. 53; Murdoch *v.* Inglis, 23rd July 1679, 3 Brown's Supp. 297; Bruce *v.* Hunter and Leisk, 16th November 1808, F. C.; Grozier *v.* Downie, 1871, 9 M. 826.

[4] Stewart *v.* Wand, 1842, 4 D. 622.

[5] Millar *v.* Cathcart, 1861, 23 D. 743.

[6] Ure *v.* Ramsay and Johnstone, 1828, 6 S. 916, per Lord Cringletie, p. 919.

[7] Johnston *v.* Craufurd, 1855, 17 D. 1023; Laird *v.* Reid *et e contra*, 1871, 9 M. 699, per Lord Ormidale (Ordinary), p. 701; Aberdeen Station Committee *v.* North British Rly. Co., 1890, 17 R. 975; Warrand *v.* Watson, 1905, 8 F. 253.

[8] M'Culloch *v.* Wallace, 1846, 9 D. 32, per Lord Cuninghame (Ordinary).

[9] Lade *v.* Largs Baking Co., 1863, 2 M. 17, per Lord Deas, p. 21.

[10] Ibid., per Lord President M'Neill, p. 20.

[11] Ure *v.* Ramsay and Johnstone, 1828, 6 S. 916.

[12] Detrick and Webster *v.* Laing's Patent Overhead Handstitch Sewing Machine Co., Ltd., 1885, 12 R. 416, per Lord President Inglis, p. 419.

rents of the estate without the concurrence of the other *pro indiviso* proprietors.[1]

Each *pro indiviso* proprietor may sue for a division of the property so held.[2] (See *Division and Sale, infra*, Part vii., Chap. xi.)

A part owner is not a joint owner or *pro indiviso* proprietor. The distinction is clearly brought out in Lord Moncreiff's judgment in the case of *Cargill* v. *Muir*,[3] where he explains the position of heirs-portioners: "Heirs-portioners are not joint proprietors, but, as their name imports, part owners or portioners. They hold *pro indiviso* while the subject is undivided. But each has a title in herself to her own part or share, which she may alienate or burden by her own separate act. The condition of two joint proprietors in this case is very different; they have no separate estates, but only one estate vested in both, not merely *pro indiviso* in respect of possession, but altogether *pro indiviso* in respect of the right." Accordingly, it has been held that a part owner of a ship has a good title to sue alone for his share of damage occasioned by her being lost in a collision.[4] Where, however, a contract has been entered into with all the part owners, an individual part owner has no title to sue alone in respect of the agreement. Thus, where there was a contract of affreightment, a part owner of a ship had no title to sue for his alleged proportion of freight or demurrage.[5]

A defender by going to proof without objecting to the title of a joint or part proprietor is held to have waived his objection, and it is incompetent to plead an objection to title when no plea to that effect is stated.[6]

Where one joint owner raises an action alone he should call the others as defenders,[7] or at least the action should be intimated to them.[4]

A part owner of a ship has a title to sue an action calling upon the ship's-husband to account for rebates.[8]

(17) Division of Commonty.—Any heritor with a right of property in a commonty has a title to sue an action of division under the Act

[1] Schaw *v.* Black, 1889, 16 R. 336. See also Bell *v.* Gunn, 1859, 21 D. 1008.

[2] Grant *v.* Heriot's Trust, 1906, 8 F. 647, per Lord President Dunedin, p. 658.

[3] 1837, 15 S. 408, at p. 409; M'Neight *v.* Lockhart, 1843, 6 D. 128, at p. 136. See also Schaw *v.* Black, 1889, 16 R. 336, per Lord Kinnear, p. 337.

[4] Lawson *v.* Leith and Newcastle Steam Packet Co., 1850, 13 D. 175.

[5] Scotland *v.* Walkinshaw, 1830, 9 S. 25.

[6] Lade *v.* Largs Baking Co., 1863, 2 M. 17.

[7] Johnston *v.* Craufurd, 1855, 17 D. 1023; Lade *v.* Largs Baking Co., 1863, 2 M. 17.

[8] Manners *v.* Raeburn and Verel, 1884, 11 R. 899.

1695, cap. 69 (record edition), cap. 38 (12mo edition). A person who has a right of servitude in a real commonty is allowed to insist upon a division,[1] but where the alleged commonty is found to be the exclusive property of a single proprietor, a person with a right of servitude has no title to insist upon a division.[2] Where the commonty has been divided and a share which is given to one of the owners of the commonty is burdened with a servitude, the person in right of the servitude has no title to pursue a division of such share.[3] If, however, a right of common property is acquired *pendente processu* by the holder of a servitude, the title to pursue is cured.[4] To pursue a division of commonty is not a mere act of management, and accordingly trustees with general powers were held not to have a title to pursue such an action.[5] Where in an action for division of a commonty opposition was offered by the representatives of a burgh of barony, who alleged that they had possessed the commonty as a corporate body on behalf of the whole burgesses and inhabitants of the burgh, the pursuer who produced a title to the commonty also was held to have a title to insist.[6]

A udal proprietor adjoining a commonty has a right of property and not of servitude on the commonty and has a title to pursue an action of division.[7]

(18) Persons with Community of Interest. — Where several unconnected persons have been aggrieved by the same act of the defender, or have a joint interest in the matter libelled, an action in their joint names is perfectly competent, but such action is strictly limited to cases of these two descriptions.[8] Thus, where two persons suffer personal injury by the same act of negligence or delict,[9] or are slandered by the same remark,[10] they may conjoin themselves in one

[1] Polwarth and Hog *v.* Home and Trotter, 1724, Mor. 2462; 1736, 1 Paton's App. 186.

[2] Stewart *v.* Feuars of Tillicoultry, 1740, Mor. 2469; Gall *v.* Greenhill, 31st May 1810, F. C.; Gordon *v.* Grant, 1850, 13 D. 1, per Lord Justice-Clerk Hope, pp. 7, 8.

[3] Laurie *v.* Duke of Hamilton, 1771, Mor. Appendix, *voce* Commonty, p. 4; Gall *v.* Greenhill, 31st May 1810, F. C.; Gordon *v.* Grant, 1850, 13 D. 1.

[4] Maitland *v.* Lambert, 1769, Mor. 2483.

[5] Graham's Tr. *v.* Boswell, 1830, 9 S. 121.

[6] Henderson *v.* Malcolm, 29th June 1815, F. C.

[7] Spence *v.* Earl of Zetland, 1839, 1 D. 415.

[8] Killin *v.* Weir, 1905, 7 F. 526, per Lord President Dunedin, p. 527. See also Feuars of Orkney *v.* Steuart, 1741, Mor. 11986; Erskine's Inst. iv. 1. 65; Shand's Practice, pp. 203, 204; Lord Forbes *v.* Leys, Mason & Co., 1824, 2 S. 603 (N. E. 515); Downie *v.* Earl of Moray, 1825, 4 S. 167 (N. E. 169); Cowan *v.* Duke of Buccleuch, 1876, 4 R. (H. L.) 14.

[9] Revey *v.* Murdoch, 1841, 3 D. 888; Black *v.* Fraser, 1900, 8 S. L. T. 225.

[10] Harkes *v.* Mowat, 1862, 24 D. 701; Mitchell *v.* Grierson, 1894, 21 R. 367.

action. Each pursuer, however, must have a separate conclusion for damages, and must take a separate issue.[1] Accordingly, where unconnected creditors in two different bonds granted by the same parties at the same time over the same subjects sued the law agents of the borrowers concluding for one sum of damages on account of his knowledge that certain signatures were forgeries, the action was dismissed.[2] In a case where several unconnected lairholders in a cemetery sued the proprietors of the ground to compel them to transfer the management to a committee of lairholders and with other conclusions, it was held that they had a title to sue, but that they could only insist in the conclusions of the summons to the extent of vindicating their own alleged rights, and not those of the whole body of lairholders.[3]

In a recent case, where a father sued as tutor and administrator-in-law for his six pupil children, and claimed a lump sum for injuries and shock sustained by them arising out of the same act of alleged negligence, it was held that he should have condescended upon the particular sum which he thought ought to have been recovered for each child, and the case was remitted to the Sheriff to enable him to do so.[4]

Where several unconnected persons sue in a single action and the action is held to be incompetent in respect that there is no community of interest between the pursuers, the summons may competently be amended by striking out those pursuers who have no community of interest, and the remainder may insist in the action.[5] In the same way, where two persons sued for one sum of damages, the summons was allowed to be amended by making the damages payable to one of them.[6]

Persons with community of interest may, of course, sue separate actions.[7] Questions of expenses invariably arise in such cases. (See Maclaren on Expenses, p. 157 *et seq.*)

(19) Members of the Public, Ratepayers, etc.—Although it was stated in an early case that "what is known under the denomination of a popular action forms no part of the law of Scotland,"[8] this is hardly

[1] Harkes *v.* Mowat, 1862, 24 D. 701 ; Smyth *v.* Muir, 1891, 19 R. 81, per Lord Kinnear, p. 88 ; Mitchell *v.* Grierson, 1894, 21 R. 367. See also Brims and Mackay *v.* Pattullo, 1907, S. C. 1106.

[2] Gibson *v.* Macqueen, 1866, 5 M. 113.

[3] Cunningham *v.* Edmiston, 1871, 9 M. 869.

[4] Gray *v.* Caledonian Rly. Co., 1912, S. C. 339.

[5] Fischer & Co. *v.* Andersen, 1896, 23 R. 395 ; Douglas *v.* Tait, 1884, 12 R. 10, per Lord Young, p. 14, and Lord Justice-Clerk Moncreiff, pp. 14, 15 ; Paxton *v.* Brown, 1908, S. C. 406.

[6] Brown's Trs. *v.* Hay, 1897, 24 R. 1108.

[7] Karrman *v.* Crosbie, 1898, 25 R. 931, per Lord Trayner, p. 933.

[8] Ewing *v.* Glasgow Commissioners of Police, 1839, M'L. & R. 847, per Lord Chancellor Cottenham, p. 860.

correct, as an *actio popularis* is now quite familiar where it partakes of the nature of a declarator or defence of a public right, and whether the encroachment is on the part of those entrusted with the duty of safeguarding the interests of the public, or on the part of third parties. Accordingly, any member of the community has a title to sue a *popularis actio* to declare a public right-of-way;[1] a right of market;[2] a declarator that the navigation of a public navigable river should not be obstructed;[3] a declarator of common use and enjoyment by the public of a piece of land;[4] for the removal of a public danger[5] or nuisance;[6] and the like. A member of the public has also a title to raise an action to enforce obedience to an Act of Parliament under which the public have certain rights;[7] and he also has a title to complain of the illegal use made by a body having statutory powers over a public thoroughfare where he avers that such use is a nuisance to himself and to the general public.[8]

Where a third party is averred to be making an encroachment, it is not necessary for the particular member of the public who is suing to call the public authorities also as defenders as well as the third party.[9]

If the member of the public seeking to vindicate a public right is a *bonâ fide* representative of his class, the fact that he is a poor man will not induce the Court to ordain him to find caution for expenses.[10] If, however, the pursuer is a man who has been put forward as a poor man to fight the battle of wealthy people, he will not be allowed to insist on his action unless either the true *domini litis* have been sisted as parties, or he has found caution for the defenders' expenses if the latter parties are assoilzied.[11] In a recent case[12] a proof was allowed of averments that a pursuer was not the true *dominus litis*, but an impecunious

[1] Torrie *v.* Duke of Athol, 1849, 12 D. 328; Jenkins *v.* Robertson, 1869, 7 M. 739; Potter *v.* Hamilton, 1870, 8 M. 1064; Robertson *v.* Duke of Atholl and Others, 1905, 42 S. L. R. 601.

[2] Blackie *v.* Mags. of Edinburgh, 1884, 11 R. 783; 1886, 13 R. (H. L.) 78.

[3] Colquhoun's Trs. *v.* Orr Ewing & Co., 1877, 4 R. 344.

[4] Sanderson *v.* Lees, 1859, 22 D. 24; Grahame *v.* Mags. of Kirkcaldy, 1879, 6 R. 1066; 1882, 9 R. (H. L.) 91; Murray *v.* Mags. of Forfar, 1893, 20 R. 908; Wallace-James *v.* Montgomerie & Co., 1899, 2 F. 107.

[5] Fergusson *v.* Ferguson, 1900, 38 S. L. R. 100.

[6] Adam *v.* Alloa Commissioners, 1874, 2 R. 143.

[7] Adamson *v.* Edinburgh Street Tramways Co., 1872, 10 M. 533.

[8] Ogston *v.* Aberdeen Tramways Co., 1896, 24 R. (H. L.) 8.

[9] Stewart *v.* Greenock Harbour Trs., 1864, 2 M. 1155; Adamson *v.* Edinburgh Street Tramways Co., 1872, 10 M. 533; Ogston *v.* Aberdeen Tramways Co., 1896, 24 R. (H. L.) 8.

[10] Potter *v.* Hamilton, 1870, 8 M. 1064.

[11] Jenkins *v.* Robertson, 1869, 7 M. 739.

[12] Robertson *v.* Duke of Atholl and Others, 1905, 42 S. L. R. 601.

person put forward by others to escape liability for expenses in order to determine whether the pursuer should be ordained to find caution.

A section of the public has similar rights. Thus, the gardeners of Edinburgh, as members of the public, were held to have a good title to sue the magistrates with respect to the right to hold markets.[1] A railway company, however, has no title to sue an *actio popularis*.[2]

It has been held that members of the public have a title, as ratepayers, to sue a reduction of a school board election as being *ultra vires*;[3] but that they have no title to sue as to the disposal of a statue erected by public subscription.[4]

Where a pursuer institutes an action to restrict or annul an alleged public right, and calls a member of the public for that purpose as a defender, the latter is entitled to a sist to enable the case to be considered by the County Council, who are empowered by the Local Government Act, 1894, to take steps to vindicate rights-of-way.[5] In similar circumstances, a public limited company formed for the preservation of rights-of-way were allowed to be sisted as defenders, and it was intimated that a decree against the company would be *res judicata* in a question with the public.[6]

An action to have funds, which have been improperly diverted, restored to the coffers of a town, is not an *actio popularis*, and consequently it was held that ratepayers, on behalf of themselves and other ratepayers, had no title to sue such an action.[7] In the same way, a ratepayer has no title to interdict a town council from making a payment out of the common good. The Crown alone has such a title.[8] If, however, a ratepayer condescends upon a direct patrimonial interest in assessments, he has a title to sue a declarator that the rating authorities are acting *ultra vires* in assessing him illegally.[9] He has also a title to

[1] Blackie *v.* Mags. of Edinburgh, 1884, 11 R. 783; 1886, 13 R. (H. L.) 78.

[2] Park Yard Co. *v.* North British Rly. Co., 1897, 24 R. 1148.

[3] Duncan *v.* Crighton, 1892, 19 R. 594.

[4] Robertson *v.* Trs. for the Eskdale District of Dumfries County Roads, 1886, 24 S. L. R. 24.

[5] Alston *v.* Ross, 1895, 23 R. 273.

[6] Macfie *v.* Scottish Rights-of-Way and Recreation Society, Ltd., 1884, 11 R. 1094.

[7] Ewing *v.* Glasgow Commissioners of Police, 1839, M'L. & R. 847; County Council of Stirling *v.* Corporation of Falkirk, 1912, S. C. 1281, per Lord President Dunedin. See also Burgesses of Inverury *v.* Mags. of Inverury, 14th December 1820, F. C.

[8] Conn *v.* Mags. of Renfrew, 1906, 8 F. 905.

[9] Cowan and Mackenzie *v.* Law, 1872, 10 M. 578; Wakefield *v.* Commissioners of Supply of Renfrew, 1878, 6 R. 259; Leith Dock Commissioners *v.* Mags. of Leith, 1897, 25 R. 126; County Council of Stirling *v.* Mags. of Falkirk, 1912, S. C. 1281; Farquhar and Gill *v.* Mags. of Aberdeen, 1912, S. C. 1294. See also Edinburgh and

bring a petition under sec. 67 of the Burgh Police (Scotland) Act, 1892, averring himself to be dissatisfied with the assessment account, although he states no prejudice to himself personally.[1]

A member of the public who is qualified to object to the granting of a licence by the licensing magistrates has a title to sue a reduction of such a licence illegally granted.[2]

A publican who held a licence for premises in a burgh from county Justices was held to have a title to sue a declarator that the licensing jurisdiction of the burgh had not been transferred from the county Justices to the burgh magistrates.[3]

A frontager to a public road has a higher right than a mere member of the public in the road. Accordingly, where a local authority heightened a road so as to prevent a frontager from getting direct access to the road, the frontager had a good title to sue the local authority for damages.[4]

Rival traders were found to have a title and interest as ratepayers, but not as rival traders, to interdict harbour trustees as owners of public ferries from using the ferry steamers as excursion steamers in excess of their statutory powers.[5]

(20) Joint Delinquents.—Where one of several joint delinquents has been found liable in damages, and the delinquency has been the commission of an act or acts of gross carelessness or fraud, he has no title to sue an action of relief against his co-delinquents.[6] Where, however, the acts involve no moral offence on the part of the delinquents, the case is different, and the delinquent who pays the whole damages, after a joint and several decree has been pronounced against all the delinquents, has a title to sue for proportionate relief from his co-delinquents.[7] The same result happens where one of the delinquents alone is sued and pays the damages.[8]

Glasgow Rly. Co. *v.* Meek, 1849, 12 D. 153; British Fisheries Society *v.* Mags. of Wick, 1872, 10 M. 426.

[1] Heddle *v.* Mags. of Leith, 1898, 25 R. 801.

[2] Black *v.* Tennent, 1899, 1 F. 423; Bootland *v.* M'Farlane, 1900, 2 F. 1014.

[3] Tennent *v.* Mags. of Partick, 1894, 21 R. 735.

[4] Sinclair *v.* Lanarkshire Middle Ward District Committee, 1907, S. C. 285.

[5] Nicol *v.* Dundee Harbour Trs., 1914, S. C. 374; 1915, S. C. (H. L.) 7.

[6] Smith *v.* Reilly, 1800, Hume's Dec. 605; Western Bank *v.* Bairds, 1862, 24 D. 859, per Lord Justice-Clerk Inglis, p. 901; Palmer *v.* Wick, etc., Steam Shipping Co., 1894, 21 R. (H. L.) 39, per Lord Watson, pp. 43-46.

[7] Palmer *v.* Wick, etc., Steam Shipping Co., 1894, 21 R. (H. L.) 39, per Lord Watson, pp. 43-46; Ellerman Lines, Ltd. *v.* Clyde Navigation Trs., 1909, S. C. 690, per Lord President Dunedin, p. 692. See also Duthie *v.* Caledonian Rly. Co., 1898, 25 R. 934.

[8] Allen *v.* M'Combie's Trs., 1909, S. C. 710, per Lord President Dunedin,

(21) Insured Persons. — Insurance of property against loss is different from insurance against personal accident or life insurance. Insurance against loss of property is a contract of indemnity. If the insured has been indemnified, he has still a good title to sue a third party by whose negligence or delict his property has been destroyed; but in such a case he only acts on behalf of the insurers, and any sum of damages recovered becomes the property of the insurers.[1] In personal accident and life insurance the contract is not one of indemnity, and accordingly the insured (or his executors, as the case may be) has a good title to sue on his own behalf such a third party, notwithstanding that the sum for which he has been insured has been paid.

An insurance company which has paid a sum due under a policy has a title to sue in its own name another insurance company for contribution on the ground that the latter had insured the same risk.[2]

(22) Judicial Factor.—A judicial factor possesses the power of suing necessary actions without special authority. Thus he may sue for debts, such as rent,[3] but he cannot sue for rents uplifted by a third party prior to his appointment.[4] He may also sue for a removing[5] or raise a declarator, multiplepoinding, and exoneration to settle the rights of claimants to the estate.[6] Where, however, he raised an action of multiplepoinding and exoneration for his own discharge, it was held that he must first comply with all the conditions that would have been imposed upon him in a petition for exoneration and discharge in the ordinary form.[7] He can sue a reduction of illegal acts and deeds of a body to which he has been appointed factor,[8] or of any deeds or acts to his ward's prejudice.[9] He has a title to call his predecessors

p. 718, and Lord Kinnear, p. 721. See also Douglas *v.* Hogarth, 1901, 4 F. 148, per Lord Trayner, p. 150.

[1] Simpson & Co. *v.* Thomson, 1877, 5 R. (H. L.) 40; Port-Glasgow and Newark Sailcloth Co. *v.* Caledonian Rly. Co., 1892, 19 R. 608. See also Burnand *v.* Rodocanachi, 1882, 7 App. Cas. 333, per Lord Blackburn, p. 339.

[2] Sickness and Accident Assurance Association, Ltd. *v.* General Accident Assurance Corporation, 1892, 19 R. 977.

[3] Lumsdaine *v.* Balfour, 1827, 2 Fac. 472, per Lord Mackenzie, pp. 474, 475.

[4] Swinton *v.* Gawler, 20th June 1809, F. C.; M'Grigor *v.* Beith, 1828, 6 S. 853; Gordon *v.* Williams' Trs., 1889, 16 R. 980.

[5] Thomson *v.* Elderson, 1757, Mor. 4070; Lumsdaine *v.* Balfour, 1827, 2 Fac. 472, per Lord Mackenzie.

[6] Deuchar *v.* Benson, 1830, 8 S. 523; Sprot *v.* Pennycook, 1855, 17 D. 840; Moncrieff *v.* Menzies, 1857, 20 D. 94; Tait's Factor *v.* Meikle, 1890, 17 R. 1182.

[7] Campbell *v.* Grant, 1869, 8 M. 227.

[8] Tait *v.* Muir, 1904, 6 F. 586.

[9] Carlyle *v.* Lowther, 1766, Mor. 8380; Blaikie *v.* Milne, 1838, 1 D. 18; Viscountess Strathallan *v.* Duke of Northumberland, 1840, 2 D. 840; Laurie *v.* Laurie, 1859, 21 D. 240.

to account;[1] to carry on actions raised by or against his predecessors;[2] to petition for the recall of arrestments used in his hands;[3] to sist himself in a ranking and sale of the estate where the pursuer dies or forbears to insist, and to carry it to a final conclusion;[4] and to compromise actions.[5]

The fact that the Court grants special powers to a judicial factor to institute proceedings is no guarantee that the factor possesses a title to sue.[6]

A judicial factor was held to have a title to sue an action for his ward at common law and under the Employers' Liability Act, 1880, before he had obtained extract of his appointment in respect that the period during which an action could be raised was about to expire.[7]

A judicial factor appointed to manage the funds, property, and affairs of a parish was held to have a good title, in conjunction with the presbytery of the bounds, to sue a declarator of redemption of the parish church which had been adjudged for arrears of ground-annual.[8]

A judicial factor on a trade incorporation was held to have a title to sue the surviving members, who had divided amongst themselves portions of the capital not required to secure the rights of existing and prospective annuitants without first reducing the resolutions by which such payments had been made.[9]

Where an executrix of a will had not confirmed at the date of the raising of an action to reduce it, the Court, on the motion of the pursuers, appointed a factor on the deceased's estate for the purpose of defending the reduction.[10]

A judicial factor has no title to be appointed executor-dative on the estate of the deceased husband of his ward where others, who have a title, offer to confirm.[11]

[1] Bogles *v.* Bogle, 1794, Mor. 2107; Fergusson *v.* Menzies, 1830, 8 S. 782; Morland *v.* Sprot, 1831, 9 S. 478; Kerr *v.* Bremner, 1835, 14 S. 180; 1837, 2 S. & M'L. 895; Dalmahoy, Petr., 1836, 14 S. 1125; Watson *v.* Crawcour, 1843, 5 D. 1182; Anderson, Petr., 1855, 17 D. 596; Anderson, Petr., 1857, 19 D. 329; Wardlaw *v.* Mackenzie, 1859, 21 D. 940.

[2] Mackintosh's Trs. *v.* M'Queen's Trs., 1836, 15 S. 255; Forbes *v.* Morrison, 1845, 7 D. 853; Frasers, Petrs., 1850, 12 D. 914.

[3] Morison *v.* Rennie, 1847, 10 D. 146; Matthew, Petr., 1858, 21 D. 18.

[4] A. S., 23rd November 1711.

[5] Anderson, Petr., 1855, 17 D. 596.

[6] Boyle, Petr., 1853, 15 D. 420.

[7] Calver *v.* Howard, Baker & Co., 1894, 22 R. 1.

[8] M'Dougall *v.* Blackie, 1863, 1 M. 503.

[9] Tait *v.* Muir, 1902, 5 F. 288.

[10] Blackwood *v.* Reith, 1905, 13 S. L. T. 629.

[11] Martin *v.* Ferguson's Trs., 1892, 19 R. 474.

A factor *loco absentis* has a title to present a petition for service of an absentee,[1] and, in a case of necessity, to reduce a service prejudicial to his ward's interest.[2]

(23) NOMINAL PURSUER.—See *Assignee*, p. 217; *Members of the Public, etc.*, p. 225.

(24) RELATIONSHIP.—(a) *Legal.*—(i.) *Husband and Wife.*—It is a general rule that a consistorial action can only be raised and carried on during the subsistence of the marriage, and that the title to pursue is solely in the injured spouse.[3] Where, however, a husband died after obtaining decree of divorce in the Outer House, but before the hearing of a reclaiming note, his trustees and executors were held to have a title to sist themselves as respondents and defend the judgment.[4] A declarator of marriage may be raised by one of the parties to the alleged marriage after the death of the other party.[5] Where a party raises a declarator of marriage and dies *pendente processu*, it has not yet been decided whether the executor of the pursuer may be sisted as a pursuer in order to proceed with the action, but an opinion has been given to the effect that he may.[6] A marriage may be proved incidentally in an action where a third party has an interest to prove it.[7]

A declarator of nullity of marriage may be instituted not only by either of the parties but also by anyone having a patrimonial interest where the ground of nullity is other than impotency.[8] The defender in action of divorce has a good title to sue a counter action of divorce previous to a final decree in the prior action,[9] or to reclaim against a decree of divorce although he or she has not lodged defences.[10]

A husband has no title to pursue a reduction of a disposition and assignation granted by his wife of property destined to her "for her own special use and appropriation, exclusive of the *jus mariti* or right of administration over the same, in any manner of way, in the lending out or disposal thereof."[11]

[1] Paton, Petr., 1785, Mor. 4071.

[2] Kennedy *v.* M'Lean, 1851, 13 D. 705, per Lord Fullerton, p. 711.

[3] Stair, i. 4. 7; Erskine's Inst. i. 6. 43; Ritchie *v.* Ritchie's Trs., 1874, 1 R. 826.

[4] Ritchie *v.* Ritchie, 1874, 1 R. 826.

[5] Sceales *v.* Sceales, 1866, 4 M. 300; Steuart *v.* Robertson, 1875, 2 R. (H. L.) 80; Petrie *v.* Petrie, 1911, S. C. 360.

[6] Green or Borthwick *v.* Borthwick, 1896, 24 R. 211.

[7] Pirie *v.* Ochterlony, 3rd August 1787, Hume's Dec. 248; Downie *v.* Douglas, 19th January 1792, Hume's Dec. 251; Rudland *v.* Gilbert and Lapsley, 1843, 16 Jur. 97.

[8] Fraser, Husband and Wife, p. 1244; Bell's Prin., sec. 1524.

[9] Walker *v.* Walker, 1871, 9 M. 460.

[10] Ross *v.* Ross, 1897, 24 R. 1029.

[11] Gordon *v.* Gordon, 1832, 11 S. 36.

A husband who has been divorced has a title to sue *quoad* moveables vested in his wife, but not paid to her before the decree of divorce.[1]

A woman who sued for separation and aliment from a man with whom she went through a ceremony of marriage in 1875 admitted that in 1868 she had been married to a man who deserted her in 1871, since which time she had not heard of him. As she failed to prove that her husband was dead in 1875 when she went through the said ceremony of marriage with the defender, the Court held that she had no title to sue.[2]

A husband has a title to have his wife removed from his house and to have her interdicted from returning thereto, on his undertaking to pay aliment to her.[3]

A husband has no title to sue his wife for damages for slander.[4]

A husband has a title to sue for damages and *solatium* for the death of his wife and *vice versâ*.[5] Although he has no title as his wife's executor to sue for damages for injuries received by his deceased wife,[6] an opinion has been expressed that he may do so as an individual.[7]

A married woman has a title to sue for damages arising from a delict, even where the delict arises out of a contract entered into between her husband and the party committing the delict. Thus, a wife was held entitled to sue a medical man called in by her husband in respect of the doctor's want of skill and fault in his treatment of her.[8]

An injured spouse has a title to sue for divorce for adultery libelling the same acts of adultery upon which a decree of separation has been granted previously.[9]

A wife has no title to sue for *solatium* in respect of a slander upon her husband after his death.[10] (See *Married Women, supra*, p. 176 *et seq.*)

(ii.) *Parent and Child.*—The father of a *legitimate* pupil child who

[1] Ferguson *v.* Jack's Exrs., 1877, 4 R. 393.

[2] Sharp *v.* Sharp, 1898, 25 R. 1132.

[3] Colquhoun *v.* Colquhoun, 1804, Mor. App. *voce* Husband and Wife, No. 5; MacLure *v.* MacLure, 1911, S. C. 200.

[4] Young *v.* Young, 1903, 5 F. 330.

[5] Eisten *v.* North British Rly. Co., 1870, 8 M. 980, per Lord President Inglis, pp. 984, 985.

[6] Bern's Exr. *v.* Montrose Asylum, 1893, 20 R. 859; *cp.* Auld *v.* Shairp, 1874, 2 R. 191.

[7] Bern's Exr. *v.* Montrose Asylum, 1893, 20 R. 859, per Lord Young.

[8] Edgar *v.* Lamont, 1914, S. C. 277. See also Mellon *v.* Henderson, 1913, S. C. 1207.

[9] Macpherson *v.* Macpherson, 1911, 2 S. L. T. 99.

[10] Broom *v.* Ritchie & Co., 1904, 6 F. 942.

has sustained injuries through the fault of a third party has a good title to sue, on behalf of his child, an action of damages in respect of the injury.[1] He may compromise the case without the authority of the Court being obtained,[2] and is entitled to demand payment of any sum due to his child and to grant a sufficient discharge therefor.[3] He has also a title to sue an action of damages and *solatium* on his own behalf for the child's death.[4] The mother has also a title to sue on behalf of her child for damages for its injuries or for damages and *solatium* for its death,[5] but not while her husband is alive,[6] even where she has divorced her husband.[7] A parent cannot sue for a son's death where the latter has accepted compensation under the Workmen's Compensation Act from his employer.[8]

A child may sue for the death of his parent arising from delict or negligence.[9] A child, however, cannot sue for injury done to his parent by *post-mortem* defamation.[10]

A grandchild whose father is dead and who is dependent upon the earnings of his parental grandfather has been held entitled to claim reparation for his death.[11]

A parent has the sole title to compel a school board to provide a child with education.[12]

Where a father sues as tutor and administrator-in-law on behalf of several of his children who have been injured in the same accident, he must condescend upon the sum which he thinks ought to be recovered for each child, and not claim a lump sum for all the children.[13] (See *Pupils, supra,* p. 166 *et seq.; Minors, supra,* p. 172 *et seq.; Married Women, supra,* p. 176 *et seq.*)

(iii.) *Collaterals.*—Collaterals have no title to sue an action for *solatium* or pecuniary loss where the action is not one of assythment,

[1] Macneil *v.* Macneil, 1798, Mor. 16384; Cochrane, Petr., 1891, 18 R. 456.

[2] Gow *v.* Henry, 1899, 2 F. 48.

[3] Dumbreck *v.* Stevenson, 1861, 23 D. (H. L.) 1; 4 Macq. 86; Murray's Trs. *v.* Bloxsom's Trs., 1887, 15 R. 233.

[4] Eisten *v.* North British Rly. Co., 1870, 8 M. 980, per Lord President Inglis, pp. 984, 985; Campbell *v.* Barclay, Curle & Co., 1904, 6 F. 371.

[5] Weems *v.* Mathieson, 1861, 4 Macq. 215.

[6] Bell *v.* Laing, 1896, 4 S. L. T. 166; Barrett *v.* North British Rly. Co., 1899, 1 F. 1139. See also Whitehead *v.* Blaik, 1893, 20 R. 1045.

[7] Aitken *v.* Gourlay and M'Nab, 1903, 5 F. 585.

[8] Gray *v.* North British Rly. Co., 1915, S. C. 211.

[9] Eisten *v.* North British Rly. Co., 1870, 8 M. 980, per Lord President Inglis, pp. 984, 985.

[10] Broom *v.* Ritchie & Co., 1904, 6 F. 942.

[11] Hanlin *v.* Melrose and Thomson, 1899, 1 F. 1012.

[12] Sinclair *v.* Moulin School Board, 1908, S. C. 772.

[13] Gray *v.* Caledonian Rly. Co., 1912, S. C. 339.

and the latter action will not lie unless the act upon which it is founded is punishable as a crime.[1] Actions of assythment seem to have fallen into disuse.

(b) *Natural.*—Illegitimate relations as such have no title to sue actions. Thus the mother of an illegitimate child cannot obtain damages or *solatium* in respect of her child's death,[2] nor has an illegitimate child a title to sue the employer of his mother for damages and *solatium* for her death.[3] Where an illegitimate child was killed and its parents subsequently married, it was held that the father had no title to sue an action of damages for its death.[4] An illegitimate child or grandchild, or the parent or grandparent of an illegitimate child, may now claim compensation as a dependant on the death of the father or grandfather or child or grandchild respectively.[5]

(c) *Procedure.*—Where several relatives have a title to sue in respect of some wrongful act, they must bring one action, and one only, in which the damages due to them may be respectively assessed.[6] If one relative brings an action and others are known, the Court will order intimation to them in order that they may crave themselves to be sisted in the action within a limited period.[7] If, however, the pursuer raises an action and states on record and undertakes to prove that the others who are entitled to claim have given up their claims or refuse to press them or cannot be found, there is no objection to his going on with the action alone.[8] If the pursuer does not do so, or does not call the other parties as defenders for their interest, the action is held to be incompetent.[9] Where the other relatives intimate that they do not desire to prosecute the claim, or are called in the action and do not appear, or are asked to concur and do not do so, they are excluded ever after.[10]

In a recent action of damages by children for the death of their mother, the father being insane and called as a defender, an issue was allowed;[11] and in another case, where children sued for the death of

[1] Greenhorn *v.* Addie, 1855, 17 D. 860; Eisten *v.* North British Rly. Co., 1870, 8 M. 980, per Lord President Inglis, pp. 984, 985.

[2] Renton *v.* North British Rly. Co., 1869, 6 S. L. R. 255; Weir *v.* Coltness Iron Co., 1889, 16 R. 614; Clarke *v.* Carfin Coal Co., 1891, 18 R. (H. L.) 63.

[3] Clement *v.* Bell & Sons, Ltd., 1899, 1 F. 924.

[4] M'Neill *v.* M'Gregor, 1901, 4 F. 123.

[5] Workmen's Compensation Act, 1906, sec. 13.

[6] Darling *v.* Gray & Sons, 1892, 19 R. (H. L.) 31, per Lord Watson, pp. 32, 33.

[7] Smith *v.* Wilsons and Clyde Coal Co., Ltd., 1893, 21 R. 162.

[8] Pollok *v.* Workman, 1900, 2 F. 354, per Lord Justice-Clerk Macdonald, p. 356. bid., per Lord Moncreiff, p. 357.

[10] Ibid., per Lord Justice-Clerk Macdonald, p. 356; Grant *v.* Wood Bros., 1902, 10 S. L. T. 296.

[11] M'Rae *v.* Glasgow Corporation, 1915, 2 S. L. T. 94.

their father, and one child was insane and was called as a defender, an issue was similarly allowed.[1]

(25) BANKRUPTCY PROCEEDINGS.—1. *Trustee in Sequestration.*—A trustee in a sequestration is entitled by his act and warrant "to recover any property belonging or debt due to the bankrupt, and to maintain actions in the same way as the bankrupt might have done if his estate had not been sequestrated."[2]

The trustee may either raise an action,[3] or, if it has already been raised, he may sist himself and carry it on as trustee.[4] Where a party becomes bankrupt *pendente processu* the proper course is for the opposite party to move that intimation of the dependence of the action be made to the trustee. Intimation may also be made by order of the Court *ex proprio motu*.[5] Where a summons was raised and executed, but before it was called the pursuer was sequestrated, it was held competent to call the summons in the name of the trustee alone.[6] The trustee may, however, refuse to take up an action pending at the instance of the bankrupt and may at the same time reserve his right to litigate the question, in which case the decision in the bankrupt's action will not be *res judicata* should the trustee subsequently raise an action.[7]

Actions for the recovery of liquidated damages in respect of breach of contract or for unliquidated damages in respect of fraud or misrepresentation whereby the bankrupt's estate has suffered detriment may be sued by the trustee, but actions in respect of failure to complete a contract unexecuted at the date of sequestration can only be sued by the trustee where he is in a position to fulfil the counterpart.[8]

A trustee has also a title to sue in regard to *acquirenda, i.e.* any estate, wherever situated, which after the date of sequestration and before the bankrupt has obtained his discharge is acquired by the bankrupt.[9] Accordingly a sum of damages recovered by the bankrupt in a personal action such as could not be insisted upon by the trustee himself has been held to be recoverable by the trustee.[10] A trustee may also sue for the salary and periodical payments in respect of offices held by the bankrupt at the date of the sequestration,[11] but not for

[1] Macdonald *v.* Glasgow Corporation, 1915, 2 S. L. T. 249.
[2] Bankruptcy (Scotland) Act, 1913, sec. 70; Bankruptcy (Scotland) Act, 1856, sec. 73.
[3] Howden *v.* Rocheid, 1868, 6 M. 300.
[4] Thom *v.* Bridges, 1857, 19 D. 721.
[5] Hallowell *v.* Niven, 1843, 5 D. 655.
[6] Gallie *v.* Lockhart, 1840, 2 D. 445; Barstow *v.* Taylor, 1840, 2 D. 446 (note).
[7] Shepperd *v.* Munro, 1829, 7 S. 680.
[8] Goudy on Bankruptcy (3rd ed.), p. 295.
[9] Bankruptcy Act, 1856, sec. 103; Bankruptcy Act, 1913, sec. 98.
[10] Jackson *v.* M'Kechnie, 1875, 3 R. 130.
[11] Barron *v.* Mitchell, 1881, 8 R. 933.

money earned by the bankrupt's professional labour made after the date of sequestration, unless there is a stipulation to that effect.[1]

Actions of damages for personal bodily injury to the bankrupt vest in the trustee, and accordingly he has a title to pursue such actions even after the bankrupt has been discharged though not reinvested.[2] With regard to actions of damages for defamation of the bankrupt, while there are indications of opinion[3] that such actions are so personal to the bankrupt himself as not to be transmissible to a trustee, the present practice still is for an action raised by a person who becomes bankrupt *pendente processu* to be intimated to the trustee in order that the latter may sist himself should he be so advised, and there is no doubt, if an award of damages is given in respect of any such action of slander, that the award of damages vests in the trustee.[4]

There are, however, certain special rights and interests which are not affected by sequestration, and accordingly a trustee has no title to sue actions arising out of the personal and domestic affairs of a bankrupt, such as actions of divorce, declarator of marriage, petitions for custody of children and the like, so far at least as they do not affect the sequestrated estate.[5] Although he cannot raise such actions, yet if any of these actions affect the bankrupt's estate the trustee has a good title to be sisted. Thus, where a wife raises an action of divorce for adultery, the effect of which, if successful, will mean the payment to the wife of a sum out of the husband's estate, by virtue of an antenuptial or postnuptial settlement or otherwise, the husband's trustee can sist himself as a defender and plead all the defences competent to the bankrupt husband.[6] A trustee may raise a reduction of a decree of divorce by a wife against a bankrupt husband on the ground that there was no jurisdiction against the husband.[7]

A trustee in a sequestration has a title to sue for the reduction of illegal preferences,[8] and it is not necessary for him to aver that he represents prior creditors.[9] He has no title to represent a particular

[1] Mason *v.* Paterson, 1904, 12 S. L. T. 511.

[2] Thom *v.* Bridges, 1857, 19 D. 721; Galbraith *v.* Whitehead, 1863, 1 M. 644; Graham *v.* Mackenzie, 1871, 9 M. 798.

[3] Lord Justice-Clerk Hope in Thom *v.* Bridges, 1857, 19 D. 721, p. 723; Lord Justice-Clerk Moncreiff in Jackson *v.* M'Kechnie, 1875, 3 R. 130, at pp. 132, 133; Scott *v.* Johnston, 1885, 12 R. 1022, per Lord Young, p. 1024, and Lord Rutherfurd Clark, p. 1025.

[4] Jackson *v.* M'Kechnie, 1875, 3 R. 130.

[5] Goudy on Bankruptcy (3rd ed.), p. 396.

[6] Fraser, Husband and Wife, ii. 1225; Greenhill *v.* Ford, 1822, 1 S. 296 (N. E. 275); 2 Shaw's App. 435.

[7] Corbidge *v.* Somerville, 1913, S. C. 858, and cases therein cited.

[8] Bankruptcy Act, 1856, sec. 11; Bankruptcy Act, 1913, sec. 9.

[9] Galbraith *v.* British Linen Co., 1898, 36 S. L. R. 139; Hutton *v.* Hill, 1901,

set of creditors, such as alimentary creditors, but represents the general body of creditors.[1] Accordingly, he has no title to appeal against a judgment of the Sheriff recalling the trustee's deliverance in favour of the claim of certain creditors to a preference.[2] A trustee who sists himself as a defender renders himself liable to the whole conclusions of the summons.[3]

A trustee who enters into litigation on behalf of a sequestrated estate incurs personal liability to the opposite party for the expenses of the litigation,[4] whether he initiates the litigation[5] or defends,[6] or whether he sists himself as a pursuer[7] or defender.[8] He is liable for expenses both before as well as after he is sisted.[7] Where a trustee was removed from office after he had obtained from the Lord Ordinary a judgment in his favour, with expenses, he was held to have no title to sist himself in a reclaiming note although he averred he had an interest in the question of expenses.[9]

A trustee takes *tantum et tale* as the estate stood in the bankrupt.[10] Thus a trustee cannot take advantage of the breach of trust of the bankrupt,[11] nor is he in right of an *ex facie* absolute assignation recorded in the name of the bankrupt which was really in security of advances which had been repaid.[12]

The title of a foreign official appointed to sue on behalf of the creditors of a Scotsman who carried on business abroad will be recognised by the Scottish Courts.[13]

A trustee has a title to sue for not merely the share of a debt

8 S. L. T. 467. See also Bell's Comm. ii. 194 *et seq.*; Brown & Co. *v.* M'Callum, 1890, 18 R. 311, per Lord Kinnear, p. 317; Cook *v.* Sinclair & Co., 1896, 23 R. 925.

[1] Corbet *v.* Waddell, 1879, 7 R. 200.

[2] Skinner's Tr. *v.* Keith, 1887, 14 R. 563.

[3] Watson *v.* Duncan, 1896, 4 S. L. T. 75.

[4] Cowie *v.* Muirden, [1893] A. C. 674; White *v.* Steel, 1894, 21 R. 649, per Lord Kincairney, p. 650; Craig *v.* Hogg, 1896, 24 R. 6, per Lord Justice-Clerk Macdonald, p. 12, and Lord Trayner, p. 22; Hutton, Petr., 1899, 6 S. L. T. 401; Maxwell *v.* Young, 1901, 3 F. 638, per Lord M'Laren, p. 639.

[5] Stiven *v.* Reynolds & Co., 1891, 18 R. 422.

[6] A. & B. *v.* Tunnock's Tr., 1865, 4 M. 83.

[7] Torbet *v.* Borthwick, 1849, 11 D. 694.

[8] Watson *v.* Duncan, 1896, 4 S. L. T. 75.

[9] Mackenzie *v.* Fowler, 1897, 24 R. 1080.

[10] Howden *v.* Fleeming, 1868, 6 M. (H. L.) 113; Watson *v.* Duncan, 1879, 6 R. 1247; Graeme's Tr. *v.* Giersberg, 1888, 15 R. 691; Heritable Reversionary Co., Ltd. *v.* Millar, 1892, 19 R. (H. L.) 43; Mounsey, 1896, 4 S. L. T. 46; Jopp *v.* Johnston's Tr., 1904, 6 F. 1028; Hinkelbein *v.* Craig, 1905, 13 S. L. T. 84; Wm. Morton & Co. *v.* Muir Bros. & Co., 1907, S. C. 1211.

[11] Colquhoun's Tr. *v.* Campbell's Trs., 1902, 4 F. 739.

[12] Forbes' Trs. *v.* Macleod, 1898, 25 R. 1012.

[13] Obers *v.* Paton's Trs., 1897, 24 R. 719.

effeiring to a minority of creditors who have resolved upon an action, but for the full debt.[1]

2. *Bankrupt.*—(a) *Generally.*—As the act and warrant of confirmation confers upon the trustee the title to recover the property of the bankrupt and to maintain actions, it is a general rule that the bankrupt has no title to sue an action which the trustee can and does take up.[2]

Actions relating to a bankrupt's marital or parental rights do not fall within the terms of the act and warrant, and accordingly a bankrupt has a title to sue or defend actions of divorce, declarator of marriage, and the like.[3] He has also a title to sue actions of damages for injury to his person or character,[4] although it is the practice to order intimation of the dependence of such actions to his trustee, who may sist himself, if so advised; and if damages are recovered they go to the trustee.[5] A bankrupt during his sequestration may also sue actions which his trustee refuses to take up or abandons.[6]

A bankrupt has a title to sue actions in respect of any formal or gratuitous position or office that he holds and which is not affected by his sequestration. Thus, he may sue as the curator and administrator of his wife.[7]

A bankrupt may intervene in a case where he avers that his trustee has made a settlement with the defender in bad faith.[8]

A bankrupt has a title to appear and object to a petition by a resigning trustee in a sequestration getting his discharge.[9] He has also a title to present a petition for the appointment of a new trustee, the old trustee having been discharged.[10]

An objection to a bankrupt's title must be made *debito tempore.*[11]

[1] Garden *v.* Cameron, 1823, 2 S. 449 (N. E. 401).

[2] Galbraith *v.* Whitehead, 1863, 1 M. 644, per Lord Justice-Clerk Inglis, p. 646; Graham *v.* Mackenzie, 1871, 9 M. 798, per Lord Cowan, p. 800; Whyte *v.* Forbes, 1890, 17 R. 895, per Lord Shand, p. 902.

[3] Goudy on Bankruptcy (3rd ed.), p. 396.

[4] Thom *v.* Bridges, 1857, 19 D. 721; Jackson *v.* M'Kechnie, 1875, 3 R. 130; Scott *v.* Johnston, 1885, 12 R. 1022.

[5] Jackson *v.* M'Kechnie, 1875, 3 R. 130.

[6] Bell's Com. (5th ed.), ii. 434; Gavin *v.* Greig, 1843, 5 D. 1191; Galbraith *v.* Whitehead, 1863, 1 M. 644; Fleming *v.* Walker's Trs., 1876, 4 R. 112. See also Macdonald *v.* Mackintosh, 1905, 7 F. 771. See Northern Heritable Securities Investment Co., Ltd. *v.* Whyte, 1888, 16 R. 100; Scottish Equitable Life Assurance Society *v.* Hunter, 1910, 2 S. L. T. 296.

[7] Horn *v.* Sanderson and Muirhead, 1872, 10 M. 295.

[8] Clark and Crabb *v.* Cumming, 1891, 28 S. L. R. 343.

[9] Duke (Somervell's Tr.) *v.* Somervell, 1903, 41 S. L. R. 20.

[10] Macduff *v.* Baird, 1892, 20 R. 101.

[11] Forbes *v.* Lord Duffus, 1842, 4 D. 1469.

Where a person after his bankruptcy grants a lease he has a good title to remove the tenant, although he has not been retrocessed.[1]

A bankrupt has a good title to present a petition for the appointment of a new trustee, the former trustee having been discharged.[2]

(b) *Caution.*—(i.) *Bankrupt Pursuer.*—The general rule is that a bankrupt pursuer must find caution,[3] even in actions of slander.[4] The fact that he has executed a voluntary trust deed makes no difference,[5] and a consenting pursuer falls under the general rule.[6]

To this general rule there are various exceptions. Thus, where a bankrupt pursuer sued his trustee for an accounting;[7] or a reduction of an assignation;[8] or sued his trustee and creditors;[9] or a fellow joint adventurer;[10] or his landlord for breaking into his premises;[11] or his wife and paramour;[12] or his father's trustees for an alimentary debt;[13] or prosecuted a suspension of diligence which might attach his person,[14] he was allowed to proceed without finding caution. A bankrupt applying to the Court for his discharge does not require to find caution.[15] A person may be notour bankrupt in the sense of the Debtors Act, 1880, and yet not notour bankrupt for the purpose of being compelled to find caution.[16] Thus it was held that because a man was in jail for a particular debt, it was no reason to ordain him

[1] King *v.* Wieland, 1858, 20 D. 960.

[2] Macduff *v.* Baird, 1892, 20 R. 101.

[3] Manuel & Co. *v.* Bain, 1826, 4 S. 381 (N. E. 384); Laidlaw *v.* Dunlop, 1830, 8 S. 307 (note); Hay *v.* Collier, 1834, 12 S. 659; Love *v.* Hunter, 1835, 13 S. 448; Samuel *v.* Greig, 1844, 6 D. 1259; Thornton *v.* Thornton, 1845, 8 D. 87; Maxwell *v.* Maxwell, 1847, 9 D. 797; Gilchrist *v.* Proctor, 1847, 10 D. 149; Ramsay *v.* Stenhouse, 1847, 10 D. 234; Mackersy *v.* Muir, 1850, 12 D. 1057; Carne *v.* Manuel, 1851, 13 D. 1253; Stephen *v.* Skinner, 1860, 22 D. 1122; Maclean *v.* Duke of Argyll, 1865, 1 S. L. R. 82; Horn *v.* Sanderson and Muirhead, 1872, 10 M. 295.

[4] Clarke *v.* Muller, 1884, 11 R. 418; Collier *v.* Ritchie & Co., 1884, 12 R. 47; Scott *v.* Roy, 1886, 13 R. 1173; Watson *v.* Williamson, 1895, 3 S. L. T. 21; Brown *v.* Oliver & Co., 1895, 3 S. L. T. 43; Powell *v.* Long, 1896, 23 R. 955; Cook *v.* Kinghorn, 1904, 12 S. L. T. 186; Miller *v.* J. & M. Smith, Ltd., 1908, 16 S. L. T. 268.

[5] Munro *v.* Mudie, 1901, 9 S. L. T. 53; Ritchie *v.* M'Intosh, 1881, 8 R. 747, per Lord Young, p. 748.

[6] Douglas *v.* M'Kinlay, 1902, 5 F. 260.

[7] Ritchie *v.* M'Intosh, 1881, 8 R. 747.

[8] Rogerson and Others *v.* Rogerson's Tr., 1885, 22 S. L. R. 673.

[9] Heggie *v.* Heggie, 1855, 17 D. 802; M'Alister *v.* Swinburne, 1873, 1 R. 166.

[10] Burnett *v.* Murray, 1877, 14 S. L. R. 616.

[11] Thom *v.* Andrew, 1888, 15 R. 780; Paul *v.* Gray, 1894, 1 S. L. T. 575.

[12] Derrick *v.* Derrick and Another, 1900, 8 S. L. T. 321.

[13] Paton *v.* Paton's Trs., 1901, 8 S. L. T. 455.

[14] Young *v.* Robertson, 1875, 2 R. 599.

[15] Scott *v.* Scott's Tr., 1914, S. C. 704.

[16] Macrae *v.* Sutherland, 1889, 16 R. 476.

to find caution.[1] In the same way, where an execution of a search on a decree for £25 was returned stating that the debtor was not to be found, the Court refused to ordain caution to be found.[2]

Mere poverty will not be sufficient to compel a party to find caution.[3] Where, however, poverty is combined with parochial relief, a pursuer is usually ordained to find caution,[4] although in exceptional cases this will not be required.[5] In one case[6] it was held by the Lord Ordinary (Lee) that a pursuer who was in poverty and unable to satisfy the reporters *probabilis causa*, did not require to find caution. In a subsequent case,[7] however, Lord Wellwood ordained a pursuer in similar circumstances to do so. (See Maclaren on Expenses, p. 13 *et seq.*)

(ii.) *Bankrupt Defender.*—The general rule is that a bankrupt defender does not require to find caution for expenses.[8] To this rule there have been some exceptions. Thus, where the bankrupt defender is truly the pursuer in the issue he will be required to find caution;[9] where a defender, pending a litigation, voluntarily dispossessed himself of his whole means and estate as if there had been a sequestration;[10] where a trustee of a sequestrated estate, who himself was bankrupt, sisted himself as a defender;[11] where a defender, against whom a warrant had been issued for his arrest as a fraudulent bankrupt, admitted the debt, but put forward a counter claim.[12]

A bankrupt defender who presents a reclaiming note[13] or moves to

[1] M'Laren *v.* King, 1834, reported in 6 D. 1260 (note).

[2] Nicol *v.* Sykes, 1848, 11 D. 214.

[3] Ritchie *v.* M'Intosh, 1881, 8 R. 747, per Lord Young, p. 748; Macdonald *v.* Simpson, 1882, 9 R. 696, per Lords Young and Craighill; Porteous *v.* Pearl Life Assurance Co., 1901, 8 S. L. T. 430.

[4] Hunter *v.* Clark, 1874, 1 R. 1154; Robertson *v.* Midlothian County Council, 1898, 25 R. 569; Fraser *v.* Macintosh, 1901, 9 S. L. T. 117.

[5] Macdonald *v.* Simpson, 1882, 9 R. 696; Johnstone *v.* Dryden, 1890, 18 R. 191.

[6] Thompson *v.* North British Rly. Co., 1882, 9 R. 1101.

[7] Robertson *v.* Meikle and Others, 1890, 28 S. L. R. 18. See also Buchanan *v.* Ballantine, 1910, 2 S. L. T. 74.

[8] M'Intosh *v.* Cooper, 1826, 4 S. 775 (N. E. 783); Robertson *v.* Henderson, 1833, 12 S. 70; Taylor *v.* Fairlie's Trs., 1833, 6 W. & S. 301; Russell *v.* Crichton, 1839, 1 D. 617; Bell *v.* Forrest, 1840, 2 D. 1460; Tod *v.* Millie, 1851, 13 D. 1398; Stephen *v.* Skinner, 1860, 22 D. 1122; Buchanan *v.* Stevenson, 1880, 8 R. 220; Hoggs *v.* Caldwell, 1882, 19 S. L. R. 452; Stiven *v.* Fleming, 1885, 22 S. L. R. 673; Lawrie *v.* Pearson, 1888, 16 R. 62; Drew *v.* Robertson, 1903, 11 S. L. T. 67.

[9] Ferguson, Lamont & Co.'s Tr. *v.* Lamont, 1889, 17 R. 282; Robb *v.* Dickson, 1901, 9 S. L. T. 224.

[10] Stevenson *v.* Lee, 1886, 13 R. 913.

[11] Richmond *v.* Railton's Tr., 1850, 12 D. 1017.

[12] Professional and Civil Service Supply Association *v.* Lawson, 1913, 2 S. L. T. 55.

[13] Weir *v.* Buchanan, 1876, 4 R. 8; Buchanan *v.* Stevenson, 1880, 8 R. 220;

set aside an adverse verdict[1] will not require to find caution; nor will a respondent becoming bankrupt pending appeal;[2] nor a bankrupt opposing a recall of his sequestration;[3] nor a bankrupt suspending a decree in absence.[4]

3. *Discharged Bankrupt.*—If a bankrupt and his trustee are both discharged, and the former is reinvested, his radical right revives without express assignation.[5] He has a title to sue without finding caution,[6] and it is not a ground for asking him to find caution that he is prosecuting a claim which fell under the sequestration, but which the trustee did not pursue.[7] (See Maclaren on Expenses, pp. 16, 17.)

Where a trustee is discharged and also the bankrupt, the latter without composition, and no new trustee is appointed, the bankrupt, although not reinvested, has by virtue of his radical right a good title to sue for behoof of his estate,[8] but not for his own behoof unless with regard to a claim which has been abandoned.[9]

A discharged bankrupt has a good title to sue for a debt which became due to him prior to his sequestration, although he has failed to insert it in the state of affairs given up by him in his sequestration, and that whether he has been discharged on a composition[10] or not.[11] In the latter case the creditors are *in titulo* to demand the money recovered.

Where a bankrupt is discharged but not reinvested and his trustee is not discharged, the bankrupt has no title to sue, although he avers that his trustee has improperly delayed proceedings.[12]

Johnstone *v.* Henderson, 1906, 8 F. 689; *cp.* Smith's Trs. *v.* M'Cheyne, 1879, 16 S. L. R. 592.

[1] Russell *v.* Crichton, 1839, 1 D. 617.

[2] Ferguson *v.* Leslie, 1873, 11 S. L. R. 16; Mackay *v.* Boswall-Preston, 1915, 2 S. L. T. 291.

[3] Hooper *v.* Fergusson & Co., 1850, 12 D. 1309.

[4] Stephen *v.* Skinner, 1860, 22 D. 1122.

[5] Donald *v.* Dick, 1821, 1 S. 64; Reid *v.* Wilson, 1825, 4 S. 38 (N. E. 39); Russell & Co. *v.* Stewart, 1829, 7 S. 302.

[6] Megget *v.* Scoular, 1832, 10 S. 233; Young *v.* Watson, 1836, 14 S. 794; Cooper *v.* Frame & Co., 1893, 20 R. 920, per Lord Kinnear; Stevenson *v.* Dawson, 1896, 23 R. 496; Gracie *v.* Gracie's Trs., 1909, 2 S. L. T. 89.

[7] Cooper *v.* Frame, 1893, 20 R. 920.

[8] Whyte *v.* Murray, 1888, 16 R. 95.

[9] Macdonald *v.* Macintosh, 1905, 7 F. 771. See also Northern Heritable Securities Investment Co., Ltd. *v.* Whyte, 1888, 16 R. 100, per Lord President Inglis, p. 103; affd. 18 R. (H. L.) 37, per Lord Watson, p. 39; Scottish Equitable Life Assurance Society *v.* Hunter, 1910, 2 S. L. T. 296.

[10] Baillie *v.* Young, 1835, 13 S. 472.

[11] Geddes *v.* Quistorp, 1889, 17 R. 278; *cp.* Kerr *v.* Moody, 1876, 13 S. L. R. 480.

[12] Galbraith *v.* Whitehead, 1863, 1 M. 644.

A discharged bankrupt has a good title to sue a count and reckoning with secured creditors with respect to securities of which the trustee did not demand an assignation.[1]

A discharged bankrupt has no title to challenge an agreement entered into by his trustee, with consent of his creditors, under which the trustee agreed to grant an absolute disposition of the subjects of a bond to the heritable creditors;[2] nor has he a title to claim unclaimed dividends.[3]

A bankrupt discharged under a composition contract who is compelled to submit to extortion by a creditor before the latter will agree to the composition contract has a good title to sue for repetition.[4] If there is no extortion, the question is still open.

A discharged bankrupt, whose estate was transferred by the statutory trustee to a private trustee for security and relief of his cautioners, cannot sue for a debt owing previous to the sequestration without the consent of the private trustee.[5]

A bankrupt discharged under a composition contract has a title to sue the cautioner of his trustee, who is due a sum under his intromissions.[6]

It is an open question whether a bankrupt after his discharge has a title to reduce an endorsation by him in violation of the Act 1696, cap. 5.[7]

4. *Creditors.*—A creditor has no title to sue directly a debtor of the bankrupt,[8] except in a multiplepoinding, where he may have a riding claim on the claim lodged by such debtor.[9] He may, however, compel the trustee to give him the use of his name, or purchase the debt from the trustee and obtain as assignation, upon undertaking to relieve the trustee of all liability for the expenses of the litigation.[10] He will not be allowed to open up a compromise made between the trustee, with the consent of a majority of the creditors, and a debtor to the estate.[11]

[1] Kinmond, Luke & Co. *v.* James Finlay & Co., 1904, 6 F. 564.
[2] Douglas *v.* Maclachlan, 1881, 8 R. 470.
[3] Air *v.* Royal Bank of Scotland, 1886, 13 R. 734.
[4] Arrol and Cook *v.* Montgomery, 1826, 4 S. 499 (N. E. 504).
[5] Meggett *v.* Campbell, 1833, 11 S. 675.
[6] Bell *v.* Carstairs, 1842, 5 D. 318.
[7] Drummond *v.* Watson, 1850, 12 D. 604.
[8] Henderson *v.* Robb, 1889, 16 R. 341.
[9] Balfour *v.* Baxter Bros. & Co., 1852, 24 Jur. 290, per Lord Ivory, p. 295; Gill's Trs. *v.* Patrick and Others, 1889, 16 R. 403.
[10] Sprot *v.* Paul, 1828, 6 S. 1083; Spence *v.* Gibson, 1832, 11 S. 212; Gray *v.* Fraser, 1850, 12 D. 684, per Lord Moncreiff, p. 686; M'Kay *v.* Brownlee, 1866, 4 M. 333; Henderson *v.* Robb, 1889, 16 R. 341.
[11] Marshall and Aitken *v.* Campbell's Tr., 1889, 16 R. 895.

A prior creditor has a title to reduce acts of a bankrupt in violation of the Act 1696, cap. 5, or which amount to an illegal preference at common law, but he has no title to recover the subject of the alienation either as acting for himself or as a trustee for other creditors.[1] A prior creditor in a voluntary trust is in the same position.[2]

A creditor has a good title to object to a deliverance of commissioners on the ground of *ultra vires*, although he has not appealed within fourteen days of its date, as provided by sec. 169 of the Bankruptcy Act.[3]

A creditor in a voluntary trust who makes a claim, but does not accede to the trust, is not thereby debarred from suing later for his full debt,[4] even though he has been paid a share of the estate according to his proportion.[5]

A creditor of an insolvent firm who obtained possession of the business and goodwill of the firm and proceeded to carry on the business was sued by a second creditor to restore the property of the insolvent firm to the creditors, or alternatively to pay the creditor's claim in full, and it was held he had a title to sue.[6]

The Court refused to sist a creditor of a bankrupt in an action against the latter which had been settled by the trustee, as there had been no appeal from the resolution to compromise, and the indemnity was insufficient.[7]

Creditors have a title to sue a reduction of a sale of a bankrupt estate to the trustee.[8]

A creditor is entitled to sist himself to a petition for the removal of a trustee by other creditors who have disclaimed, and carry on the petition.[9]

The creditors in a bond and disposition in security have no title to sue an action of count and reckoning and for payment against trustees of an *inter vivos* trust created by the truster to enable said bond to be

[1] Brown & Co. *v.* M'Callum, 1890, 18 R. 311 ; Cook *v.* Sinclair & Co., 1896, 23 R. 925.

[2] Fleming's Trs. *v.* M'Hardy, 1892, 19 R. 542 ; M'Laren's Tr. *v.* National Bank of Scotland, 1897, 24 R. 920.

[3] Lindsay *v.* Hendrie, 1880, 7 R. 911.

[4] Athya *v.* Clydesdale Bank, 1881, 18 S. L. R. 287 ; Davidson *v.* The Union Bank, 1881, 19 S. L. R. 15 ; The Heritable Securities Investment Association, Ltd. *v.* Wingates, 1891, 29 S. L. R. 904.

[5] Ogilvie *v.* Taylor, 1887, 14 R. 399.

[6] Smart & Co. *v.* Stewart and Others, 1910, S. C. 18 ; 1910, 1 S. L. T. 376.

[7] Edgar *v.* Kennedy and Hutton's Tr., 1905, 7 F. 452.

[8] Fraser *v.* Hankey & Co., 1847, 9 D. 415.

[9] Richmond & Co. *v.* M'Phun, 1854, 16 D. 546.

paid where the trustees are only liable for the fulfilment of their duties to the truster.[1]

A heritable creditor who has obtained a decree of maills and duties against the tenants on an estate in an action in which the proprietor has been called but has not appeared has a title to use sequestration for rent against a tenant who has not been called in the action of maills and duties.[2]

5. *Voluntary Trust.*—The trustee under a voluntary trust for creditors has no title to sue an action for reduction of a transaction between the insolvent and a third party on the ground of illegal preference.[3]

It was held that a truster had a good title to sue an action against the trustee and two members of a committee appointed to advise the trustee in respect that the defenders had by their illegal actings lost a sum of money to the estate.[4]

Trustees infeft for payment of the truster's debts, with powers to sell and to carry on all necessary actions, have been held entitled to sue a declarator of non-entry against a vassal in a portion of the trust lands.[5]

6. *Liquidation.*—A liquidator has no title to raise an action in his own name, but must do so in the name of the company.[6] In a winding up by the Court he must have the sanction of the Court before bringing or defending an action in name and on behalf of the company;[7] and after a winding-up order has been made, no action may be proceeded with or commenced against the company except by leave of the Court.[8]

Where a liquidator is solvent, he may sue an action without having to find caution for expenses, on the ground that he is personally liable for expenses.[9]

By the 69th section of the Companies Act of 1862[10] it is provided that where a limited company is pursuer in an action, the Judge having jurisdiction may, if it appears by any credible testimony that there is reason to believe that the assets of the company will be insufficient

[1] Lucas' Trs. *v.* Beresford's Trs., 1892, 19 R. 943.

[2] Robertson's Trs. *v.* Gardner, 1889, 16 R. 705.

[3] Fleming's Trs. *v.* M'Hardy, 1892, 19 R. 542; M'Laren's Tr. *v.* National Bank of Scotland, 1897, 24 R. 920.

[4] Campbell *v.* Cullen, 1911, 1 S. L. T. 258.

[5] Ker *v.* Russell, 1838, 1 D. 179.

[6] Munro *v.* Hutchison, 1896, 3 S. L. T. 268; *cp.* Millar, Petr., 1890, 18 R. 179.

[7] Companies (Consolidation) Act, 1908, sec. 151 (1) (*a*).

[8] Ibid., sec. 142.

[9] Motor Plants, Ltd. *v.* Stewart & Co., 1909, 1 S. L. T. 478.

[10] 25 & 26 Vict. cap. 89.

to pay the expenses of a successful defender, require sufficient security to be given for such expenses, and may stay all proceedings until such security is given. Sec. 278 of the Companies (Consolidation) Act, 1908,[1] is in similar terms.

It has been held that a reduction of a charge was of the nature of a defence, and that the parties reducing might proceed without finding caution in terms of the foregoing section.[2] In the same way a limited company which had successfully pursued an action and had gone into liquidation before an appeal was heard was not required to find caution.[3] A limited company defending an action does not become a pursuer in the sense of the section by presenting a reclaiming note.[4]

A limited company which averred a guarantee fund of £253 for a case were not required to find caution,[5] and there was the same result where a solvent liquidator was conjoined with an insolvent company.[6]

In an action under the 1908 Act the Court refused to interfere with the Lord Ordinary's discretion in the matter of caution, and intimated that before the Court will interfere it must be shown that the Lord Ordinary has gone completely wrong.[7]

(26) MANDATARY.—Where a person receives a mandate in general terms to sue actions on behalf of another person, much depends upon the terms of such a mandate whether the mandatary can sue particular actions and follow them to the Court of Appeal. Care should therefore be taken to make such mandates quite explicit, as it has been found that a mandate to sue in the Sheriff Court does not extend to the Court of Session,[8] and a mandate to make objections in the Licensing Court does not cover an appeal to the Court of Appeal.[9]

(27) MEMBER OF TRADE UNION, FRIENDLY SOCIETY, ETC.—In a case where a member of a trade union was expelled from the union after raising a summons against its officials to compel restoration of funds to the union, a proof before answer was allowed.[10]

[1] 8 Edw. VII. cap. 69.

[2] English's Coasting and Shipping Co., Ltd. *v.* British Finance Co., Ltd., 1886, 13 R. 430.

[3] Star Fire and Burglary Insurance Co., Ltd. *v.* Davidson & Sons, Ltd., 1902, 4 F. 997.

[4] Sinclair *v.* Glasgow and London Contract Corporation, Ltd., 1904, 6 F. 818.

[5] Southern Bowling Club, Ltd. *v.* Edinburgh Evening News, Ltd., 1901, 9 S. L. T. 35.

[6] Motor Plants, Ltd. *v.* Stewart & Co., 1909, 1 S. L. T. 478.

[7] New Mining and Exploring Syndicate, Ltd. *v.* Chalmers and Hunter, 1909, S. C. 1390.

[8] Bonny *v.* Gillies, 1829, 8 S. 13.

[9] Goodall *v.* Bilsland and Others, 1909, S. C. 1152.

[10] M'Dowall *v.* M'Ghee, 1913, 2 S. L. T. 238.

Where a policyholder and member of a friendly society had no patrimonial interest, it was held he had no title to sue an interdict against the board of management.[1]

[1] Edgar *v.* Board of Management of City of Glasgow Friendly Society, 1914, 2 S. L. T. 408.

CHAPTER VI

HOW CORPORATE AND UNINCORPORATE BODIES SUE AND ARE SUED

I. Corporate Bodies.—(1) *Generally.*—Corporations are usually constituted by Royal Charter, Letters-Patent, or by Act of Parliament. They may also be created by prescription,[1] or by chartered incorporations within their own body by "seal of cause," as in the case of guilds and crafts in burghs.[2]

Corporations should sue and be sued in their corporate character,[3] though upon occasion they have been allowed to sue by means of a committee specially authorised to do so.[4]

In suing for penalties, the instance is the same as in civil causes.[5]

(2) *Particular Cases.*—(a) *Burghs.*—"The Corporation of the City of Glasgow."[6] "The Provost, Magistrates, and Councillors of the Royal Burgh of Kirkcaldy."[7] "The Provost, Magistrates, and Councillors of the Burgh of Cumnock."[8]

(b) *School Boards.*—"The School Board of the Burgh of Glasgow."[9] "The School Boards of the Parishes of Dunlop and Stewarton."[10]

(c) *County Councils.*—"The County Council of the County of Midlothian."[11] "The St. Andrews and Cupar District Committees of the Fifeshire County Council."[12]

[1] Corporation of Wrights of Glasgow *v.* Crosse, 8th March 1765, F. C. (Supp. p. 209).

[2] Erskine's Inst. i. 7. 64; Begbie *v.* Brown, 26th January 1776, F. C.; Skirving *v.* Wrights of Dundee, 19th January 1803, F. C.; Mowat & Co. *v.* Tailors of Aberdeen, 1825, 4 S. 52 (N. E. 53); Gray *v.* Smith, 1836, 14 S. 1062.

[3] Graham *v.* Writers to the Signet, 1825, 1 W. & S. 538.

[4] Bow *v.* Patrons of Cowan's Hospital, 1825, 4 S. 276 (N. E. 280). See also Low *v.* Lord Arbuthnot, 1826, 4 S. 651 (N. E. 657).

[5] Fairbairn *v.* Lochryan Oyster Fishery Co., Ltd., 1908, S. C. (J.) 1.

[6] 1910, S. C. 858; 58 & 59 Vict. cap. 143, sec. 6 (local and personal).

[7] 63 & 64 Vict. cap. 49, secs. 5, 6, 9; 1910, S. C. 790.

[8] 1910, S. C. 571.

[9] 35 & 36 Vict. cap. 62, sec. 22; 1910, S. C. 195.

[10] 1910, S. C. 195.

[11] 52 & 53 Vict. cap. 50, sec. 72; 1911, S. C. 463.

[12] Ibid., sec. 79; 1911, S. C. 266.

(d) *Parish Councils.*—"The Parish Council of the Parish of Leith."[1] "The Parish Council of the City Parish of Aberdeen."[1] "The Landward Committee of the Parish Council of the Parish of Inveresk."[2]

(e) *Banks.*—"The Governor and Company of the Bank of Scotland, incorporated by Act of Parliament."[3] "The Royal Bank of Scotland, incorporated by Royal Charter."[4] "The British Linen Company, incorporated by Royal Charter."[5] "The National Bank of Scotland, Ltd., incorporated by Royal Charter and Act of Parliament."[6] "The Clydesdale Bank, Ltd."[7] "The Union Bank of Scotland, Ltd."[8] "The Commercial Bank of Scotland, Ltd., incorporated by Royal Charter and Act of Parliament."[9] "The North of Scotland and Town and County Bank, Ltd."

(f) *Universities.* — "The University of St. Andrews."[10] "The University Court of the University of Glasgow."[11]

(g) *Industrial and Provident Societies.*—These are bodies corporate by the name described on the certificate of registration."[12]

(h) *Guildry.*—"The Incorporation of the Guildry of Dunfermline."[13]

(i) *Companies Incorporated under the Companies (Consolidation) Act,* 1908.[14]—These companies sue and are sued in the registered name and address of the company. The liquidators of such companies must sue in the company name and not in their own name.[15]

(j) *Companies Incorporated under a Special Act of Parliament.*—"The Caledonian Railway Company, incorporated by Act of Parliament, and having their principal office at ."[16] "The Walker Trustees, incorporated by 'The Walker Trust Act, 1877.'"[17] No special mention in the Act is necessary to allow the company to sue and be sued in their corporate name, and it is unnecessary to state in the instance that they are incorporated, but it is advisable to do so.[18]

(k) *Companies Incorporated Abroad.*—"The International Banking Corporation, organised and existing under and by virtue of the laws of the State of Connecticut in the United States of America, having its

[1] 1910, S. C. 404; 57 & 58 Vict. cap. 58, sec. 32.
[2] 57 & 58 Vict. cap. 58, sec. 23; 1906, 8 F. 896.
[3] 1911, S. C. 593. [4] 1893, 20 R. 290. [5] 1906, 8 F. 704.
[6] 1909, S. C. 1308. [7] 1909, S. C. 1405. [8] 1909, S. C. 206.
[9] 1890, 18 R. 80. [10] 21 & 22 Vict. cap. 83, sec. 25.
[11] 52 & 53 Vict. cap. 55, sec. 5 (3); 1904, 6 F. 918.
[12] 25 & 26 Vict. cap. 87, sec. 5.
[13] 1908, 46 S. L. R. 714. [14] Sec. 16 (2).
[15] Sec. 151; Munro *v.* Hutchison and Others, 1896, 3 S. L. T. 268.
[16] 1910, S. C. 951. [17] 1910, S. C. 1037.
[18] Whitehaven and Furness Junction Rly. Co. *v.* Macfadyen, 1848, 10 D. 1127.

principal office in the city of New York, and a branch office at Threadneedle House, 31 Bishopsgate Street Within, London." [1]

(l) *Parish.*—With regard to certain matters, such as funds left to a parish for pious purposes or for the poor, it was held in early times that a parish was a corporate body.[2] Such a corporation consisted of the minister of the parish, the kirk-session, and the heritors combined.[3] It cannot be said that these bodies now represent the parish to the exclusion of other bodies,[4] and accordingly the question is not of much practical interest.

(m) *Building Society.*—Upon receiving a certificate of incorporation under the Building Societies Act, 1874, this body becomes a body corporate by its registered name.[5]

II. Unincorporate Bodies.—(1) *General Rule.*—It is a general rule that unincorporated bodies cannot sue by their common name but require to sue and be sued in the name of individual members. Where this course is adopted the names of the individual members of the society, company, association, etc., should be inserted *nominatim* in the instance, and there should be added "members of an association (*or as the case may be*) commonly called (*specify name of association, etc.*)"; or "partners of the company carrying on business under the name of (*specify name of company*)." There should also be prefixed or added the name of the company, society, association, etc. It is not necessary that all the members or partners should be included in the instance—a majority is sufficient.[6] A minority,[7] or a committee of management,[8] has no such right.

(2) *Exceptions to the General Rule.*—(a) *Bodies Exempted by Statute*—(i.) *Commissioners of Supply.*—These form a public statutory body and may sue and be sued in the name of their clerk, thus[9]:—"The Commissioners of Supply of the County of Renfrew, and James Caldwell, residing at Paisley, Clerk of Supply of said County." [10]

(ii.) *Trade Union.*—A trade union, if registered, is "a legal entity,

[1] 1910, S. C. 182.

[2] Minister, Heritors, and Kirk-Session of Dalry *v.* Newal and Others, 1791, Mor. 14557.

[3] Earl of Galloway and Others *v.* Minister and Kirk-Session of Dalry, 22nd February 1810, F. C.

[4] Kinloss Parish Council *v.* Morgan, 1908, S. C. 192.

[5] 37 & 38 Vict. cap. 42, sec. 9.

[6] Shotts Iron Co. *v.* Hopkirk, 1828, 6 S. 399; Sclater *v.* Clyne, 1831, 9 S. 248; Balfour *v.* Kerr, 1856, 18 D. 619.

[7] May *v.* Mathews and Forbes, 1834, 13 S. 94.

[8] Wilson *v.* Kippen, 1823, 2 S. 378 (N. E. 335).

[9] 20 & 21 Vict. cap. 72, sec. 51.

[10] 1878, 6 R. 259.

and though not perhaps in a strict sense a corporation, is a newly created corporate body created by statute,"[1] and "it is anomalous in that, although consisting of a fluctuating body of individuals and not being incorporated, it can own property and act by agents."[2] It may sue and be sued in the name of trustees or any other officer who may be authorised to do so by its rules touching the property, right or claim to property of the trade union,[3] and the trustees have a title to sue notwithstanding that the rules provide that the general secretary for the time being shall be the person to sue and be sued on behalf of the union.[4] With regard to any other matter it can sue and be sued in its registered name.[5] The trustees cannot now be sued for a tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute.[6]

An unregistered trade union has no corporate existence, and requires to sue and be sued in the same way as an unincorporated voluntary association (*q.v.* p. 253 *et seq.*).[7]

Where a trade union was registered under the Companies Acts and brought an action against one of its members and described itself in the summons as "incorporated under the Companies Acts, 1862 to 1890," it was held that such registration was void, and that it had set forth no proper title to sue as an unincorporated company.[8]

(iii.) *Friendly Society.*—The trustees of a registered society or branch, or any other officers authorised by its rules, may bring or defend any action or other legal proceeding in any Court whatsoever touching or concerning any property, right, or claim of the society or branch, and may sue or be sued in their proper names without any description than the title of their office.

In any legal proceedings brought under the Friendly Societies Act, 1896, by a member or person claiming through a member, a registered society or branch may also be sued in the name, as defendant, of any officer or person who receives contributions or issues policies on behalf of the society or branch within the jurisdiction of the Court in which

[1] Taff Vale Rly. Co. *v.* Amalgamated Society of Railway Servants, [1901] A. C. 426, per Lord Brampton, p. 442.

[2] Osborne *v.* Amalgamated Society of Railway Servants, [1909] 1 Ch. 163, per Lord Justice Farwell, p. 191.

[3] 34 & 35 Vict. cap. 31, sec. 9.

[4] Gough *v.* Macdonald, 1900, 2 F. 899.

[5] Taff Vale Rly. Co. *v.* Amalgamated Society of Railway Servants, [1901] A. C. 426.

[6] 6 Edw. VII. cap. 47, sec. 4 (2).

[7] Wilson *v.* Scottish Typographical Association, 1911, 1 S. L. T. 253.

[8] Edinburgh and District Aerated Water Manufacturers Defence Association, Ltd. *v.* Jenkinson & Co., 1903, 5 F. 1159.

the legal proceeding is brought, with the addition of the words "on behalf of the society or branch" (naming the same).[1]

(b) *Church of Scotland and its Courts.*—(i.) *General Assembly.*—The Assembly may sue or be sued by means of the Moderator and its officials as representing the Assembly. In one case where the Moderator, the First and Second Clerks, the Agent, and the Procurator were called as defenders the name of the Agent was struck out, and the Assembly was held to be properly called by means of the other officials.[2] The Assembly may also sue by means of a committee or by its officials specially appointed and authorised for that purpose.

(ii.) *Presbytery.*—This body has no property or funds as a presbytery. The majority may assume the denomination of the presbytery, but must also state their individual names as pursuers and defenders, and the majority cannot bind a protesting minority in the matter of expenses.[3] A presbytery may also sue by means of a committee or officials specially appointed and authorised.[4] If a presbytery is only called for its interest, intimation to the Moderator alone has been held to be good notwithstanding that the intimation was not made at a meeting of the presbytery.[5]

(iii.) *Kirk-Session.*—The kirk-session must sue and be sued in the name of the minister and the individual members of the session as such minister and members and as individuals.[6]

(iv.) *Quoad Sacra Church.*—The majority of a committee of management may use the name of the committee in order to raise an action provided the majority was authorised at a meeting called for the purpose, and it was held that calling such a meeting from the pulpit was sufficient notice.[7]

(v.) *Heritors.*—Heritors are a *quasi*-corporate body and have the privilege of suing and being sued in their own name and the name of their clerk, thus—"The Heritors of the Parish of Bathgate, and John Wright, Clerk to and as representing said Heritors."[8]

[1] 59 & 60 Vict. cap. 25, sec. 94 (1), (2); Wilkinson *v.* City of Glasgow Friendly Society, 1911, S. C. 476.

[2] Cruikshank *v.* Gordon, 1843, 5 D. 909.

[3] Buist *v.* Taylor, 1856, 18 D. 596, per Lord Justice-Clerk Hope, p. 602.

[4] Presbytery of Deer *v.* Heritors of Pitsligo, 1876, 3 R. 975.

[5] Clark *v.* Stirling, 1839, 1 D. 955.

[6] School Board of Glasgow *v.* Kirk-Sessions of Anderston, 1910, S. C. 195. See also Forbes *v.* Town Council of Glasgow, 1837, 15 S. 628; Kirk-Session of North Berwick *v.* Seine, 1839, 2 D. 23; Kirk-Session of Peebles *v.* Mags. of Peebles, 1874, 1 R. 1139 (session papers); Steel *v.* Kirk-Session of St. Cuthbert's Parish, 1891, 18 R. 911 (session papers).

[7] Darling *v.* Darling, 1898, 25 R. 747.

[8] 1908, 46 S. L. R. 714. See also Fergusson *v.* Heritors of Kirkpatrick-Durham 1850, 12 D. 1145; Boswell *v.* Duke of Portland, 1834, 13 S. 148.

For *Dissenting Church Courts*, see *Voluntary Associations*, p. 253 *et seq.*

(c) *Mercantile Firms.*—(i.) *Proper Firm.*—A mercantile company or firm carrying on business as a proper firm may sue or be sued, or raise diligence, without the name of any individual partner being added,[1] as,

"Walker, Fraser, and Steele, Property Agents in Glasgow—*Pursuers*," [2]

and this applies to an English firm against which jurisdiction has been founded by arrestment, although it may not so sue or be sued in the English Courts.[3]

(ii.) *Descriptive Firm.*—Where a company or firm which trades by a descriptive name sues or is sued, the instance of the summons should contain, in addition to the descriptive name, the names of three partners, if there are so many, or if there are less, the names of so many as there are,[4] as follows:—

"The Budhill Coal and Sandstone Company, Glasgow, and William Meek, 99A Dunbeth Road, Coatbridge, and John Loudon and James Loudon, both residing at The Cottages, Newhouse, the sole individual partners of that company, as such partners and as individuals." [5]

"Coylton Coal Company, carrying on business at Littlemill, Rankinston, and James Morton, Coalmaster there, the only known partner of that company." [6]

Where appropriate, descriptive firms come under the same rules as are laid down for voluntary associations. (See *infra*, p. 253.)

(iii.) *Dissolved Firm.*—Where a firm is dissolved by death, the title to sue for the firm's debts is in the remaining partners.[7] Where a firm is mutually dissolved the right to sue for the firm's debts is granted to some person or persons named in the deed of dissolution.

[1] Forsyth *v.* Hare & Co., 1834, 13 S. 42; Wilson *v.* Ewing, 1836, 14 S. 262; Thomson *v.* Johnstone, 1836, 15 S. 173; Young *v.* Livingston, 1860, 22 D. 983. See also Gordon *v.* Douglas, Heron & Co., 1795, 3 Paton's App. 428; Thomson *v.* Liddell & Co., 2nd July 1812, F. C.

[2] 1910, S. C. 222.

[3] Paton *v.* Neill, Edgar & Co., 1873, 10 S. L. R. 461. See also Thomson, Bonar & Co. *v.* Johnstone, 1836, 15 S. 173; Wheatcraft and Turner *v.* Hawthorns & Co., 1866, 3 S. L. R. 30.

[4] Culcreuch Cotton Co. *v.* Mathie, 1822, 2 S. 47 (N. E. 41); Sea Insurance Co. of Scotland *v.* Gavin, 1827, 5 S. 375 (N. E. 348); Shotts Iron Co. *v.* Hopkirk, 1828, 6 S. 399; Commercial Banking Co. *v.* Pollock's Trs., 1828, 3 W. & S. 365; Maclean *v.* Rose, 1836, 15 S. 236; Kerr *v.* Clyde Shipping Co., 1839, 1 D. 901; London, Leith, etc., Shipping Co. *v.* M'Corkle, 1841, 3 D. 1045; Antermony Coal Co. *v.* Wingate & Co., 1866, 4 M. 1017, per Lord Colonsay, pp. 1018, 1019.

[5] 1909, S. C. 277.

[6] 1905, 7 F. 727.

[7] Royds *v.* Fraser's Trs., 1822, 1 S. 244 (N. E. 231); Nicoll *v.* Reid, 1877, 5 R. 137.

Where it is desired to sue a dissolved firm, and the firm has not disappeared, it may be as well to constitute the debt against the dissolved firm first. This being done, any of the partners of the dissolved firm may be sued for the firm's debt. Another way is to sue all the partners of the dissolved firm. This method will be necessary where the dissolved firm has disappeared.[1]

(d) *Voluntary Associations.*— It has always been the practice in actions between members of an unincorporated association or society, where the constitution has stipulated for the body suing or being sued in the name of certain office-bearers, for the Court to give effect to such a stipulation.[2] In the same way, when a third party has entered into an agreement with an office-bearer or committee of an unincorporated association or society who represented that he or they were acting on its behalf, the Court has sustained an action by or against such office-bearer or committee in reference to such agreement;[3] and the same rule holds good where office-bearers or other individual members of an unincorporated association or society, to whom property has been destined or gifted for behoof of said body, sue or are sued in respect of said property.[4] In a case where legacies were left to certain unincorporated bodies on the declaration that the receipt of the treasurer or secretary would be a valid discharge, the bodies were allowed to sue in their own name, or that of their directors, with the treasurer or secretary, or in the name of the treasurer or secretary alone.[5]

With regard to ordinary actions, while the Court has in several cases refused to allow office-bearers to sue on behalf of unincorporated societies,[6] there has been for a considerable time a recognition by the Court of the title of office-bearers or individuals who have been appointed at a meeting of the society to sue on its behalf. Thus, the General Assembly of the General Baptist Churches and certain members appointed specially at a

[1] M'Naught *v.* Milligan, 1885, 13 R. 366; Neilson *v.* Wilson, 1890, 17 R. 608, per Lord President Inglis, p. 612. See also M'Tavish *v.* Saltoun, 3rd February 1821, F. C.; Geddes *v.* Hopkirk, 1827, 5 S. 747 (N. E. 697); Munnoch *v.* Dewar, 23rd February 1831, F. C.; Muir *v.* Collett, 1862, 24 D. 1119.

[2] Wilson and Others *v.* Kippen, 1821, 1 S. 85 (N. E. 88); Gemmels *v.* Barclay, 1830, 9 S. 33; Gillies *v.* Hunter, 1831, 9 S. 257; Sturrock *v.* Thoms' Exrs., 1851, 13 D. 762; The Chapter General of the Limited Order of the Temple, etc. *v.* Mackersy, 1903, 11 S. L. T. 516.

[3] Fisher and Hepburn *v.* Syme and Stewart, 1827, 6 S. 216; Leslie *v.* Sproat, 1829, 7 S. 312; Downe, Bell and Mitchell *v.* Pitcairn, 1829, 3 W. & S. 472; Richmond *v.* Grahame, 1847, 9 D. 633.

[4] M'Culloch *v.* Wallace, 1846, 9 D. 32, per Lord Cuninghame (Ordinary), p. 34.

[5] Sommervail and Others, 1830, 8 S. 370.

[6] Lawson *v.* Gordon, 7th July 1810, F. C.; Robertson *v.* Anderson, 1841, 3 D. 186; Fleming *v.* Ballantyne, 1842, 5 D. 305.

meeting of the Assembly called for that purpose were allowed to sue for a legacy;[1] and, on the dissolution of an unincorporated company, a party who was appointed at a meeting to ingather the estate was allowed to sue on behalf of the company in respect of said estate.[2] This practice is now firmly established, and where office-bearers, being the actual administrators of a voluntary society, come forward as pursuers in an action after being duly authorised at a meeting of the society called for the purpose, or with a sufficient number of members to show that they represent the society, their title to sue will be sustained.[3]

In the same way a voluntary association or society may be brought into Court as defenders by citing the office-bearers, and if any committee or individual is specially interested, by citing them also.[4]

The instance of the summons in the case of the Renton Football Club is as follows:—

"The Renton Football Club, having its principal office in Renton, Dumbartonshire; and , President; , Vice-President; , Match Secretary; , Honorary Secretary; , Treasurer; and (names of seven persons), Office-bearers and Members of Committee; and (names of five persons), Members of said Renton Football Club,—*Pursuers;* against the Scottish Football Association, having its principal office at No. 53 Waterloo Street, Glasgow; and , President; , Vice-President; , Honorary Treasurer (and three of the General and Professional Committee aftermentioned); , Secretary; and (twenty-three names), members of General Committee; and (nine names), members of the Professional Committee of the said Scottish Football Association,—*Defenders.*"

In the Condescendence it is stated: "The pursuers were duly authorised at a meeting of the club to sue the present action."

Dissenting churches and their Courts are voluntary associations and subject to the same rules as aforementioned. The manner in which a dissenting General Assembly or Supreme Court sues is sometimes in its

[1] The General Assembly of the General Baptist Churches *v.* Taylor, 1841, 3 D. 1030.

[2] Jameson *v.* Watson, 1852, 14 D. 1021.

[3] Edinburgh Veterinary Medical Society *v.* Dick's Trs., 1874, 1 R. 1072, per Lord Neaves, p. 1078; Renton Football Club *v.* M'Dowall, 1891, 18 R. 670; Pagan and Osborne *v.* Haig, 1910, S. C. 341.

[4] Somerville *v.* Rowbotham, 1862, 24 D. 1187; Renton Football Club *v.* M'Dowall, 1891, 18 R. 670; Murdison *v.* Scottish Football Union, 1896, 23 R. 449; Bridge *v.* South Portland Street Synagogue, 1907, S. C. 1351; Taff Vale Rly. Co. *v.* Amalgamated Society of Railway Servants, [1901] A. C. 426.

own name along with its officials,[1] and sometimes by a committee appointed or authorised to sue.[2] Where the latter method is adopted it is usual to refer in the instance to such appointment and authority.

In calling a dissenting General Assembly as a defender, it is sufficient to name the Assembly, its Moderator, and officials.[3]

Dissenting presbyteries when called for their interest have been held sufficiently cited when called by their office-bearers.[4] If, however, a presbytery is called as a proper defender or is the pursuer, it is thought that the same rule would obtain as prevails in the Church of Scotland, where individual members require to be mentioned as pursuers or defenders,[5] except where authority is given to a committee or individual in the case of a presbytery suing. In the same way it has been held that a dissenting congregation may be sued by its office-bearers.[6]

[1] United Free Church of Scotland *v.* M'Iver, 1902, 4 F. 1117 ; General Assembly of the Free Church of Scotland *v.* Johnston, 1905, 7 F. 517; United Free Church of Scotland *v.* Black, 1909, S. C. 25.

[2] General Assembly of the General Baptist Churches *v.* Taylor, 1841, 3 D. 1030 ; Bannatyne *v.* The United Free Church of Scotland, 1902, 4 F. 1083.

[3] Skerret *v.* Oliver, 1896, 23 R. 468, per Lord Kincairney, p. 475 ; General Assembly of the Free Church of Scotland *v.* Johnston, 1905, 7 F. 517.

[4] Skerret *v.* Oliver, 1896, 23 R. 468, per Lord Kincairney, p. 475.

[5] Buist *v.* Taylor, 1856, 18 D. 596, per Lord Justice-Clerk Hope, p. 602.

[6] Bridge *v.* South Portland Street Synagogue, 1907, S. C. 1351.

CHAPTER VII

STATUTORY LIMITATION

A TIME limit has sometimes been placed by Act of Parliament upon the right of a pursuer, who has otherwise a title and interest, to raise certain kinds of action.[1] The most important of these Acts is the Public Authorities Protection Act, 1893.[2] It enacts that any action, prosecution, or other proceeding against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next of the ceasing thereof.[3]

It does not apply to any proceedings of any department of the Government against any local authority or officer of a local authority;[3] nor does it apply to any action or other proceeding for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or in respect of any alleged neglect or default in the execution of any Act of Parliament, or on account of any act done in any case instituted under an Act of Parliament, when that Act of Parliament applies to Scotland only, and contains a limitation of the time and other conditions of the action or proceeding.[4]

The Act does not apply to cases where the conclusions are purely declaratory, and involve the defenders in no pecuniary liability or damages;[5] nor to cases of interdict;[6] nor does it apply where an

[1] Poor Law Amendment Act, 1845, sec. 86; Cruelty to Animals Act, 1850, sec. 7; Coal Mines Regulation Act, 1887, sec. 62; Sale of Food and Drugs Act, 1899, sec. 19; Public Health (Scotland) Act, 1897, sec. 166; Baker *v.* Glasgow Corporation, 1915, 53 S. L. R. 183; Summary Jurisdiction Act, 1908, sec. 26.

[2] 56 & 57 Vict. cap. 61. [3] Ibid., sec. 1.

[4] Ibid., sec. 3; Gilillan *v.* Middle Ward District Committee of Lanarkshire County Council, 1902, 9 S. L. T. 432; 10 S. L. T. 274; Duncan *v.* Mags. of Hamilton, 1902, 5 F. 160; Montgomerie & Co., Ltd. *v.* Burgh of Haddington, 1907, 15 S. L. T. 474.

[5] Stirling *v.* Stirling County Council and Others, 1900, 7 S. L. T. 351-3.

[6] Farquhar and Gill *v.* Mags. of Aberdeen, 1912, S. C. 1294.

incompetent action is brought against persons acting in a public capacity.[1] It is not sufficient in itself to render the statute available that the defenders are a public authority; the action must have been raised against them in respect of the execution, etc., by them of an Act of Parliament, or of a public duty or authority, and not merely that the parties are exercising the ordinary rights of debtor and creditor.[2] Police constables sued for having maliciously and without probable cause arrested a person on a false charge of assault have been held not entitled to the benefit of the Act,[3] and the same result followed where public authorities acted *ultra vires*.[4] A tenant who raises an action to enforce his right to compensation for the value of his interest in land taken compulsorily by public bodies does not come within the scope of the Act.[5]

The Act applies even though the defenders do not found on it in their original defences, but put it on record by way of amendment.[6] Where corporations are permitted by the Legislature to take up and carry on for a profit a business which is usually undertaken by a private trader, they are protected by the statute.[7] Managers of a reformatory sued by an inmate in respect of an accident met with in the course of work ordered by the managers to be done by him were held to be similarly protected,[8] as was also a volunteer colonel sued by the father of a child killed by an ammunition waggon, the horses of which had bolted.[9] Where two rate collectors, who were also sheriff officers, forcibly entered a house in order to execute a summary warrant for the recovery of rates, notwithstanding that rates had been already paid, the Act was held to apply.[10] A Port Authority falls under the Act.[11]

In a prosecution where the prosecutor had a good title, which *de facto* was not libelled, he was held entitled to be protected.[12]

[1] Davidson *v.* Anderson, 1905, 13 S. L. T. 298.

[2] Edinburgh Mags. *v.* Heriot's Trust, 1900, 7 S. L. T. 371; M'Phie *v.* Mags. of Greenock, 1904, 7 F. 246; Lanarkshire Upper Ward District Committee *v.* Airdrie, Coatbridge and District Water Trs., 1906, 8 F. 777.

[3] M'Ternan *v.* Bennett, 1898, 1 F. 333.

[4] Edwards *v.* Kinloss Parochial Board, 1891, 18 R. 867; Mitchell *v.* Aberdeen Mags., 1893, 20 R. 253.

[5] Corporation of Glasgow *v.* Miller, 1905, 13 S. L. T. 167; Gilliland *v.* County Council of Ayr, 1907, 15 S. L. T. 21.

[6] Christie *v.* Glasgow Corporation, 1899, 36 S. L. R. 694.

[7] Spittal *v.* Corporation of Glasgow, 1904, 6 F. 828.

[8] Conolly *v.* Managers of Stranraer Reformatory, 1904, 11 S. L. T. 638.

[9] Wilson *v.* Edinburgh City Artillery Volunteers, 1904, 7 F. 168.

[10] M'Fadzean *v.* Corporation of Glasgow, 1903, 40 S. L. R. 339.

[11] Clyde Salvage Co., Ltd. *v.* Anstruther Union Harbour Commissioners, 1908, 15 S. L. T. 888.

[12] Ferguson *v.* M'Nab, 1885, 12 R. 1083.

A proof may be necessary in order to ascertain whether in a particular case the act complained of was done in the execution of a public duty.[1]

The date from which the six months are measured is the date of the act which is the cause of the action, and not the date of recovery.[2]

"Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."[3] The expression "judgment" is applicable to expenses in the Inner House as well as in the Outer House.[4] This provision is not peremptory, and it is within the power of the Court to deprive successful defendants of their expenses on cause shown.[5]

Expenses as between agent and client must be asked for at the time of the award of expenses.[6]

The following English decisions may prove of service:—

It is open to the pursuer to show that there was good cause for delay past the six months.[7]

A municipal corporation acting under powers conferred by a provisional electric lighting order,[8] a navigation and dock Act,[9] and a tramway Act[10] comes within the protection of the Act; but not a public company incorporated by Act of Parliament for the purpose of earning profits as well as for the performance of public duties.[11]

"Public authorities" are not confined to municipalities.[12]

Where a public authority commits a trespass, an action of declarator and for interdict must be raised within six months.[13]

Where an action is raised in respect of illegal diligence following upon a conviction which was subsequently quashed, the period limited by the Act begins to run from the date of the illegal diligence and not from the date of the conviction.[14]

[1] Knox *v.* Macarthur, 1865, 3 M. 890.

[2] Spittal *v.* Corporation of Glasgow, 1904, 6 F. 828.

[3] Sec. 1 (*b*).

[4] Spittal *v.* Corporation of Glasgow, 1904, 6 F. 828; Aird *v.* Tarbert School Board, 1907, S. C. 305. See also Clippens Oil Co., Ltd. *v.* Edinburgh and District Water Trs., 1906, 8 F. 731, at p. 750.

[5] Aird *v.* Tarbert School Board, 1907, S. C. 305, per Lord President Dunedin and Lord Kinnear, p. 314.

[6] Mags. of Aberchirder *v.* Banff District Council, 1906, 8 F. 571; Edinburgh and District Water Trs. *v.* Somerville & Son, Ltd., 1907, S. C. 355; Walsh *v.* Mags. of Pollokshaws, 1907, 14 S. L. T. 845.

[7] Worthington *v.* Hulton, 1865, L. R. 1 Q. B. 63.

[8] Ambler & Sons, Ltd. *v.* Corporation of Bradford, [1902] 2 Ch. 585.

[9] "The Ydun," [1899] P. 236.

[10] Parker *v.* London County Council, [1904] 2 K. B. 501; Lyles *v.* Southend-on-Sea Corporation, [1905] 2 K. B. 1.

[11] Attorney-General *v.* Proprietors of Margate Pier and Harbour, [1900] 1 Ch. 749.

[12] "The Johannesburg," [1907] P. 65.

[13] Offin *v.* Rochford Rural District Council, [1906] 1 Ch. 342.

[14] Polley *v.* Fordham, [1904] 2 K. B. 345.

The Act does not apply to actions or proceedings for defamatory statements made at a meeting of commissioners;[1] for statutory compensation for damage done to property;[2] for interdict;[3] for the recovery of land;[4] upon a building contract;[5] for an action *in rem*;[6] for the expenses of extraordinary traffic caused by contractors to a public authority;[7] for damages for fraudulent representations made as to the nature of works to be executed by the pursuer for a public authority;[8] and for reduction of an agreement between two local authorities.[9]

The pollution of a stream by periodical inundation from a sewer out of repair is a continuing cause of action, and the pursuer's right to damages is not limited by the Act.[10]

[1] Royal Aquarium Co. *v.* Parkinson, [1892] 1 Q. B. 431.

[2] Delany *v.* Metropolitan Board of Works, 1867, L. R. 3 C. P. 111.

[3] Attorney-General *v.* Hackney Local Board, 1875, L. R. 20 Eq. 626; Flower *v.* Low Leyton Local Board, 1877, 5 Ch. D. 347; Bateman *v.* Poplar District Board of Works, 1886, 33 Ch. D. 360; Harrop *v.* Mayor of Ossett, [1898] 1 Ch. 525.

[4] Foat *v.* Mayor of Margate, 1883, 11 Q. B. D. 299.

[5] West Ham Guardians *v.* Churchwardens of St. Matthew's, Bethnal Green, [1896] A. C. 477; Sharpington *v.* Fulham Guardians, [1904] 2 Ch. 449; Tilling, Ltd. *v.* Dick, Kerr & Co., [1905] 1 K. B. 562.

[6] "The Burns," [1907] P. 137.

[7] Kent County Council *v.* Folkestone Corporation, [1905] 1 K. B. 620.

[8] S. Pearson & Son, Ltd. *v.* Lord Mayor of Dublin, [1907] A. C. 351.

[9] Holsworthy Urban District Council *v* Holsworthy Rural District Council, [1907] 2 Ch. 62.

[10] Attorney-General *v.* Lewes Corporation, [1911] 2 Ch. 495. See also Earl of Harrington *v.* Derby Corporation, [1905] 1 Ch. 205.

CHAPTER VIII

TITLE AND INTEREST TO DEFEND

EVERY person who has been called as a defender has a title to state defences, although it may happen that the defences, when stated, are found to be irrelevant or insufficient to entitle the defender to prevail.[1] In several cases it would appear from the rubric as if this were not so, but an examination of the facts of each case bears this out. Thus, where a pursuer raised an action of declarator that he had the only good right to the hereditary office of Royal Standard-Bearer for Scotland, and that the defender had no right to that office, it would appear at first sight as if the Lord Ordinary (Kyllachy) had held that the defender had no right to appear and state defences. This, however, is not the case, as what Lord Kyllachy did was to hold, after a careful examination of the defender's defences, that he had not relevant or sufficient averments to entitle him to enter into a competition of titles with the pursuer, *i.e.* that although he had a good title to defend, his defence was irrelevant.[2] In the same way, where the only defender who put in defences in a case was a bondholder in possession who was not bound by an agreement made between the pursuer and the proprietor, it was held that her defences did not entitle her to successfully defend an action of reduction of said agreement, as she was no party thereto.[3] Again, where a bondholder over a *pro indiviso* share of subjects raised an action of maills and duties against the tenants for payment of his debtor's share of the rents, and called as defenders his debtor and the other *pro indiviso* proprietors, and the debtor alone compeared, the latter was allowed to state defences, but his defences were held to be irrelevant to the effect that he could not object to his own assignation;[4] and where a debtor in an obligation for payment of an annuity was called as defender in an action for payment by a person who had adjudged the creditor's right, and pleaded that the adjudger's right had been extinguished by payment of the debt, on

[1] Drummond *v.* Ross, 1824, 3 S. 315 (N. E. 223); Pollock *v.* Turnbull, 1827, 5 S. 195 (N. E. 181).

[2] Earl of Lauderdale *v.* Wedderburn, 1905, 7 F. 1045; 1908, S. C. 1237.

[3] Heron *v.* Martin, 1893, 20 R. 1001.

[4] Schaw *v.* Black, 1889, 16 R. 336.

which the adjudication proceeded, it was held that although he was entitled to defend, his defences were irrelevant.[1] In a later case,[2] where the heir of the person who gifted a private school raised an action of declarator that the site had reverted to him, and called the trustees of the school, who did not defend, the school board was allowed to put in defences, which, however, were held to be irrelevant from want of interest. In a recent case[3] certain *pro indiviso* proprietors sought to interdict certain indwellers in a burgh from fishing in a river on certain days, and the right to defend was admitted, but the defences were held to be incompetent in respect that they merely raised the question of the extent of the pursuer's *pro indiviso* rights, which is a question to be determined by agreement or by litigation between the *pro indiviso* proprietors, and between them alone.

The misunderstanding with regard to these and similar cases seems to have arisen owing to the use of the word "title" in a double sense—the title to defend being confused with the title to prevail in the defence.

Although every person called as a defender has thus a title to enter a defence, it may happen that persons who have not been called have also a title and interest to be heard in defence. Thus, where a pursuer institutes an action to restrict or annul an alleged right-of-way and calls a member of the public for that purpose as a defender, the county council may insist upon being sisted as defenders to vindicate the right-of-way in the public interest.[4] Neither a parish council nor its landward committee, however, has any such right or title.[5] In one case[6] a public limited company formed for the preservation of rights-of-way was allowed to be sisted as a defender, the Court intimating that a decree against the company would be *res judicata* in a question with the public. Again, where the complainers raised an action to interdict the respondents from allowing trade rivals of the complainers to inspect plant belonging to the latter which had been erected in the works of the respondents, and the respondents did not lodge answers, the trade rivals were allowed to sist themselves as respondents in the interdict proceedings;[7] and where the defenders in an action

[1] Macleod's Trs. *v.* Murray, 1891, 18 R. 830.

[2] Houldsworth *v.* School Board of Cambusnethan, 1904, 7 F. 291.

[3] Warrand *v.* Watson, 1905, 8 F. 253.

[4] Alston *v.* Ross, 1895, 23 R. 273.

[5] Hope *v.* Landward Committee of the Parish Council of Inveresk, 1906, 8 F. 896.

[6] Macfie *v.* Scottish Rights-of-Way and Recreation Society, Ltd., 1884, 11 R. 1094.

[7] Gas Power and By-Products Co., Ltd. *v.* Power Gas Corporation, Ltd., 1911, S. C. 27. See, however, Laing's Sewing Machine Co. *v.* Norrie & Sons, 1877, 5 R. 29.

were ordained by the House of Lords to lengthen certain piers in a river, and third parties raised a suspension and interdict to prevent the defenders from doing so until the sanction of the Board of Trade had been obtained, the pursuers in the original action were held to have a right to be sisted as respondents.[1]

Generally speaking, the magistrates of a burgh are entitled to defend any action calculated to affect the interest of the inhabitants of the burgh as a whole.[2]

A neighbouring proprietor who can qualify an interest has usually a good title to be called as a defender in a Dean of Guild petition, even though his property does not immediately adjoin the building or alteration proposed.[3]

The Lord Advocate has a title to enter defences in actions of nullity of marriage and divorce,[4] and also in actions to settle charitable schemes.[5]

Where a female defender marries *pendente processu*, the husband has a title to sist himself and defend.[6]

Where a defender dies *pendente processu* leaving trustees, the latter have a right to be sisted in his stead, even in a consistorial action;[7] but if the deed conferring the office of trustee has been lost or destroyed, the trustees will not be entitled to be sisted as defenders until an action of proving the tenor of the lost deed has at least been called.[8]

A trustee in bankruptcy has a right to sist himself as a party in room of a bankrupt defender, but if he does so he is liable in full for the expenses of the opposite party before, as well as after, he has sisted himself.[9] He may do so in an action of divorce where the bankrupt is defender.[10]

A creditor may in certain circumstances be entitled to enter appearance on behalf of a trustee who refuses to defend, but in such a case

[1] Glasgow Shipowners' Association *v.* Clyde Navigation Trs., 1885, 12 R. 695. See also Lord Blantyre *v.* The River Clyde Trs., 1879, 6 R. (H. L.) 72.

[2] Keiller *v.* Mags. of Dundee; Scott *v.* Mags. of Dundee, 1886, 14 R. 191.

[3] Lawrie *v.* Jackson, 1891, 18 R. 1154; *cp.* Scott's Trs. *v.* Shaw, 1892, 19 R. 895.

[4] Conjugal Rights (Scotland) Act, 1861 (24 & 25 Vict. cap. 86), sec. 8; Paul *v.* Paul, 1896, 4 S. L. T. 124, 171.

[5] The Trusts (Scotland) Act, 1867 (30 & 31 Vict. cap. 97), sec. 16.

[6] Erskine's Inst. i. 6. 21; Fraser, Husband and Wife, i. 583; Herriot *v.* Jacobsen, 1909, S. C. 1228.

[7] Ritchie *v.* Ritchie's Trs., 1874, 1 R. 826.

[8] Geikie *v.* Hutchison, 1848, 10 D. 354.

[9] Torbet *v.* Borthwick, 1849, 11 D. 694; Ellis *v.* Ellis, 1870, 8 M. 805, per Lord President Inglis, p. 806.

[10] Somerville's Tr. *v.* Somerville's Trs., 1911, 2 S. L. T. 48 and 225; Corbidge *v.* Somerville, 1912, 2 S. L. T. 19; 1913, S. C. 859.

the creditor must enter into an agreement to keep the trustee *indemnis* before he can demand the use of the trustee's name in order to carry on a defence.[1] One creditor may also take the place of another creditor.[2]

A bankrupt may take up the defence in an action which his trustee refuses to defend,[3] or has abandoned.[4]

A trustee may defend an action directed against a truster where the latter does not defend.[5]

A law agent has a right to be sisted as a defender in a case where his client, the defender, has obtained a decree for expenses, or a judgment necessarily leading to such a decree, or where there has been collusion between the parties in order to defeat his claim for expenses.[6] In consistorial causes, where the parties have become reconciled, it is quite competent, where there has been an investigation into the facts, for the agent of the wife to be sisted as a party in order that he may recover from the husband the expenses incurred by him on behalf of the wife.[7]

A person may be called for any interest he may have and have a right to defend in the same way as if he had been called in the ordinary way as a defender. Thus, where a superior raised an action of poinding of the ground for recovery of arrears of feu-duties and there were called as defenders the feuar and his heritable creditors, the latter of whom were called for any interest they might have, the Court allowed the heritable creditors to defend alone and to urge all the pleas relevant to the feuar.[8]

In an action in which a pursuer asks for a declarator that he has the exclusive rights to certain salmon fishings, it is not necessary for a relevant defence that the defender, who has a Crown charter, should have had possession thereunder.[9]

See *Motion to Sist Party, infra,* Part v. Chap. viii.

[1] Edgar *v.* Kennedy and Hutton's Tr., 1905, 7 F. 452.

[2] Cochrane *v.* Gilkison, 1854, 16 D. 546.

[3] Goudy (3rd ed.), p. 396 *et seq.*

[4] M'Whinnie *v.* Johnston and Morrison, 1864, 2 M. 668.

[5] Carrick *v.* Hutchison, 1844, 6 D. 1148.

[6] Tod and Wright *v.* Wilson and M'Lellan, 1822, 1 S. 381 (N. E. 358); M'Lean *v.* Auchinvole, 1824, 3 S. 190 (N. E. 129); Murray *v.* Kyd, 1852, 14 D. 501; Hamilton and Macqueen *v.* Hay, 1854, 17 D. 107; Cornwall *v.* Walker, 1871, 8 S. L. R. 442; Welsh *v.* Cousins, 1898, 35 S. L. R. 656; Crawford *v.* Smith, 1900, 8 S. L. T. 249; Ammon *v.* Tod, 1912, S. C. 306; Mitchell *v.* Stephen, 1913, 2 S. L. T. 367.

[7] Macgregor and Barclay *v.* Martin, 1867, 5 M. 583; Smith *v.* Smith, 1871, 9 M. 538; Clark *v.* Henderson, 1875, 2 R. 428; Wales *v.* Wales, 1902, 9 S. L. T. 371.

[8] Scottish Heritages Co., Ltd. *v.* North British Property Investment Co., Ltd., 1885, 12 R. 550.

[9] Maxwell *v.* Lamont, 1903, 6 F. 245.

CHAPTER IX

PROPER PARTIES TO CONVENE AS DEFENDERS

(1) Persons under Disability.—(a) *Pupils.*—See *supra*, p. 166.

(b) *Minors.*—See *supra*, p. 172.

(c) *Married Women.*—See *supra*, p. 176.

(d) *Insane Persons.*—See *supra*, p. 164.

(2) Crown and Public Departments. — All actions against the Crown or any of the Public Departments should be directed against the Lord Advocate,[1] except in the case of the Admiralty, which should be sued in either of the following ways:—"The Lord High Admiral of the United Kingdom" or "the Commissioners for executing the office of Lord High Admiral of the United Kingdom."[2]

(3) Trustees.—Where a body of trustees commits a wilful breach of directions given by a truster to the detriment of the trust, all its members must be made defenders to a suit for reparation, as they are liable *ex contractu*. If, however, the same body commits a comparatively venial breach of duty in violation of the general law regulating trust administration, any member may be sued for the whole loss resulting, because he has been guilty of a *quasi*-delict.[3]

Trustees must be sued *nominatim* with the qualification "the trustees of the late, etc.," added. It is not sufficient to convene "the trustees of *A. B.*" without specification of individual names and designations.[4]

Where a minority of trustees desires to escape liability for the expenses of an action brought against the trustees, it must disclaim the defences put in.[5]

(4) Heirs.—As both the heir-at-law and the executor are liable for the general debts of a deceased person, a creditor may sue an action of constitution against the heir without calling the executors.[6] Where

[1] 19 & 20 Vict. cap. 56, sec. 22; 20 & 21 Vict. cap. 44, sec. 1.

[2] 31 & 32 Vict. cap. 78, sec. 4.

[3] Palmer *v.* Wick, etc., Shipping Co., Ltd., 1894, 21 R. (H. L.) 39, at p. 43. See also Croskery *v.* Gilmour's Trs., 1890, 17 R. 697; Beatt *v.* Ogg, 1897, 4 S. L. T. 266; Mackay *v.* Mackay, 1897, 4 S. L. T. 337; Sim *v.* Muir's Trs., 1906, 8 F. 1091, per Lord Salvesen; Allen *v.* M'Combie's Trs., 1909, S. C. 710.

[4] Bell *v.* Trotter's Trs., 1841, 3 D. 380.

[5] Bennett *v.* Maclellan, 1891, 18 R. 955, per Lord Adam, p. 957.

[6] British Linen Co. *v.* Lord Reay, 1850, 12 D. 949.

the heir has not completed his title and entered to his ancestor's estate, and has not renounced, it was formerly necessary to use a general charge to enter heir before the action of constitution. In 1847,[1] however, charges to enter heir were abolished, and by the Titles to Land Consolidation Act, 1868, the execution of a summons of constitution is equivalent to a general charge to the heir to enter.[2]

(5) Executors.—Where a person liable *ex contractu* dies, an action may be raised against his executors, or if the action has been raised and the defender dies *pendente processu*, the action may be transferred against his executors.

If a *delinquent* should die, the maxim *actio personalis moritur cum persona* has no application, and an action of damages founded on delict or *quasi*-delict lies against the delinquent's executors or other representatives, or if raised against the delinquent during the latter's lifetime, transmits against his executors on his death *pendente lite*,[3] at least so far as *lucrati*.[4] This applies to *solatium* as well as to patrimonial loss.[5]

(6) Cautioners.—Formerly, a cautioner could not be sued in a cautionary obligation unless the principal debtor had been first discussed, but this has been changed by the Mercantile Law Amendment Act, and now a creditor may proceed against the principal debtor and the cautioner or either of them, and use all competent action or diligence against both or either of them.[6]

(7) Joint Delinquents.—As each joint delinquent is liable *singuli in solidum*, a pursuer can raise his action against all the delinquents, or against one or more, and he may recover his whole damages against one of the co-delinquents.[7] At one time it seemed that where a

[1] 10 & 11 Vict. cap. 48, sec. 16.

[2] 31 & 32 Vict. cap. 101, sec. 60.

[3] Erskine's Inst. iii. 1. 15 ; Bell's Prin., secs. 544, 546 ; Calder *v.* Mackenzie's Representatives, 1776, Mor. *voce* Personal and Transmissible, App. Part ii. No. 2 ; Macnaughton *v.* Robertson, 17th February 1809, F. C. ; Morrison *v.* Cameron, 25th May 1809, F. C. ; Kay *v.* Wilson's Trs., 1850, 12 D. 845 ; Clarkson *v.* Fleming, 1858, 20 D. 1224 ; Mackenzie *v.* Goldie, 1866, 4 M. 277 ; Auld *v.* Shairp, 1874, 2 R. 191, per Lord Neaves ; Oncken's Factor, 1892, 19 R. 519 ; Liddell *v.* Findlay, 1905, 13 S. L. T. 150.

[4] Davidson *v.* Tulloch, 1860, 3 Macq. 783.

[5] Evans *v.* Stool, 1885, 12 R. 1295.

[6] 19 & 20 Vict. cap. 60, sec. 8 ; Morrison *v.* Harkness, 1870, 9 M. 35 ; Sheldon and Ackhoff *v.* Milligan, 1907, 14 S. L. T. 703.

[7] Erskine's Inst. iii. 1. 15 ; Stair, i. 9. 5 ; Ferguson *v.* Kinnoul, 1842, 1 Bell's App. 662 ; Western Bank *v.* Douglas, 1860, 22 D. 447 ; Western Bank *v.* Bairds, 1862, 24 D. 859, per Lord Justice-Clerk Inglis, p. 901 ; Dobbie *v.* Halbert, 1863, 1 M. 532 ; Murray *v.* Brown and Porteous, 1881, 19 S. L. R. 253 ; Croskery *v.* Gilmour's Trs., 1890, 17 R. 697 ; Palmer *v.* Wick, etc., Steam Shipping Co., 1894, 21 R. (H. L.) 39, per Lord Watson, p. 43 ; Beatt *v.* Ogg's Trs., 1897, S. L. T. 266 ; Gillon *v.* Chalmers,

pursuer raised an action against several joint delinquents "jointly and severally," he was bound to make out a case of joint liability in order to succeed in getting a decree at all;[1] but it is now the law that under a conclusion against joint delinquents "jointly and severally" a pursuer may be entitled to a decree against one of the alleged joint delinquents, although he may fail against, or settle with, the others.[2] In fact, the words "or severally" usually added to such a conclusion are now unnecessary and mere surplusage.[3]

Where there is a single wrong it is competent for a pursuer to ask for a decree for a lump sum against joint delinquents "jointly and severally,"[4] but not where there are separate wrongs.[5] It is really one wrong where the averment against delinquents "jointly and severally" is that the delinquents by their separate negligence or delict have contributed to one common result.[6]

The Articles of Regulation, 29th April 1695, sec. 28, restricting the number of defenders that could be called in one action to six, does not apply to joint delinquents; and if, therefore, the alleged ground of liability is the same against all the defenders, there is no limit to the number of parties who may be called.[7]

An innocent game which is not averred to be played in an illegal

1900, 8 S. L. T. 75; Duthie *v.* Caledonian Rly. Co., 1898, 25 R. 934; Sim *v.* Muir's Trs., 1906, 8 F. 1091; Ellerman Lines, Ltd. *v.* Clyde Navigation Trs., 1909, S. C. 690, per Lord President Dunedin, p. 692; Allen *v.* M'Combie's Trs., 1909, S. C. 710.

[1] Glegg on Reparation (2nd ed.), p. 95; Mackersy *v.* Davis, 1895, 22 R. 368, per Lord M'Laren, p. 370; Thomson & Co. *v.* Pattison, Elder & Co., 1895, 22 R. 432, per Lord President Robertson, p. 436; Douglas *v.* Hogarth, 1901, 4 F. 148, per Lord Trayner, p. 150.

[2] Robinson *v.* Reid's Trs., 1900, 2 F. 928; Douglas *v.* Hogarth, 1901, 4 F. 148; Baird's Trs. *v.* Leechman, 1903, 10 S. L. T. 515; Fleming *v.* Gemmill, 1908, S. C. 340; Mackenzie *v.* Macallister, 1909, S. C. 367, per Lord President Dunedin, p. 371; Ellerman Lines, Ltd. *v.* Clyde Navigation Trs., 1909, S. C. 690.

[3] Fleming *v.* Gemmill, 1908, S. C. 340, per Lord M'Laren, p. 345, and Lord Pearson, p. 345.

[4] Ellerman Lines, Ltd. *v.* Clyde Navigation Trs., 1909, S. C. 690; Brown & Co. *v.* North British Rly. Co. and Raeburn and Verel, 1909, 1 S. L. T. 546; Goodall *v.* Forbes, 1909, S. C. 1300. See also Findlay *v.* Glennie, 1894, 1 S. L. T. 482; Muirhead *v.* Watt and Wilson, 1895, 3 S. L. T. 71.

[5] Barr *v.* Neilson, 1868, 6 M. 651; Taylor *v.* M'Dougall & Sons, 1885, 12 R. 1304; Sinclair *v.* Caithness Flagstone Co., Ltd., 1898, 25 R. 703; Hannay *v.* Muir, 1898, 1 F. 306; Conway *v.* Dalziel, 1901, 3 F. 918; Hook *v.* M'Callum, 1905, 7 F. 528.

[6] Scottish Co-operative Wholesale Society *v.* Glasgow Fleshers' Trade Defence Association, 1898, 35 S. L. R. 645; Belmont Laundry Co. *v.* Aberdeen Steam Laundry Co., 1898, 1 F. 45; Ellerman Lines, Ltd. *v.* Clyde Navigation Trs., 1909, S. C. 690, per Lord President Dunedin, p. 692; Lord M'Laren, p. 693. See also Buccleuch *v.* Cowan, 1866, 5 M. 214.

[7] Western Bank *v.* Douglas, 1860, 22 D. 447; Breadalbane *v.* MacGregor, 1846, 9 D. 210; 1848, 7 Bell's App. 43; Buccleuch *v.* Cowan, 1864, 2 M. 653; affd. 4 R. (H. L.) 14.

manner will not give rise to an action against all the players "conjunctly and severally."[1]

(8) Joint, and Joint and Several, Obligants.—In an action for a sum due under a joint obligation, or for implement of a joint contract, all the parties liable under it must be called as defenders. If an action raised against several defenders jointly is found to be irrelevant against one, it may go on against the other defenders.[2]

With regard to obligants bound jointly and severally, a pursuer may raise an action against any one of the obligants provided the obligation has been constituted or is in writing. If the obligation has not been constituted, or is not in writing, all the joint obligants must be called.[3] It is not necessary for the written obligation to contain a statement that the obligation is conjunct and several if it is plain that the obligation is of such a nature, such as a promissory note.[4] This rule does not seem, however, to apply to a decree *ad factum præstandum*,[5] nor to a natural obligation which requires to be implemented conjunctly and severally.[6]

On a "joint and several" conclusion it is competent to pronounce a decree against defenders "jointly."[7]

In a case where the conclusion against two defenders to make payment was without the words "conjunctly and severally" the Lord Ordinary granted a decree against the defenders "conjunctly and severally," as he was of opinion that this was the nature of the liability disclosed.[8] (See *Joint Delinquents*, p. 265.)

(9) Corporations.—Whether a corporation should be called as a defender depends upon whether the injury has been done by the corporation as a body, or whether it has been done by individual members in their individual capacity.[9] The individual members may be sued although the injury has been done nominally by the corporation as a whole.[10] Where a committee of a corporation acts *ultra vires*,

[1] Ward *v.* Abraham, 1910, S. C. 299.

[2] Milne *v.* Smiths, 1892, 20 R. 95; Reilly *v.* Smith, 1904, 6 F. 662.

[3] Neilson *v.* Wilson, 1890, 17 R. 608; Gibson *v.* Irvine, 1900, 7 S. L. T. 391.

[4] Gordon *v.* Sutherland, 1761, Mor. 14677; Macdougall *v.* Foyer, 13th February 1810, F. C.; M'Kellar *v.* Campbell, 7th June 1811, F. C.; Zuill *v.* M'Murchy, 1842, 4 D. 871; Milne's Trs. *v.* Ormiston's Trs., 1893, 20 R. 523.

[5] Erskine's Inst. iii. 3. 74.

[6] Hamilton *v.* Hamilton, 1877, 4 R. 688; Duncan *v.* Duncan, 1882, 19 S. L. R. 696; Dear *v.* Duncan, 1896, 3 S. L. T. 241.

[7] Gillespie *v.* Paisley Road Trust and Burgh Commissioners, 1900, 7 S. L. T. 350.

[8] Brodie *v.* Coplan, 1906, 14 S. L. T. 35.

[9] Gordon *v.* British and Foreign Metaline Co., 1886, 14 R. 75.

[10] Ferguson *v.* Kinnoul, 1842, 1 Bell's App. 662, at p. 702; Dunbar *v.* Auchterarder Presbytery, 1849, 12 D. 284. See also Eadie *v.* Glasgow Corporation, 1908, S. C. 207.

the individual members thereof should be sued, and not the parent body.[1]

Under the Local Government (Scotland) Act, 1889, the district committees of county councils may be sued as separate bodies.[2]

(10) PARTNERS.—Where a firm is still subsisting no partner can be sued for a company debt until the debt has been constituted against the firm.[3] It is no objection to a decree against a firm that it was pronounced after sequestration of the firm and the death of the sole partner without being transferred against the creditors of representatives if notice has been given to the latter and they refuse to appear.[4]

Where a partnership is dissolved, an action for payment of a partnership debt against *one* of the partners is incompetent unless the obligation has been previously constituted against the firm. If the firm has disappeared, all the partners of the dissolved firm should be called.[5] Where, however, a partner of a firm carrying on business abroad, which has been dissolved, comes within the jurisdiction of the Court of Session, he can be sued for a firm debt contracted in Scotland, without having the debt first constituted against the firm.[6]

Where a new partner has been assumed into a business, the question whether the new firm can be sued for the debts of the old firm is one of circumstances. Where there is no real change in the copartnery, the new firm may be liable,[7] but otherwise the new firm cannot be sued for the debts of the old firm.[8] Even though the new firm is liable for the debts of the old firm, a creditor of the old firm cannot sue the new firm unless he has a *jus quæsitum* against the latter.[9]

[1] Murdison *v.* Scottish Football Union, 1896, 23 R. 449, at pp. 465, 466.

[2] 52 & 53 Vict. cap. 50, sec. 79; Nelson *v.* County Council of the Lower Ward of Lanarkshire, 1891, 19 R. 311.

[3] Reid and M'Call *v.* Douglas, 11th June 1814, F. C.; A. *v.* B., 1741, Mor. 14560; Stevenson & Co. *v.* M'Nair, 1757, Mor. 14560; Johnstone *v.* Duncan, 1824, 2 S. 625 (N. E. 532); Neilson *v.* Wilson, 1890, 17 R. 608, per Lord President Inglis, p. 612.

[4] Hamilton *v.* M'Gilp, 1826, 5 S. 140 (N. E. 129).

[5] M'Naught *v.* Milligan, 1885, 13 R. 366; Neilson *v.* Wilson, 1890, 17 R. 608, per Lord President Inglis, p. 612. See also M'Tavish *v.* Saltoun, 3rd February 1821, F. C.; Bell *v.* Willison, 1822, 1 Shaw's App. 220; Geddes *v.* Hopkirk, 1827, 5 S. 747 (N. E. 697); Dewar *v.* Munnoch, 1831, 9 S. 487.

[6] Muir *v.* Collett, 1862, 24 D. 1119. See also Edinburgh and Glasgow Bank *v.* Ewan, 1852, 14 D. 547.

[7] M'Keand *v.* Laird's Tr., 1861, 23 D. 846; Miller *v.* Thorburn, 1861, 23 D. 359; Heddle's Exrx. *v.* Marwick and Hourston's Tr., 1888, 15 R. 698. See also Wotherspoon *v.* Henderson's Trs., 1868, 6 M. 1052.

[8] Nelmes & Co. *v.* Montgomery & Co., 1883, 10 R. 974; Stephen's Tr. *v.* Macdougall & Co.'s Tr., 1889, 16 R. 779; *cp.* Tully *v.* Ingram, 1891, 19 R. 65; A & A. Campbell *v.* Campbell, 1910, 47 S. L. R. 837.

[9] Henderson *v.* Stubbs, Ltd., 1894, 22 R. 51.

A person who was called as the sole remaining partner of a firm was held not entitled to object that the representatives of a deceased partner were not called, as he refused to state who and where they were.[1]

A retired partner may be sued for the debts of a firm on the ground that he has failed to prove that the pursuer has been informed that the retired partner has ceased to be associated with the business, or liable for its debts.[2]

A single individual who trades under the name of a proper firm may be sued either in the name of the firm or as an individual.[3]

The individual partners of a proper firm may be charged upon a decree against the firm alone,[4] and where the decree is against th firm and one partner named it is competent to charge another partner not named.[5] Where, however, the warrant to charge the debtors bears to make payment to a proper firm and its individual partners named, a charge in the name of the individual partners alone is held invalid.[6]

The dependence of an action against a proper firm is a good warrant for inhibition against an individual partner.[7]

A proper firm may be sued for the fraud of one of its partners, but the specific fraud and the name of the specific partner must be averred.[8]

On an information by the Lord Advocate against the individual partners of a firm for a contravention of the Stamp Act it is not necessary to call the firm as a defender.[9]

Where all the partners of a firm trading under a descriptive name grant a bill, and the descriptive name does not appear on the bill, the bill is a good ground of diligence against the assets of the firm if it was in fact granted in respect of the firm, and this will be presumed until the contrary is proved.[10] (See *How Corporate and Unincorporate Bodies Sue and are Sued, supra,* p. 247.)

[1] M'Braire *v.* Hamiltons, 1826, 2 W. & S. 66.

[2] Stocks *v.* Simpson & Co., 1905, 13 S. L. T. 422.

[3] Booth *v.* Commercial Bank, 1823, 2 S. 311 (N. E. 273); Mills *v.* Hamilton, 1830, 9 S. 111; Rose *v.* Moore & Son, 1833, 11 S. 344; Young *v.* Livingston & Son, 1860, 22 D. 983.

[4] Thomson *v.* Liddell & Co., 2nd July 1812, F. C.; Wallace *v.* Plock, 1841, 3 D. 1047; Partnership Act, 1890 (53 & 54 Vict. cap. 39), sec. 4.

[5] Knox *v.* Martin, 1847, 10 D. 50. See also Forsyth *v.* Hare & Co., 1834, 13 S. 42; Maclean *v.* Rose, 1836, 15 S. 236.

[6] Craig *v.* Brock, 1841, 4 D. 54.

[7] Ewing *v.* M'Clelland, 1860, 22 D. 1347.

[8] Thomson & Co. *v.* Pattison, Elder & Co., 1895, 22 R. 432, per Lord President Robertson, p. 437.

[9] Lord Advocate *v.* Thomson, 1897, 24 R. 543.

[10] Rosslund Cycle Co. *v.* M'Creadie, 1907, S. C. 1208.

(11) Joint Adventure. — Whatever distinction may have been drawn in the past between joint adventure and partnership seems to have disappeared, and the parties to a joint adventure may be convened according to the same rules as apply to the case of partnership.[1]

(12) Landlord and Tenant.—Where a third party has a claim arising from the defective condition of a property which is let to a tenant, the test of whether the landlord or the tenant should be sued is—who had control and management of the property and its repair when the cause of action arose? If the landlord, then the landlord should be sued; if the tenant, then the tenant. If the pursuer is unable to ascertain how matters stand, he may convene both the landlord and the tenant, and if successful against one of them, the unsuccessful party will be liable in the expenses not only of the pursuer but of the successful defender.[2]

Where a nuisance or other injurious act is not authorised by the lease, and does not arise from the natural and ordinary use of the subjects let, or might have been avoided if due care had been taken, the proper party to call as a defender is the tenant.[3] Where, however, a nuisance is sanctioned by the lease, or if it is unavoidable or inseparable from the natural and ordinary working of the subject leased, then the proprietor is the proper defender.[4] Where both landlord and tenant are interested, both must be called.[5]

Where a nuisance is created by a feuar within his own feu, the feuar alone is the proper party to call as a defender, unless in the feu-charter the superior has expressly authorised the nuisance to be committed.[6] Where, however, the nuisance is created through the authorised use by the feuars of a sewer belonging to the superior, the latter should

[1] Donaldson *v.* Paul, 1766, Mor. 14609; Crooks *v.* Tawes, 1779, Mor. 14596; White *v.* M'Intyre, 1841, 3 D. 334; British Linen Co. *v.* Alexander, 1853, 15 D. 277.

[2] Kennedy *v.* Shotts Iron Co., 1913, S. C. 1143, and cases therein cited.

[3] Collins *v.* Hamilton, 1837, 15 S. 895; Dunn *v.* Hamilton, 1838, 3 S. & M'L. 356; Harris *v.* James, 1876, 45 L. J. Q. B. 545; Duncan *v.* Mags. of Aberdeen, 1877, 14 S. L. R. 603; Devlin *v.* Jeffray's Trs., 1902, 5 F. 130. See also Henderson *v.* Stewart, 1818, 15 S. 868 (note); Tassie & Co. *v.* Glasgow Mags., 1822, 1 S. 503 (N. E. 467); Glasgow Mags. *v.* Aitchison, 1822, 1 S. 506 (N. E. 469); affd. 1825, 1 W. & S. 153; Weston *v.* Tailors of Potterrow, 1839, 1 D. 1218; Buccleuch *v.* Cowan, 1866, 5 M. 214, at p. 219.

[4] Dunn *v.* Hamilton, 1838, 3 S. & M'L. 378; Buccleuch *v.* Cowan, 1866, 5 M. 214, at p. 219; Robertson *v.* Stewart, 1872, 11 M. 189; Caledonian Rly. Co. *v.* Baird & Co., 1876, 3 R. 839; North British Rly. Co. *v.* Budhill Coal and Sandstone Co., Ltd., 1912, 1 S. L. T. 461.

[5] Mackinnon *v.* Macdonald, 1905, 7 F. 589.

[6] Buccleuch *v.* Cowan, 1866, 5 M. 214, per Lord Justice-Clerk Inglis, p. 218.

be called.[1] In the same way, where the nuisance, although caused by the feuars, exists upon the superior's own ground, the superior must be called.[2]

Where a superior granted a feu reserving the minerals and afterwards leased the minerals, and injury to the surface of the feu was occasioned by the workings of the mineral tenants, an action by the feuar against his superior alone in respect thereof was held to be competent.[3]

(13) Agent and Principal.—An agent for an undisclosed principal may be sued in his own name. If, however, the seller comes to know the name of the principal, the former may elect to sue the principal, but if he does so he is disabled from maintaining any plea that would alter the relations of the principal and agent to the disadvantage of the former.[4] Agent and principal cannot both be sued.[5]

The fact that a third party has brought against an agent an action that is dismissed on a technical plea does not amount to election.[6] "The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum, or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies, but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way, and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election."[7]

If the seller knew who the principal was from the beginning, the election is held to be made at the date of the contract.[8]

[1] Governors of Heriot's Hospital *v.* Dicksons Bros., 1826, 5 S. 94 (N. E. 87); affd. 1830, 4 W. & S. 1; Scott *v.* Scott, 1881, 8 R. 851.

[2] Mackay *v.* Greenhill, 1858, 20 D. 1251.

[3] Highgate & Co. *v.* Mags. of Paisley, 1896, 23 R. 992.

[4] Thomson *v.* Davenport, 1829, 2 Smith's Leading Cases (1915 ed.), 355, per Lord Tenterden, pp. 384, 385; 9 B. & C. 78; Bennett *v.* Inveresk Paper Co., 1891, 18 R. 975, per Lord M'Laren, p. 983. See also Young *v.* Smarts, 1831, 10 S. 130; Carsewell *v.* Scotts, 1839, 1 D. 1215.

[5] Ferrier *v.* Dods, 1865, 3 M. 561.

[6] Curtis *v.* Williamson, 1874, L. R. 10 Q. B. 57; Meier *v.* Küchenmeister, 1881, 8 R. 642.

[7] Scarf *v.* Jardine, 1882, 7 App. Cas. 345, per Lord Blackburn, pp. 360, 361.

[8] Paterson *v.* Gandasequi, 1812, 2 Smith's Leading Cases (1915 ed.), 341; Addison *v.* Gandasequi, 1812, 2 Smith's Leading Cases (1915 ed.), 348.

Once an election has been made, the principal cannot be sued after the agent has been sued, or *vice versâ*.[1]

If the agent is a buyer for a foreign principal, there is a presumption that the agent buys on his own account, and therefore may be sued in his own name, but this may be rebutted by evidence that he is only an agent.[2]

An action raised against an agent for a disclosed principal is incompetent.[3] Where it is doubtful whether the agent has disclosed his principal, an action against the agent and principal with alternative conclusions is quite competent.[4]

(14) Pro Indiviso Proprietors.—If an action is raised with regard to a *pro indiviso* property as a whole, all the *pro indiviso* proprietors must be called as defenders.[5] It may happen, however, that one of the *pro indiviso* proprietors has entered into an agreement to sell his share or to dispose of it in security. If the action has reference to such a matter, it will only be necessary to call the particular *pro indiviso* proprietor interested.[6]

(15) Part Owners.—It has been held that all the part owners are liable with regard to disbursements made for or furnishings supplied to a ship, and should accordingly be all called as defenders, except where the credit of an individual owner has been specially interposed.[7]

(16) Bankrupts.—A bankrupt may be sued alone in personal matters not falling under the sequestrated estate; but in matters affecting the sequestrated estate the proper party to convene as a defender is the trustee in the sequestration. It may also be advisable to call the bankrupt for any interest he may have. (See *supra*, p. 235 *et seq.*)

(17) Master and Servant.—At common law, where a third party is injured through the fault of a person in the employment of another person, he may either sue the actual delinquent,[8] or, if the injury was occasioned by the servant while acting within the scope of his employ-

[1] Thomson *v.* Davenport, 1829, 2 Smith's Leading Cases (1915 ed.), 355; 9 B. & C. 78; Priestley *v.* Fernie, etc., 1865, 34 L. J. Ex. 172.

[2] Bennett *v.* Inveresk Paper Co., 1891, 18 R. 975, per Lord M'Laren, pp. 984, 985. See also Millar *v.* Mitchell, 1860, 22 D. 833; Ireland *v.* Livingston, 1872, 5 E. & I. App. Cas. 395, per Lord Blackburn, p. 408; Athya *v.* Buchanan, 1872, 45 Jur. 16; Delaurier *v.* Wylie, 1889, 17 R. 167, per Lord Kyllachy, p. 191.

[3] King *v.* Shirra, 1827, 5 S. 231 (N. E. 215); Russel *v.* M'Farlane, 1837, 15 S. 989; M'Millan *v.* M'Culloch, 1842, 4 D. 492.

[4] Jardine's Trs. *v.* Carron Co., 1862, 24 D. 443, per Lord Ivory, p. 446.

[5] North British Rly. Co. *v.* North-Eastern Rly Co., 1896, 24 R. (H. L.) 19.

[6] Grant *v.* Heriot's Trust, 1906, 8 F. 647, per Lord President Dunedin, p. 662.

[7] Hay *v.* Cockburn's Trs., 1850, 12 D. 1298.

[8] Glegg on Reparation, p. 93 *et seq.*

ment, or in consequence of an act specially ordered by the employer, he may sue the employer.[1]

A servant may sue a fellow-servant for damages for injury occasioned by the fault of the latter,[2] but he can only sue the employer at common law in respect thereof where the employer himself is also at fault, as where the employer fails to supply sufficient plant or to adopt a proper system of working.[3] This common law right has been modified by the Employers' Liability Act[4] and the Workmen's Compensation Act,[5] but in each of these cases the procedure must be followed through in the Sheriff Court.

[1] Glegg on Reparation (2nd ed.), p. 522 *et seq.*
[2] Matthews *v.* M'Donald, 1865, 3 M. 506.
[3] Glegg on Reparation, p. 427 *et seq.*
[4] 43 & 44 Vict. cap. 42.
[5] 6 Edw. VII. cap. 58.

CHAPTER X

LITIGANT IN FORMA PAUPERIS

(1) Appointment of Counsel and Agents for the Poor, and of Reporters on Probabilis Causa.—The Faculty of Advocates shall at each anniversary meeting appoint six of their number to be counsel for the poor; and the Writers to the Signet and the Solicitors before the Supreme Courts shall each, in the month of December annually, appoint four of their number respectively to be agents for the poor—two in the Court of Session, and two in the High Court of Justiciary. The said bodies shall also at the same time respectively appoint two advocates, one Writer to the Signet, and one Solicitor before the Supreme Courts to act exclusively as reporters on the *probabilis causa* of applicants for the benefits of the poor's roll. Lists of the counsel and agents for the poor and reporters on the *probabilis causa* so appointed shall forthwith be furnished to the Principal Clerk in each Division of the Court, to the Clerk of Justiciary, and also to the Keeper of the Minute-Book, to be by him printed and published in January yearly.[1]

A reporter on *probabilis causa* cannot also be an agent for the poor.[2]

(2) Benefit of Admission.—Admission to the poor's roll confers upon a litigant the privilege of obtaining the services of counsel and agents for the poor gratuitously, and the right to litigate without payment of the dues of Court. These benefits are, however, only extended to litigants in the first instance, and do not extinguish the obligation under which all litigants rest of being responsible for the judicial expenses incurred on their behalf,[3] with the exception of the expenses of the application for admission and procedure thereon other than the outlay of the poor's agent.[4]

A litigant on the poor's roll does not require to sist a mandatary who shall be liable in expenses, if awarded,[5] nor to find caution for expenses, though it is not incompetent to oblige him to make payment of expenses

[1] C. A. S., A, x. 1.

[2] M'Kean *v.* Herbison, 1913, S. C. 548.

[3] Taylor *v.* Barr, 1841, 3 D. 892.

[4] A. S., 21st December 1842, sec. 15; C. A. S., A, x. 15.

[5] Carling *v.* Campbell, 1826, 4 S. 548 (N. E. 556); Middlemas *v.* Brown, 1828, 6 S. 511.

previously awarded before allowing him to proceed with his action.[1] In like manner, where a pursuer on the poor's roll obtains an award of expenses, the opposite party is entitled to set off against the award a decree for expenses obtained by him at a former period of the litigation before the pursuer was put upon the poor's roll; and the fact that the pursuer's agent at the time of the award of expenses in his favour is an agent for the poor does not alter the general rule.[2] He is also allowed to proceed with a reduction of a decree in absence without payment of the expenses decerned for in that decree, contrary to the usual rule in such cases.[3]

Parties who have been allowed to sue or defend *in forma pauperis* are exempted from payment of fees of Court in the first instance, but when they are entitled to expenses the Court fees, including all dues of extracts issued or to be issued, shall be included and decerned for.[4]

(3) Certificate of Poverty, and Procedure to Obtain the Same. —No person shall be entitled to the benefit of the poor's roll unless he shall produce a certificate, under the hands of the minister and two elders of the parish where such poor person resides, setting forth his or her circumstances in the form of Schedule A, Codifying Act of Sederunt, A, x.[5]

If the party's health admit of it,[6] he shall appear personally before the minister and elders, at the time and place to be appointed by them, to be examined as to the facts required by said schedule; and the minister and elders shall then certify how far the statement given by the party consists with their own proper knowledge, or that of any one of them, and whether its credit rests on the information of others, or solely on the statement of the applicant, in which latter case they shall certify whether he be of good character and worthy of credit.[7]

Ten days' previous intimation, by letter post paid, shall be given to the adverse party, of the time and place fixed for making the said declaration or statement before the minister and elders, the dispatch of such letter to be certified by the agent of the pauper or by a messenger-

[1] Barry *v.* Geddes, 1827, 5 S. 727 (N. E. 678); Weepers *v.* Pearson and Jackson, 1859, 21 D. 305.

[2] Gordon *v.* Davidson, 1865, 3 M. 938.

[3] Paterson *v.* Burke, 1844, 6 D. 953.

[4] A. S., 18th December 1896, sec. 4; C. A. S., A, x. 16; Panario *v.* Turner, 1828, 6 S. 695; Cargill, Petr., 1830, 8 S. 595 (note); Calder *v.* Parker, 1841, 3 D. 477: Smith *v.* Flowerdew, 1843, 6 D. 250.

[5] A. S., 21st December 1842, sec. 2; C. A. S., A, x. 2.

[6] Key *v.* Mackintosh, 1878, 5 R. 524; Clapperton, Petr., 1884, 12 R. 19.

[7] A. S., 21st December 1842, sec. 3; C. A. S., A, x. 3.

at-arms, or other officer of the law, and one witness, the certificate to be in the form of Schedule B, Codifying Act of Sederunt, A, x.[1]

The said declaration and certificate, with the certificate of intimation, shall be transmitted free of expense to one of the agents for the poor, and shall, not more than three months from the date of the declaration, be lodged, with an inventory thereof, in the office of the clerk of one of the Divisions of the Inner House, and if in proper form shall be forthwith entered in the Minute-Book.[2]

Where the adverse parties numbered over one hundred, the Court allowed a person in a multiplepoinding petitioning for the benefit of the poor's roll to do without intimation regarding the declaration, and ordered intimation of the petition to be made on the walls and in the Minute-Book, with notice to the raiser of the multiplepoinding, instead of in the usual manner.[3]

If there is no minister of the parish owing to suspension, death, or other cause, the Court has remitted to the Sheriff or to a Justice of the Peace to take the place of the minister.[4] Where the kirk-session was in abeyance, the Court admitted the applicant on a certificate from the minister and elders of another parish.[5] Where there was only one elder the certificate of the minister and the elder was held to be sufficient.[6] The Court has remitted to the Sheriff to take the declaration where there were no elders;[7] where the action has been against the kirk-session of the applicant's parish;[8] and where the parish minister was Moderator of the General Assembly, a reduction of whose sentence of deposition the applicant was suing.[9]

An objection that the elders are not ordained will not be sustained, as the signature of the minister is a sufficient attestation that the other subscribers are elders,[10] and the certificate need not be given in kirk-session, a certificate subscribed on one paper by the minister and on another paper by the elders having been held to be sufficient.[11]

Where it was ascertained, after a favourable report from the reporters on *probabilis causa*, that the certificate was awanting, the

[1] A. S., 21st December 1842, sec. 4; C. A. S., A, x. 4.
[2] A. S., 21st December 1842, sec. 5; C. A. S., A, x. 5.
[3] Grassie, Petr., 1836, 15 S. 116.
[4] Gelatly, Petr., 1852, 14 D. 848; Stewart, Petr., 1853, 16 D. 164. See also Bryden, Petr., 1864, 36 Jur. 404.
[5] Carrigan, Petr., 1881, 9 R. 149.
[6] Mitchell, Petr., 1851, 14 D. 248.
[7] A. B., Petr., 1836, 14 S. 1040.
[8] A. B., Petr., 1831, 9 S. 308 (note).
[9] Mackellar, Petr., 1863, 1 M. 1114.
[10] Macintyre, Petr., 1830, 8 S. 549; A. B. *v.* C. D., 1833, 12 S. 127.
[11] Morren *v.* Murray, 1842, 4 D. 396. See also Wylie, Petr., 1843, 5 D. 578.

omission was allowed to be supplied;[1] and where the certificate was found to be informal in like circumstances, it was held that the objection came too late.[2]

A certificate from a dissenting minister and elders is not valid,[3] although in a recent case[4] the Court remitted to a United Free minister, who resided near the applicant's residence, which was twenty miles from the parish church, to visit the applicant, who was bedridden, to get his declaration. A certificate from the minister and elders of a *quoad sacra* parish is sufficient compliance with the Act of Sederunt.[5]

The certificate must be from the minister and elders of the applicant's proper parish, and it will not do for the applicant to go to another parish expressly for the purpose of obtaining such a certificate.[6]

Where a minister[7] and elders[8] refuse to give a certificate, the Court has cited him or them to give evidence at the bar as to the applicant's condition. The Court has also remitted to the Sheriff to inquire and report in similar circumstances.[9] In one case[10] where the applicant was on the poor's roll of the parish this was considered sufficient proof to send the case to the reporters on *probabilis causa*, although the minister and elders refused to give the applicant a good character, and stated that he was notoriously of a litigious disposition. In another case[11] it was intimated that where a kirk-session obstinately refuses or delays to take the required declaration they will be found liable in expenses.

An applicant for the poor's roll need only produce a certificate of good character from the minister and elders when his statement of circumstances rests entirely on his own authority,[12] and it is sufficient if the certificate of good character from the minister and elders bears that, "so far as known to us," the applicant has maintained a good character.[13] In one case,[14] where the truth of the applicant's statement

[1] Halket, Petr., 1857, 19 D. 877.
[2] Oal *v.* A. B., 1836, 14 S. 1120.
[3] Elphinstone, Petr., 1836, 14 S. 463.
[4] Maciver, Applicant, 1907, S. C. 552.
[5] Murrie *v.* M'Donald, 1853, 16 D. 325; *cp.* Bell, Petr., 1840, 3 D. 204.
[6] Paterson *v.* M'Kenzie, 1830, 8 S. 920.
[7] Glass, Petr., 1833, 11 S. 543.
[8] Craigie *v.* Croall and Morrison, 1832, 10 S. 315.
[9] Rattray, Petr., 1824, 3 S. 232 (N. E. 163); Thomson, Petr., 1829, 7 S. 301.
[10] Muir, Petr., 1849, 11 D. 517.
[11] Morris *v.* Greig, 1835, 13 S. 1092.
[12] Macindoe *v.* Douglas, 1849, 11 D. 516.
[13] Dickson, Petr., 1852, 14 D. 330; *cp.* Paton, Petr., 1832, 11 S. 146.
[14] Cumming, Petr., 1831, 9 S. 342 (note).

rested on his declaration alone, and the certificate stated that there was no reason to doubt his credibility, but did not state that the applicant was known to be worthy of credit; and in another case,[1] where the certificate was rested solely on the statement of the applicant, who was unknown to the minister, the Court remitted the causes to the counsel for the poor.

It is entirely outwith the sphere of the minister and kirk-session to consider the merits of the applicant's action in granting or refusing the certificate.[2]

A certificate from the minister and kirk-session is not required when the Board of Supervision (now the Local Government Board) by minute declares that a poor person has a just cause of action against the poor law authorities.[3]

Where a remit is made to the Sheriff to take the applicant's declaration, ten days' intimation to the adverse party requires to be given as in the case before a minister and elders,[4] and the procedure required by the Act of Sederunt need not be carried out so far as the applicant's character and credibility are concerned.[5]

Where the pauper is resident furth of Scotland, the Court will remit to a properly qualified person, as the clergyman of the parish, or a Justice of the Peace, or mayor of a town.[6] In a case[7] where the applicant was a private soldier stationed furth of Scotland with a Scottish domicile, the Court remitted to the regimental chaplain.

A pauper, who had emitted a declaration before the Sheriff and obtained a certificate, having become insane and been confined, after three years made application for a remit to the reporters on *probabilis causa*, and the Court remitted without a new certificate.[8]

(4) Note to the Lord President of the Division and Remit to Reporters.—On the lapse of eight days after the date of the insertion in the Minute-Book, or of four days next after publication of the printed Minute-Book containing the intimation, if the paper shall have been lodged during vacation or recess, the party's agent shall box a Note to the Lord President of the Division, simply stating the names and designations of the parties, and craving a remit to the reporters on the *probabilis causa;* whereupon the Court may either refuse the applica-

[1] A. B., Petr., 1832, 10 S. 673. [2] Smith, Petr., 1834, 12 S. 890.

[3] Poor Law (Scotland) Act, 1845 (8 & 9 Vict. cap. 83), sec. 74.

[4] M'Coll *v.* Downie, 7th July 1827, noted in Dunlop's Parochial Law, p. 470 (2nd ed. p. 444).

[5] Gellatly, Petr., 1852, 14 D. 1046.

[6] Mackay's Manual, p. 162; Flynne, Petr., 1882, 9 R. 909.

[7] Forrest, Petr., 1907, S. C. 435; Serrells *v.* Serrells, 1909, S. C. 238.

[8] M'Coll *v.* Downie, 1830, 8 S. 466.

tion *de plano*, or remit to the reporters, who shall thereupon consider the party's case, hear all objections, and report whether the applicant has a *probabilis causa litigandi*, and whether he otherwise merits the benefit of the poor's roll; said report not to be made sooner than six days from and after the date of the remit, except with consent of the adverse party. If the application shall not be forthwith proceeded in before the reporters, and if their report be not lodged within three months next after the date of the remit, excluding the spring and summer vacations, it shall *ipso facto* be held as abandoned, without prejudice to the party again applying for new certificates.[1]

Persons under legal disability should petition for the benefit of the poor's roll through their guardians. If they have none, or if the guardians refuse, the Court will appoint a curator *ad litem* to the applicants.[2] In a case[3] where a married woman applied for the benefit of the poor's roll, the Court refused to appoint her husband to that office, as he also was an applicant for its benefit. In another case[4] where it was discovered, after a favourable report by the reporters on *probabilis causa*, that the applicant was a married woman and had not her husband's consent, the Court held the objection to be "competent and omitted" *quoad hoc*, but that it would be open to the objector to plead it *in causa*.

In the petition the nature of the action should always be stated.[5]

The proper time to make objections to the admission of the applicant, on the ground that his circumstances are such as do not entitle him to the benefit of the poor's roll, used to be when the petition is moved in the Single Bills and before a remit is made,[6] but this has been altered by Act of Sederunt, 15th July 1914, as already mentioned.[7] It is no objection that the applicant has been unable to pay previous expenses before being reponed against an interlocutor.[8]

A petition to the Court of Session to grant leave to an appellant to sue *in forma pauperis* in the House of Lords is incompetent.[9]

(5) Meetings of Reporters.—The reporters shall meet and deal

[1] A. S., 21st December 1842, sec. 5; C. A. S., A, x. 6, as amended by A. S., 15th July 1914, in consequence of Ross, Applicant, 1914, S. C. 450.

[2] Davidsons, Petrs., 1865, 4 M. 276. See, however, Macdonald's Tr. *v.* Medhurst, 1915, S. C. 879.

[3] Rennie, Petr., 1851, 13 D. 1257.

[4] A. B., Petr., 1833, 12 S. 197.

[5] Duncan, Petr., 1846, 8 D. 411; Grant, Petr., 1884, 21 S. L. R. 549.

[6] Allan, Petr., 1872, 10 M. 510; Douglas *v.* M'Veigh, 1881, 8 R. 667; *cp.* A. B., Petr., 1837, 16 S. 306.

[7] As a result of Ross, Applicant, 1914, S. C. 450.

[8] Sassen *v.* Campbell, 1831, 9 S. 533.

[9] Urquhart, Petrs., 1865, 3 M. 882.

with remits to them at intervals of not more than four weeks during session.[1]

(6) Procedure before the Reporters. — When the Court shall remit an application for the poor's roll to the reporters on the *probabilis causa*, it shall be the duty of the agent presenting the application to procure from the applicant, or his former agent, information as to the circumstances of the case, and to draw out a memorandum thereof, and lay the same and such precognitions and productions as it is proposed to found on before the reporters, for enabling them to make their report thereon, and shall at the same time intimate the lodgment of such memorandum to the adverse party, or his agent, by letter post paid, and further lodge with the reporters a certificate that such intimation has been made, both within a reasonable time before the remit is dealt with by the reporters. The adverse party, or his agent, may see or borrow such memorandum, but shall not see or borrow such precognitions or productions, unless with the written consent of the applicant, or his agent, or by order of the reporters in the exercise of their discretion. If further evidence or explanation appear to be necessary, either as to the poverty or character of the applicant, or circumstances of the case, the agent presenting the application shall direct and assist the applicant in procuring the same.[2]

(7) Circumstances of Applicant.—Every application depends upon its own circumstances.[3] In the following cases the application was granted on the ground of poverty:—

A gentleman's servant with wages of £24 per annum, out of which he had to support one child.[4]

A man of seventy years of age with an annuity of £30 and a wife and children to support. He was temporarily disabled from work.[5]

A defender in an action of damages with a family and an annuity of £24, and 8s. a week of wages as a shoemaker.[6]

A person in his sixtieth year, with a wife but no children, earning 5s. per week, but affected with bodily infirmity—had a pension of £18, 15s. 5d. as a discharged soldier.[7]

[1] A. S., 15th July 1914.

[2] A. S., 21st December 1842, sec. 11; C. A. S., A, x. 11, as amended by A. S., 15th July 1914.

[3] Mackintosh *v.* M'Kenzie, 1829, 8 S. 123; Miller *v.* Gordon, 1838, 16 S. 812, per Lord President Hope.

[4] A. B. *v.* C. D., 1832, 10 S. 425.

[5] A. B. *v.* Patton, 1833, 11 S. 360.

[6] Gunn *v.* Goodall, 1834, 12 S. 336.

[7] Meikleham *v.* MacGruthar, 1840, 2 D. 1372.

A widow of sixty with an alimentary income of £41 per annum, called as a defender in a jury trial.[1]

A married woman who desired to reduce a settlement. Her husband earned 2s. 6d. per day, with an average weekly wage of 10s. to 11s.[2] A similar application by her husband.

A person who had continued to defend himself until the eve of a jury trial with wages of £96 per annum.[3]

A married woman who wished to sue an action of divorce.[4]

An undischarged bankrupt.[5]

A litigant whose wages were 15s. per week.[6]

A litigant whose wages were 18s. per week.[7]

A workman capable of earning 23s. per week but out of work. He wished to sue a divorce.[8]

A person with a salary of £138 per annum, out of which he had to provide a horse, cart, and man at a cost of £85 per annum.[9]

A man who earned 27s. a week, out of which he had to support himself, a wife, and family of four.[10]

A man and his wife earning along with one of their children 26s. a week, and suing an action of reduction on the grounds of forgery and circumvention.[11]

A porter with £60 a year, who was sued for aliment by his wife, but with a well-founded action of divorce against her.[12]

A person in receipt of parochial relief.[13]

In the following cases the application was *refused*:—

A clerk with an income of about £30 per annum.[14]

A married man with an income of £40, 8s. per annum, and with one child.[15]

A bachelor having an income of £54, 12s. per annum.[16]

[1] Bett, Petr., 1840, 2 D. 1466.
[2] Hallidays, Petrs., 1864, 2 M. 1288.
[3] Miller *v.* Gordon, 1838, 16 S. 812.
[4] Alison, Petr., 1849, 12 D. 415.
[5] Whyte, Petr., 1884, 11 R. 1145.
[6] Anderson *v.* Blackwood, 1885, 12 R. 1263.
[7] Wright *v.* Brown's Trs., 1885, 12 R. 959.
[8] Robertson, Petr., 1880, 7 R. 1092.
[9] Stevens *v.* Stevens, 1885, 12 R. 548.
[10] Paterson *v.* Linlithgow Police Commissioners, 1888, 15 R. 826.
[11] M'Gill *v.* Bell's Trs., 1876, 3 R. 427.
[12] Brown *v.* Brown, 1906, 8 F. 687.
[13] Hunter *v.* Clark, 1874, 1 R. 1154.
[14] Wallace, Petr., 1823, 2 S. 391 (note), N. E. 348).
[15] Drysdale *v.* A. B., 1829, 8 S. 276.
[16] Hunter *v.* A. B., 1829, 8 S. 223.

A man with one child, and with a free house, coals, and candles, and an annual income of £46, 16s.[1]

An unmarried labouring man with an annuity of £52 in addition to the profits of his labour.[2]

A lieutenant aged forty-three, on half pay of £82, with a wife and five children.[3]

A middle-aged man, fit for work, who had £50 in bank and had paid £200 for heritage a few years before.[4]

A man in receipt of £1 per week who wished to raise an action of divorce,[5] and other cases too numerous to mention in detail, each of which depend upon their own circumstances.[6]

(8) Report.—The reporters are the sole judges whether the applicant has a *probabilis causa*, and it is incompetent for the Court to review their judgment,[7] unless there are allegations of gross miscarriage of justice or neglect.[8] Where, however, the applicant had not been fully heard by the reporters, the Court remitted the case back to them.[9] In a case where there was no express report of no *probabilis causa* the Court admitted the petitioner to the roll.[10]

In an early case[11] it was held that it was the exclusive privilege of counsel reporters to judge whether there is *probabilis causa*, and in two later cases,[12] where the two counsel were of the same opinion and the two agents were of a different opinion, the Court supported the decision of the counsel. Where the four reporters, irrespective of grade, are equally divided in opinion, the practice of the Court, in applications concerning actions to be raised in the Court of Session,

[1] Christie *v.* A. B., 1830, 9 S. 169.

[2] Leslie *v.* A. B., 1832, 10 S. 315.

[3] A. B. *v.* Scott, 1834, 12 S. 489.

[4] A. B. *v.* C. D., 1836, 14 S. 965.

[5] King *v.* King, 1845, 7 D. 499.

[6] Muir, Petr., 1850, 12 D. 632; Kelt *v.* Graham & Sons, 1850, 12 D. 1112; Clarke *v.* Steel, 1856, 18 D. 980; Innes, Petr., 1857, 19 D. 1096; Webster, Petr., 1858, 20 D. 1058; Walker *v.* Brown, 1860, 22 D. 678; Graham *v.* Wilson & Co., 1860, 22 D. 1470; Duncan *v.* Morrison, 1863, 1 M. 257; Inglis, Petrs., 1863, 1 M. 391; Williamson *v.* Irvine, 1863, 2 M. 126; Sutherland, Petr., 1864, 2 M. 509; Cunningham, Petr., 1867, 4 S. L. R. 155; Collins *v.* King & Co., 1867, 39 Jur. 257; Ingram *v.* Hastie, 1872, 9 S. L. R. 375; Snaddon, Petr., 1883, 20 S. L. R. 648; Wright, Petr., 1890, 17 R. 516; Mackenzie *v.* Campbell, 1892, 29 S. L. R. 594; Macaskill *v.* M'Leod, 1897, 24 R. 999.

[7] A. B., Petr., 1833, 12 S. 58.

[8] Robson, Petr., 1876, 13 S. L. R. 421; M'Intosh *v.* Roy, 1898, 25 R. 899.

[9] Currie, Petr, 1829, 7 S. 302; *cp.* Irvine, Petr., 1842, 5 D. 372.

[10] Wilkie *v.* Flowerdew, 1836, 14 S. 668.

[11] Clark *v.* Campbell, 1833, 11 S. 908.

[12] Smith *v.* Scott, etc., 1852, 14 D. 484; Shanks *v.* Moderator, etc., of the Reformed Presbyterian Church, 1886, 13 R. 749.

has been to admit the applicant.[1] Where, however, the case is sent to the reporters with the judgment of the inferior Court or Courts against the applicant, and the reporters are equally divided, it is the practice of the Court to refuse the application.[2] In one case,[3] where the counsel reporters were of different opinions, the Court remitted the petition to other counsel; and where two of the reporters—a counsel and an agent—were not available to give an opinion, the Court allowed the remaining reporters to call in the assistance of a counsel who had been a reporter for the previous year.[4]

The Court will grant a warrant to transmit processes from an inferior Court to enable the reporters to judge of *probabilis causa*.[5] A remit has been made to the reporters to inquire into the circumstances certified by the kirk-session to have been stated to them by him.[6]

It is no objection to the reporters' *probabilis causa* being acted on that the Lord Ordinary before whom the cause depended has decided against the applicant.[7]

The party opposing the application is no longer entitled to see the precognitions submitted to the reporters, unless with the written consent of the applicant or his agent, or by order of the reporters in the exercise of their discretion.[8]

Where the reporters found a *probabilis causa*, the Court refused admission to the roll on the ground that the cause was unsuitable for trial in the Court of Session.[9]

(9) When Applicant Found Entitled to the Benefit of the Poor's Roll.—When the Court finds the applicant entitled to the benefit of the poor's roll, the application, together with the cause of the party to which it relates, is remitted to an advocate and a Writer to the Signet or a solicitor, whose names are taken from the lists of the counsel and agents for the poor in such a way as to distribute the cases equally among them as far as possible; and an entry of the

[1] Bonar, 1866, 2 S. L. R. 31 ; Marshall *v.* North British Rly. Co., 1881, 8 R. 939 ; Drummond *v.* Fletcher & Co., 1889, 17 R. 51.

[2] Carr *v.* North British Rly. Co., 1885, 13 R. 113 ; Watson *v.* Callander Coal Co., 1888, 16 R. 111; Ormond *v.* Henderson & Sons, 1897, 24 R. 399 ; Edgar *v.* Johnston, 1904, 6 F. 825.

[3] M'Callum, Petr., 1841, 3 D. 1102.

[4] Rutherford, Petr., 1855, 17 D. 1140.

[5] Stewart, Petr., 1829, 8 S. 252.

[6] Sutherland *v.* Sprott, 1858, 20 D. 499.

[7] Gibb, Petr., 1833, 11 S. 732 ; *cp.* Fairgrieve, Petr., 1865, 1 S. L. R. 51.

[8] A. S., 15th July 1914 ; *cp.* Cant *v.* Pirnie's Trs., 1906, 8 F. 1120.

[9] Buchanan *v.* Ballantine, 1910, 2 S. L. T. 74 ; 1911, S. C. 1368.

admission of the application is inserted in the Minute-Book.[1] The counsel and agents so appointed shall conduct the cause until its conclusion, or so long as the applicant remains on the poor's roll, notwithstanding that they have ceased to be advocates and agents for the poor.[2] No other advocate or agent than those appointed can be employed or can allow their names to be used unless specially authorised by the Court, and if any agent refuses to conduct a cause or neglects his duty, or if any agent other than a poor's agent acts without special authority, he shall forfeit his right to expenses, and may be publicly censured.[3]

The Dean of the Faculty of Advocates, if requested to do so by any of the counsel for the poor, may appear in support of the cause of any poor party.[4] The assistance of the Dean is gratuitous,[5] and the assistance of any other senior counsel is on the same footing, and does not require the special sanction of the Court.[6]

An agent for a party on the poor's roll is entitled to carry on a process so far as the expenses found due to the party, notwithstanding a compromise by his client.[7] In an advocation by a pauper from the Sheriff Court on the question of expenses only, the advocation was held to be incompetent in respect that the pauper's agent had not sisted himself as a party.[8]

The fact that an agent is acting gratuitously will not free him from responsibility.[9] An agent who receives an award of expenses in respect of a failure of the opposite party must pay back the expenses when judgment is ultimately pronounced against his client with expenses, including the expenses paid.[10]

Where, at the time of admission, there shall appear to have been unreasonable or vexatious opposition to the applicant's admission, the Court may dispose of the matter of expenses thereby occasioned as shall seem proper.[11]

[1] A. S., 21st December 1842, sec. 6; C. A. S., A, x. 7.
[2] A. S., 21st December 1842, sec. 7; C. A. S., A, x. 8.
[3] A. S., 21st December 1842, sec. 13; C. A. S., A, x. 13. See, however, Barr *v.* Clyne, 1832, 10 S. 408.
[4] Garvie *v.* Hammermen of Perth, 1832, 10 S. 755, at p. 758 (note).
[5] Robertson *v.* Finlay, 1849, 12 D. 393, per Lord Justice-Clerk Hope.
[6] Bell *v.* Murray, 1833, 12 S. 187; Robertson *v.* Finlay, 1849, 12 D. 393; Wark *v.* Russell and Wardrop, 1850, 12 D. 1074.
[7] Rox *v.* Stewart, 3rd July 1818, F. C.
[8] Macdougall *v.* Clark, 1852, 1 Stuart, 796.
[9] Hay *v.* Baillie, 1868, 7 M. 32.
[10] Christie *v.* A. B., 1833, 5 Jur. 371.
[11] A. S., 21st December 1842, sec. 15; C. A. S., A, x. 15.

(10) Marking on Papers.—The names of the advocate and agent appointed to conduct the cause shall be marked on the margin of the summons or defences, or notes of suspension, and on the back of every subsequent paper lodged for that party in the cause, and no enrolment shall be made except by the agent appointed, nor in the name of any advocate, except the counsel so appoin[illegible], and the word "Poor" shall be prefixed to the name of said party on every paper lodged in process.[1]

(11) Change in Circumstances of Poor Litigant.—All warrants for admission to the benefit of the poor's roll shall remain in force during the dependence of the cause, unless the opposite party shall allege that a change in the pauper's circumstances has taken place since the date of his admission, and that these would not then entitle him to the usual certificates; And on such allegation being made by minute lodged in process, the cause shall be superseded until a new declaration and certificate shall be obtained and lodged in process, on considering which, the Court, or the Lord Ordinary before whom the cause depends, shall find therein as shall seem just: And if the allegation shall appear to have been made without any probable grounds, the party making it shall *de plano* be decerned to pay such a sum of modified expenses as may seem reasonable in the circumstances; and the judgment shall not be subject to review: Provided always, that when a party shall be admitted to the benefit of the poor's roll before having raised and executed the principal action, it shall be incumbent upon him to raise and execute the same against the opposite party at farthest within three calendar months after the date of admission, otherwise the warrants thereof shall be held as recalled, and the same to be thereby recalled accordingly.[2]

Where a party on the poor's roll has refused an offer of an adequate sum in settlement, he is no longer entitled to its benefit.[3]

(12) Where Judge in Cause Considers there is not Probabilis Causa.—At any stage during the dependence of a poor's roll cause, if any circumstances shall emerge, whether from the judicial statements, pleas, or productions of parties, which in the opinion of the Lord Ordinary show that the pauper has not a *probabilis causa litigandi*, it shall be competent to the Lord Ordinary to report the circumstances verbally to the Court, or to remit the process to the reporters for their opinion; and if the Court or the reporters shall be of opinion that the pauper

[1] A. S., 21st December 1842, sec. 12; C. A. S., A, x. 12.

[2] A. S., 21st December 1842, sec. 8; C. A. S., A, x. 9.

[3] M'Intosh *v.* M'Indoe, 1821, 1 S. 218 (N. E. 207); Forbes *v.* Wilson, Stow & Co., 1835, 7 Jur. 302. See also A. B. *v.* Fraser, 1836, 14 S. 1114.

has no *probabilis causa*, he shall thereupon forfeit all right of exemption from payment of professional charges and dues of Court in the future proceedings in the cause, unless upon caution being found within a limited time for payment to the opposite party of such expenses as he may be found entitled to on the decision of the cause.[1]

(13) Expenses.—(a) *Generally.* — Litigants *in forma pauperis* are ultimately responsible for all judicial expenses incurred on their behalf, except in so far as they are specially relieved by statute.[2]

Where a pauper is found entitled to expenses, although in some early cases [3] it was held that the award included the expense of getting on the poor's roll, it is no longer the case, and the said expenses now form no part of the expenses of process.[4] With this exception, the pauper is entitled to charge the ordinary fees of Court in his account in the same manner as if he had not been on the poor's roll, and when the expenses are recovered the amount thereof must be accounted for to the several parties interested, *i.e.* counsel, agents, etc., and the fee fund dues paid to the collector of the fee fund.[5]

If a litigant *in forma pauperis* is unsuccessful, he is liable to have a decree for expenses pronounced against him in the same way as any other litigant.[6]

(b) *Consistorial.*—In consistorial causes a husband suing *in forma pauperis* an action of divorce is only bound to pay such of his wife's expenses as cannot be avoided by her taking advantage of the poor's roll.[7] If the husband is not on the poor's roll, but merely avers that he is destitute and about to make application for the poor's roll, he will be liable in an award of *interim* aliment and expenses in an action for divorce against his wife.[8]

Where a wife [9] was awarded £50 of expenses in order to defend a judgment in her favour, the husband failed to pay, and asked to be allowed an opportunity to apply for admission to the poor's roll, but the Division refused the request and refused the reclaiming note, and the House of Lords adhered.

Where both parties in a divorce case were on the poor's roll, and

[1] A. S., 21st December 1842, sec. 9 ; C. A. S., A, x. 10.

[2] Taylor *v.* Barr, 1841, 3 D. 892.

[3] Cameron *v.* M'Kinnon, 25th June 1814, F. C. ; Rankine *v.* Rankine, 1821, 1 S. 44 (note) (N. E. 47); Gentles *v.* Aitken, 1827, 6 S. 50.

[4] A. S., 21st December 1842, sec. 15 ; C. A. S., A, x. 15.

[5] A. S., 21st December 1842, sec. 16 ; C. A. S., A, x. 16.

[6] Powrie *v.* Powrie, 1895, 2 S. L. T. 552.

[7] M'Gregor *v.* M'Gregor, 1841, 3 D. 1191.

[8] Baxter *v.* Baxter, 1845, 7 D. 639.

[9] Paton *v.* Paton, 1901, 9 S. L. T. 281 ; affd. 1903, 10 S. L. T. (H. L.) 633.

the husband, who was pursuer, abandoned the action, his wife was held entitled to her expenses as between party and party only, and then modified. The fee fund dues which had been paid by the defender were ordered by the Court to be repaid in terms of sec. 5 of the Act of Sederunt, 18th December 1896.[1]

(c) *Reponing.*—In an early case [2] the Court refused a party on the poor's roll to be reponed without payment of expenses. A subsequent Act of Sederunt [3] provides for reponing without payment of expenses where the decree has gone out from the inability of the pauper to furnish the necessary information, and not from the fault or neglect of the agent in the cause, or the wilful neglect of the pauper himself. In a later case,[4] where a party on the poor's roll presented a reclaiming petition praying to be reponed against a decree in absence, the Inner House remitted to the Lord Ordinary to repone on payment of such expenses as should seem reasonable.

(d) *Agent's Account of Expenses.*—The agent, in making out his account of expenses, shall make an abstract at the end thereof, stating the amount—

1st. Of his own professional charges.

2nd. Fee to counsel and clerks.

3rd. Fee fund dues.

4th. Printing or other outlay.

And the Auditor of Court, on such account being presented for taxation, shall require the agent to furnish him with a copy of said abstract, and after taxation shall send said copy, marked as taxed, to the Clerk of Court to the process, whose duty it shall be thereupon to take steps to obtain payment in stamps of the Court fees so far as these have been recovered by the pauper or his agent from the opposite party in the cause.[5]

[1] Kelly *v.* Kelly, 1906, 14 S. L. T. 221.
[2] Pratt *v.* Dundas and Bruce, 1824, 3 S. 120 (N. E. 79).
[3] 11th July 1828, sec. 73.
[4] Ord *v.* Ord, 1861, 24 D. 25.
[5] C. A. S., A, x. 17.

PART IV

PROCEDURE IN AN ORDINARY ACTION

CHAPTER I

SUMMONS

(1) GENERALLY.—A summons is a writ in the name of the Sovereign passing the Signet, setting forth the demands of a person (therein called the pursuer) against another person (therein called the defender), and containing a Royal warrant or mandate to messengers-at-arms to cite the defender to appear in the Court of Session to answer to these demands. Any agent entitled to practise before the Court of Session may competently sign a summons: Provided that if such agent is not a Writer to the Signet, the summons shall be signed on the last page by a Writer to the Signet, in testimony of its being written to the Signet; and every Writer to the Signet shall, on a fee of 2s. 6d. being tendered to him, be bound to sign any summons that may be presented to him for that purpose, but he shall not by so signing incur any responsibility.[1] The signature of the Writer to the Signet is the warrant for affixing the Signet, and the signature of the pursuer himself is not sufficient.[2]

The summons, is usually in manuscript, but may pass the Signet in print.[3]

Formerly, summonses in maritime and consistorial causes required to be signed by one of the Principal or Depute-Clerks of Session, and it was not necessary that any such summons should pass the Signet.[4] In one case where a summons of divorce had passed the Signet in the ordinary way without being signed by a Clerk of Session, the error was held to be fatal to the whole proceedings.[5] By 1 & 2 Vict. cap. 118, sec. 29, it was enacted that summonses in Admiralty causes should pass the Signet, but this was not then extended to consistorial causes. By the Court of Session Act, 1850,[6] sec. 15, however, the signature of a Writer to the Signet, in a consistorial cause, was made in all respects equivalent to the signature of a Clerk of Session;

[1] Court of Session Act, 1868 (31 & 32 Vict. cap. 100), sec. 13.
[2] Hoey, Petr., 1885, 13 R. 207.
[3] Ibid. See also Ministers of the Barony Parish, Glasgow, Petrs., 1864, 2 M. 469.
[4] 11 Geo. IV. and 1 Will. IV. cap. 69, sec. 40.
[5] Buxton *v.* Buxton, 1845, 7 D. 1063.
[6] 13 & 14 Vict. cap. 36, sec. 15.

and in a subsequent case,[1] where a Writer to the Signet signed an action of separation and aliment, it was held that the summons must be in a form that implied at least that it might pass the Signet, and the fact that the summons did pass the Signet was not a good objection to the validity of the summons. Sec. 15 of the Court of Session Act, 1850, has now been repealed.[2]

The omission by a Writer to the Signet to sign one page of the condescendence has been held not to be fatal;[3] and where a summons bore to be "given under our Signet the 27th June in the thirteenth year of our reign, 1848," and 1848 was a clerical error for 1849, it was held that the error did not infer a nullity, although it formed a good dilatory defence.[4] Where, however, in a summons raised by an executor-dative the date of the decree-dative was blank when the summons passed the Signet, but before the summons was served the blank was filled up with a date posterior to the date of signeting, the Court dismissed the summons.[5] Signeting is not a judicial act.[6]

Formerly a summons consisted of four parts—(1) the Address; (2) the Instance; (3) the Conclusion; and (4) the Will; but now "an articulate condescendence, together with a note of the pursuer's pleas in law, shall be annexed to each summons, and shall be held to constitute part thereof."[7]

In Schedule A annexed to the Court of Session Act, 1850, are set forth forms of a petitory summons, of summonses of Count, Reckoning, and Payment; Declarator of Trust; Reduction; and Multiplepoinding; and although the Court has power to regulate the forms of summonses,[8] the only directions given by the Court upon the forms of summonses since that date have been by Act of Sederunt, 31st October 1850,[9] and by Act of Sederunt, 20th March 1907.[10] By the former the Court enacted that from and after 1st November 1850 all summonses should be framed in the manner and according to the directions contained in the 1st section of the Court of Session Act, 1850, and in the form given in Schedule A annexed thereto, and further declared that the conclusions of the summons in each case, so far as the same were matter of form and style, should be in the form and style at that date appropriate for the class of actions to which the summons belonged. By the latter a

[1] Craig *v.* Craig, 1851, 14 D. 261.
[2] 55 & 56 Vict. cap. 19 (S. L. R.).
[3] Robinson *v.* Wittenberg, 1860, 23 D. 181.
[4] Sharpe *v.* Stephenson & Co., 1849, 12 D. 327.
[5] Egleton *v.* Flowerdew, 1849, 11 D. 1486.
[6] Walls' Trs. *v.* Drynan, 1888, 15 R. 359, per Lord President Inglis, p. 362.
[7] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 1.
[8] 13 & 14 Vict. cap. 36, sec. 1; 31 & 32 Vict. cap. 100, sec. 106.
[9] C. A. S., C, i. 1.
[10] C. A. S., C, iv. 4 (*a*).

new form of summons of reduction, as set forth in the schedule thereto, was made optional, and it was declared that in the event of the earlier form being employed, the pursuer's agent should not charge higher fees for the preparation of said summons, or in connection with the procedure in the action, than if the new form had originally been used.

(2) The Address.—The address to the messengers-at-arms is the same in every summons, and is as follows:—

George the Fifth, by the grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith: To , messengers-at-arms, our Sheriffs in that part, conjunctly and severally, specially constituted, greeting.

(3) The Instance.—The instance (except in the older form of summons of reduction, where the will immediately follows the address) is in the following terms:—

Whereas it is humbly meant and shewn to us by our [*if a peer, say* our trusty and well-beloved cousin and counsellor; *if a privy councillor, say* our trusty councillor; *and if a commoner, say* lovite] [*insert name and designation, and, if suing in a representative capacity,*[1] *state the capacity*],—*Pursuer;* against [*insert name and designation, and, if sued in a representative capacity, state the capacity; also, if the defender is a foreigner against whom jurisdiction has been founded by letters of arrestment, add* against whom arrestments have been used *jurisdictionis fundandæ causa. If the defender is furth of Scotland, and his residence and place of business* (*if he be engaged in business*) *are unknown to the pursuer, set this forth*[2]],—*Defender;* in terms of the condescendence and note of pleas in law hereunto annexed.

To omit the names of the defenders and describe them generally as "*A.'s* trustees" is incompetent.[3]

Where a defender appears in an action in the Court of Session he cannot state any objection to the regularity of the execution or service as against himself of the summons whereby he is convened,[4] and where the defender does not appear a trifling error in the instance will not invalidate the citation,[5] but a substantial misnomer is fatal.[6] (See *Citation, infra,* Chap. ii.)

Care must be taken that parties to an action should be designed by their proper Christian and surnames in full and their present

[1] Earl of Minto *v.* Roxburgh, 1846, 8 D. 481; Anderson *v.* Duncan, 1861, 23 D. 258. This is the practice, although not absolutely necessary.

[2] C. A. S., C, i. 2.

[3] Bell *v.* Trotter's Trs., 1841, 3 D. 380.

[4] Court of Session Act, 1868, sec. 21.

[5] Turnbull *v.* Russell, 1851, 14 D. 45; Spalding *v.* Valentine & Co., 1883, 10 R. 1092; Cruickshank *v.* Gow & Sons, 1888, 15 R. 326.

[6] Brown *v.* Rodger, 1884, 12 R. 340.

addresses,[1] and that corporate bodies and unincorporate societies, companies and firms should be properly described[2] (see *supra*, p. 247 *et seq.*), for though clerical errors in the instance may be allowed to be amended without payment of expenses,[3] other errors in the instance may only be allowed to be amended upon satisfying the Court or Lord Ordinary that the errors were *bonâ fide* mistakes;[4] that it is necessary for the real determination of cause that such amendments should be made, and upon payment to the opposite party of such expenses as to the Court or Lord Ordinary may seem proper.[5] (See Part v., *infra, Motion for Leave to Amend.*)

Accordingly, pursuers should see that their own designations and addresses are not contradictory,[6] or such as render them impossible of identification;[7] and they should not assume names or designations, or call defenders by names or designations to which they have no right, or which are not recognised by law.[8]

In an action of damages by a wife and several of a number of children for the death of their husband and father the Court appointed intimation to be made to the other children in order that, if so desired, they might crave to sist themselves.[9] Partners suing an action must disclose their partnership in the instance of the summons.[10]

A pursuer can sue under an assumed name, even though assumed without any Royal or judicial authority.[11]

Where the pursuer in an action of damages for seduction, in which an issue had been approved, falsely stated her address in the summons, the Lord Ordinary ordained her to disclose her true address, and intimated that if she did not do so he would ordain her to find caution.[12]

Where in a divorce case the pursuer did not know the defender's address, and designed him as "sometime of , afterwards of

[1] Joel *v.* Gill, 1859, 22 D. 6; Murdoch *v.* Young, 1909, 2 S. L. T. 450.

[2] Forsyth *v.* Hare & Co., 1834, 13 S. 42; Joel *v.* Gill, 1859, 22 D. 6.

[3] Riach *v.* Wallace, 1899, 1 F. 718; Watt *v.* Smith's Trs., 1901, 9 S. L. T. 215.

[4] A. S., 20th March 1907, sec. 2 (*a*); C. A. S., B, i. 1.

[5] Ibid., sec. 2 (*b*), (*c*), (*d*), (*e*); C. A. S., B, i. 2, 3, 4, and 5.

[6] Ramage *v.* His Creditors, 1828, 6 S. 853.

[7] Sceales *v.* Sceales, 1866, 4 M. 300.

[8] Drummond *v.* Farquhar, 6th July 1809, F. C. (Episcopal Bishop in Scotland); Aberdeen Synod *v.* Milne's Trs., 1847, 9 D. 745 (*Lord* Provost when only Provost); Mackintosh *v.* Mackintosh, 1835, 13 S. 884 (chief of a clan); Alexander *v.* King's Advocate, 1830, 8 S. 634; Earl of Stirling *v.* Officers of State, 1831, 9 S. 413; Erskine *v.* Earl of Kellie, 1873, 11 M. 876 (claimants to peerages).

[9] Smith *v.* Wilsons and Clyde Coal Co., 1893, 21 R. 162; Pollok *v.* Workman, 1900, 2 F. 354.

[10] Plotzker *v.* Lucas, 1907, S. C. 315.

[11] Kinloch *v.* Lourie, 1853, 16 D. 197.

[12] Murdoch *v.* Young, 1909, 2 S. L. T. 450.

, and whose present address is to the pursuer unknown," and the defender appeared to defend, the latter was ordained to communicate his present address to the pursuer within seven days.[1]

(4) The Conclusion.—(a) *Generally.*—The conclusion in an ordinary petitory summons runs as follows:—

> Therefore the defender ought and should be decerned and ordained, by decree of the Lords of our Council and Session, to make payment to the pursuer of the sum of sterling [*where any liquid document of debt is libelled on, whether bond, bill, or other document, as the case may be, set it forth here as shortly as possible, describing it merely by its date, and the names of the parties by and to whom granted*], with the legal interest thereof from the day of until payment, together with the sum of sterling, or such other sum as our said Lords shall modify, as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland used and observed in the like cases, as is alleged.

Where an action is founded upon a bill of exchange it is necessary that the bill should be set forth in the conclusions of the summons.[2] If not set forth, the conclusions must be amended in order to make the summons competent, and this is usually done on payment of expenses.[3] Where a summons concluded for payment of a sum of money "for which the defender granted a promissory note, dated, etc.," the Court held that the promissory note was null under the Act 1696, cap. 25, in respect that it did not contain the name of the payee, but sustained the action as to the debt.[4] In another case, where a bill of exchange was libelled in the summons, the Court allowed an amendment concluding simply for the sum and corresponding amendments in the other pleadings.[5] A minute of agreement among partners was held not to be a liquid document of debt.[6]

A pursuer may combine any number of conclusions in one summons and may have alternative conclusions which are irreconcilable. Thus, a conclusion for declarator of marriage is very often coupled with a conclusion for damages for breach of promise of marriage and seduction failing the marriage being established;[7] and a declarator of marriage has been sought on two alternative grounds which are inconsistent.[8]

[1] Baird *v.* Baird, 1914, 2 S. L. T. 260.

[2] Davis *v.* Cadman, 1897, 24 R. 297.

[3] Bank of Scotland *v.* Fergusson, 1898, 1 F. 96; Sanderson *v.* Bryden, 1898, 5 S. L. T. 383.

[4] Duncan's Trs. *v.* Shand, 1872, 10 M. 984.

[5] Hope *v.* Derwent Rolling Mills Co., Ltd., 1905, 7 F. 837.

[6] Gardner *v.* Oliphant, 1905, 13 S. L. T. 255.

[7] Robertson *v.* Henderson, 1833, 12 S. 70; Stewart *v.* Menzies, 1837, 15 S. 1198; Imrie *v.* Imrie, 1891, 19 R. 185 (session papers); *cp.* Spence *v.* Spence, 1914, S. C. 887.

[8] Maloy *v.* Macadam, 1884, 12 R. 431.

A pursuer may also state eventual conclusions.[1] A conclusion for specific performance is often followed by a conclusion for damages failing performance. In such a case care must be taken that the pursuer does not abandon his claim for specific performance, as the consequence will be disastrous. Thus, where a pursuer raised an action for implement of a contract of purchase of a house, and, failing implement, for damages, the Lord Ordinary held that the defender was not bound to implement, but was liable in damages. Acquiescing in this judgment the pursuer altered the construction of his house, but the defender reclaimed, and one of the grounds of Lord Kinnear's judgment reversing the Lord Ordinary's interlocutor was that as the conclusion for damages was ancillary to the conclusion for implement, and depended upon the latter being upheld, and as the pursuer did not insist upon the conclusion for implement, the conclusion for damages must fail.[2] This is in contrast to the case of declarator of marriage or alternatively for damages for breach of promise and seduction, where the first conclusion must be negatived before the second conclusion can be proceeded with.

A conclusion for specific performance or decree *ad factum præstandum* is not always, failing performance, followed by a conclusion for damages, as in many cases a pursuer is entitled to specific implement,[3] and will not be forced to accept damages until performance is impossible or inexpedient; but it is advisable in the ordinary case to have a pecuniary conclusion as an alternative, as the question whether specific performance should be ordained or damages given is a question entirely in the discretion of the Court.[4] The conclusion for implement must explicitly state how implement is to be made.[5]

It is incompetent to have a conclusion for a lump sum of money in favour of separate pursuers.[6] It is incompetent to have a conclusion for a lump sum against several defenders in respect of different grounds of action.[7] It is competent, however, to have a conclusion for a lump sum against several defenders where there is truly one wrong contributed to by the several defenders.[8]

[1] Jameson *v.* Sharp, 1887, 14 R. 643, per Lord President Inglis, p. 648.

[2] Harvey *v.* Smith, 1904, 6 F. 511. See also Skerret *v.* Oliver, 1896, 23 R. 468.

[3] Stewart *v.* M'Dougall, 1908, S. C. 315; Rudman *v.* Jay & Co., 1908, S. C. 552.

[4] Moore *v.* Paterson, 1881, 9 R. 337, per Lord Shand, p. 351; Stewart *v.* Kennedy, 1890, 17 R. (H. L.) 1, per Lord Herschell, p. 5; Lord Watson, pp. 9, 10.

[5] Robertson *v.* Cockburn, 1875, 3 R. 21.

[6] Gray *v.* Caledonian Rly. Co., 1912, S. C. 339.

[7] Barr *v.* Neilsons, 1868, 6 M. 651; Taylor *v.* M'Dougall & Sons, 1885, 12 R. 1304; Conway *v.* Dalziel, 1901, 3 F. 918; Hook *v.* M'Callum, 1905, 7 F. 528.

[8] Gray *v.* Smart, 1892, 19 R. 692; Clark *v.* Beattie, 1909, S. C. 299; Reid *v.* Clark, 1913, 2 S. L. T. 330; 1914, 1 S. L. T. 86.

It is competent to get a decree for less than has been concluded for, even in actions concerning property.[1] In actions of count and reckoning it is competent to obtain a decree for a larger sum than is craved, if there is an alternative conclusion, "or such other sum as may be found due."[2] (See also *Persons with Community of Interest, supra*, p. 224; *Joint Delinquents, supra*, p. 228, 265; *Joint, and Joint and Several, Obligants, supra*, p. 267.)

(b) *Conclusion for Expenses.*—It is competent to award expenses without expenses being concluded for,[3] and it is also competent to award expenses to a greater extent than asked for in the conclusion.[4] Accordingly, it would not seem to be absolutely necessary that there should be a conclusion for expenses. It is, however, the present practice to insert such a conclusion, and it is thought that the present practice should be adhered to, especially in view of the fact that there seems to be some doubt as to whether in an undefended action, which has no conclusion for expenses, the latter can competently be awarded. In an undefended action where there is a conclusion for expenses, decree cannot be extracted for the sum mentioned in the conclusion for expenses in the same way as it can be extracted for the principal sum. An account of expenses must be lodged and taxed by the Auditor, whose report is a sufficient warrant to the Extractor to enter in the extracted decree the amount of expenses as taxed, without said report being brought under the consideration of the Lord Ordinary, unless by his own direction, or that of the Auditor, or on the motion of any party interested.[5]

Sometimes expenses are only concluded for in the event of the defender appearing and opposing, or appearing and occasioning expense. This happens in actions of constitution where the creditor is not entitled to expenses except in the event of the defender appearing and opposing the action.[6] If the action is unsuccessfully opposed the pursuer is entitled to expenses in the usual way.[7] It also sometimes happens in actions of proving the tenor,[8] where the pursuer is not

[1] M'Taggart *v.* M'Douall, 1867, 5 M. 534.

[2] Spottiswoode *v.* Hopkirk, 1853, 16 D. 59.

[3] Torrance *v.* Craufuird, 1822, 1 S. 301 (N. E. 280); Heggie *v.* Stark and Selkrig, 1826, 4 S. 510 (N. E. 518); Scott *v.* Wilson, 1829, 7 S. 566; Western Bank *v.* Buchanan, 1865, 4 M. 97, per Lord Deas, p. 99.

[4] Gordon *v.* Hyslop, 1826, 4 S. 512 (N. E. 520).

[5] Court of Session Act, 1821 (1 & 2 Geo. IV. cap. 38), sec. 33.

[6] Rosslyn *v.* Lawson, 1872, 9 S. L. R. 291, per Lord President Inglis.

[7] Russel *v.* Simes, Bell's 8vo Cases, *voce* Decree, p. 156; Jackson's Trs. *v.* Black, 1832, 10 S. 597; Melville *v.* Preston, 1841, 3 D. 1101.

[8] M'Leod *v.* Leslie, 1865, 3 M. 840.

entitled to expenses unless there has been unreasonable opposition, which has caused the pursuer expense in addition to the expense of proving his case in the usual way.[1] The same thing happens in actions of adjudication. Where there is opposition in such actions and the pursuer is awarded expenses, they cannot be added to the decree of adjudication.[2] If, however, an action of constitution has been raised and expenses awarded to the pursuer, the latter expenses may be added and a conclusion for adjudication of them inserted.[3]

(c) *Conclusion for Interest.* — (i.) *Generally.* — The conclusion for interest varies according to circumstances.

First. Interest is sometimes concluded for, especially in cases of damages,[4] "from the date of the decree to follow hereon until payment." As interest upon the principal sum and expenses runs *ex lege* from the date of decree,[5] this form of conclusion may appear at first sight to be unnecessary, but it is thought that there is one situation at least in which it may prove to be useful. Suppose the case of an action in the Outer House where there is no conclusion for interest from the date of decree until payment and an award of damages is given, and that the interlocutor of the Lord Ordinary is reclaimed against, is affirmed by the Inner House and becomes final, interest in such a case will only run from the date of the judgment of the Inner House. This is clear from Lord President Dunedin's judgment in the case of *Roger* v. *J. & P. Cochrane & Co.*[6] If, however, this is such a conclusion for interest, and the Lord Ordinary's interlocutor awards interest from the date of said interlocutor, and this is affirmed by the Inner House, and becomes final, it is thought that interest would run from the date of the Lord Ordinary's interlocutor. In an action of count and reckoning interest may be decerned for without any express conclusion.[7]

Second. Interest is sometimes asked for "from the date of citation to follow hereon until payment." The class of case in which this

[1] Richmond *v.* Officers of State, 1869, 7 M. 956; Borland *v.* Andrew's Judicial Factor, 1901, 4 F. 129; *cp.* Robertson *v.* Hyndman, 1833, 11 S. 775; Rintoul *v.* Boyter, 1833, 6 W. & S. 394; Browne *v.* Orr, 1872, 10 M. 397.

[2] Sutherland *v.* Duff, 21st February 1735, Elchies' Decisions, *voce* Adjudication, No. 3.

[3] Shand's Practice, p. 670; Graham Stewart on Diligence, p. 589, and authorities there cited.

[4] Martin & Sons *v.* Robertson, Ferguson & Co., 1872, 10 M. 949, per Lord President Inglis, p. 951.

[5] Dalmahoy and Wood *v.* Mags. of Brechin, 1859, 21 D. 210.

[6] 1910, S. C. 1.

[7] Donaldson *v.* Findlay, Bannatyne & Co., 1860, 22 D. 937.

conclusion is proper is the case where the debt is not liquid,[1] where interest upon the principal sum has not been stipulated for, or where such principal sum is not due to be paid at any particular period either by custom of trade or by agreement.[2] As Lord Westbury has said, "Interest can be demanded only in virtue of a contract express or implied, or by virtue of the principal sum of money having been wrongfully withheld and not paid on the day when it ought to have been paid."[3] Thus, ordinary professional and tradesmen's *business* accounts would fall under this head provided there is no custom of trade, or agreement, or an intimation in writing which would put the defender *in mora* previous to the action being raised.[4] Interest, however, has been allowed to run on a law agent's account for professional services from one year after the date of the last entry in his account,[5] unless there has been undue delay in rendering the account.[6] *Cash* advances are in a different position.[2]

Interest is not due upon feu-duties,[7] or ground-annuals,[8] or rents,[9] except from the date of citation in the action for payment.[10] In all such cases interest should only be concluded for from the date of citation.

A cautioner suing for relief against his principal is entitled to interest from the date of citation.[11]

Third. The conclusion for interest is sometimes from a date prior to citation. Thus, interest is due *ex lege* in various cases by statute, and

[1] Wallace *v.* Geddes, 1821, 1 Shaw's App. 42.

[2] Blair's Trs. *v.* Payne, 1884, 12 R. 104.

[3] Carmichael *v.* Caledonian Rly. Co., 1870, 8 M. (H. L.) 119, at p. 131. See also Edinburgh and Glasgow Union Canal Co. *v.* Carmichael, 1842, 1 Bell's App. 316, per Lord Brougham, p. 338, and Lord Campbell, p. 343; Durie's Trs. *v.* Ayton, 1894, 22 R. 34, per Lord Young, p. 38.

[4] Blair's Trs. *v.* Payne, 1884, 12 R. 104, per Lord Fraser, pp. 111, 112; Somervell's Tr. *v.* Edinburgh Life Assurance Co., 1911, S. C. 1069.

[5] Henry *v.* Sutherland, 1801, Mor. Appendix, *voce* Annual-Rent, No. 1; Young *v.* Baillie, 1830, 8 S. 624; Walls *v.* Speirs, 1865, 3 M. 536.

[6] Bremner *v.* Mabon, 1837, 16 S. 213.

[7] Napier *v.* Spier's Trs., 1831, 9 S. 655; Wallace *v.* Earl of Eglinton, 1835, 13 S. 564; Wallace *v.* Crawfurd's Exrs., 1838, 1 D. 162; Maxwell's Trs. *v.* Bothwell School Board, 1893, 20 R. 958.

[8] Moncreiff *v.* Dundas, 1835, 14 S. 61. See, however, Murdoch *v.* Caledonian Rly. Co., 1907, 15 S. L. T. 453.

[9] Blair's Trs. *v.* Payne, 1884, 12 R. 104, per Lord Fraser, p. 110. See also Advocate-General *v.* Sinclair's Trs., 1855, 17 D. 290; Stirling and Dunfermline Rly. Co. *v.* Edinburgh and Glasgow Rly. Co., 1857, 19 D. 598.

[10] Marquis of Tweeddale *v.* Aytoun, 1842, 4 D. 862, per Lord Mackenzie, p. 863; Pollock *v.* Mags. of Edinburgh, 1862, 24 D. 371.

[11] Drummond & Co. *v.* Croom, 1824, 2 S. 608 (N. E. 520).

it is in virtue of statutory enactment that it is claimable in Scotland upon bills of exchange and promissory notes from the date of presentment or maturity.[1] Interest is also due *ex pacto*, which must be explicit,[2] and the date agreed upon, either mutually or by stipulation of the creditor, for the interest to be paid, is the date from which a creditor is entitled to demand interest.[3] It is also due from the date money is lent, although there is no stipulation for interest,[4] except where it is clear that no interest was intended to be charged.[5] It is also due upon cash advances from the date of their advance.[6] Cash advances by a law agent do not include ordinary judicial outlays.[7]

In the *sale of land*, if the purchaser enters into possession without paying the price, interest usually runs from the date of his possession until payment.[8]

On *legacies*, interest runs from the testator's death.[9] In one case,[10] however, where at the death of the testator there was no sufficient money to pay legacies, but after the death of the liferentrix sufficient funds accrued for that purpose, no interest was due prior to the death of the liferentrix. Where a testator advances sums to his children during his lifetime and directs that they are to be deducted from their shares in his trust estate, no interest is to be reckoned on the advances,[11] though it has been held otherwise where the advances were made by

[1] Act 1681, cap. 86 (record edition), cap. 20 (12mo edition); Act 1696, cap. 38 (record edition), cap. 36 (12mo edition); 12 Geo. III. cap. 72; 45 & 46 Vict. cap. 61, secs. 5 and 57; Wauchope *v.* North British Rly. Co., 1863, 2 M. 326.

[2] Forbes *v.* Welsh and Forbes, 1894, 21 R. 630.

[3] Linlithgow Oil Co. *v.* North British Rly. Co., 1904, 12 S. L. T. 421.

[4] Garthland's Trs. *v.* M'Dowall, 26th May 1820, F. C.; Cunninghame *v.* Cunninghame, 1821, 1 S. 212 (N. E. 201); Cuninghame *v.* Boswell, 1868, 6 M. 890; *cp.* Garden *v.* Rigg, 1748, 1 Pat. App. 409.

[5] Christie *v.* Matheson, 1871, 10 M. 9.

[6] Hill *v.* Gilroy, 1821, 1 S. 33; Findlay, Bannatyne & Co.'s Assignee *v.* Donaldson, 1864, 2 M. (H. L.) 86; Graham's Exrs. *v.* Fletcher's Exrs., 1870, 9 M. 298; Blair's Trs. *v.* Payne, 1884, 12 R. 104.

[7] Barclay *v.* Barclay, 1850, 22 Jur. 354; Macpherson *v.* Tytler, 1853, 15 D. 706.

[8] Wallace *v.* Oswald, 1825, 3 S 525 (N. E. 364); Speirs *v.* Ardrossan Canal Co., 1827, 5 S. 764 (N. E. 714); Dickson *v.* Munro, 1855, 17 D. 524; West Highland Rly. Co. *v.* Place, 1894, 21 R. 576; Grandison's Trs. *v.* Jardine, 1895, 22 R. 925; Greenock Harbour Trs. *v.* Glasgow and South-Western Rly. Co., 1909, S. C. (H. L.) 49.

[9] Kirkpatrick *v.* Bedford; Bedfords *v.* Kirkpatrick, 1878, 6 R. (H. L.) 4; M'Lean' Trs. *v.* M'Leans, 1891, 18 R. 892; May's Trs. *v.* Paul, 1900, 2 F. 657.

[10] Ewing's Trs. *v.* Mathieson, 1901, 9 S. L. T. 367; Ewing *v.* Mathieson, 1904, 41 S. L. R. 594.

[11] Smith's Trs. *v.* Sellar, 1894, 21 R. 633; *cp.* Johnston *v.* Cochran, 1829, 7 S. 226.

the trustees.[1] In claims for *legitim*, interest runs from the testator's death.[2]

Interest has been held to run from the date when due until payment on arrears of aliment of a bastard;[3] on a composition by a singular successor;[4] on a duplication of a ground-annual;[5] and on over-payments of rates and taxes,[6] and on mistaken payments of surplus teinds to the Crown, from the date of payment until the date of repayment.[7]

A heritor has been held liable in interest on the arrears of stipend[8] or augmented stipend.[9] Where, however, an action was against a party who had undertaken to relieve lands of augmentations, it was held that interest only ran from the date of citation.[10] Interest has been refused on a claim by a titular for arrears of teind duty.[11]

The *form of conclusion* for interest due prior to citation is usually in the following words—"with the legal interest thereof from the day of until payment." There is no reason, however, why this form should not be varied, in the option of the pursuer, to run in the following way:—"Therefore the defender ought and should be decerned and ordained to make payment to the pursuer of (1) the sum of £ sterling, as principal, and (2) the sum of £ sterling as legal [*or otherwise, as the case may be*] interest on said sum of £ sterling from the day of , until the date of citation to follow hereon, together with the legal interest on the sum of [*insert a sum comprising principal and interest as aforementioned added together*] from the date of citation to follow hereon until payment." What is really due at the date of citation is two sums—first, principal, and second, interest upon the principal from the date when interest became due either *ex pacto* or *ex lege* until the date of citation, and these two sums might have been sued for as one sum upon

[1] Matthew's Trs. *v.* Matthew, 1905, 13 S. L. T. 470.

[2] M'Murray *v.* M'Murray's Trs., 1852, 14 D. 1048; Gilchrist *v.* Gilchrist's Trs., 1889, 16 R. 1118; Bishop's Trs. *v.* Bishop, 1894, 21 R. 728.

[3] Hill *v.* Gilroy, 1821, 1 S. 33; Pott *v.* Pott, 1833, 12 S. 183.

[4] Mags. of Edinburgh *v.* Horsburgh, 1835, 13 S. 571; but see Steuart *v.* Murdoch and Rodger, 1882, 19 S. L. R. 649.

[5] Murdoch *v.* Caledonian Rly. Co., 1907, 15 S. L. T. 453.

[6] Glasgow Gas Light Co. *v.* Barony Parish of Glasgow, 1868, 6 M. 406.

[7] Gwydyr *v.* Lord Advocate, 1894, 2 S. L. T. 280.

[8] Haldane *v.* Ogilvy, 1871, 10 M. 62.

[9] Anderson *v.* Urquhart, 31st January 1805, F. C.; Dawson *v.* Pringle, 15th June 1808, F. C.; Drummond *v.* Montgomerie, 1842, 5 D. 277.

[10] Earl of Rosslyn *v.* Earl of Strathmore's Trs., 1843, 6 D. 90.

[11] Glasgow University *v.* Pollok, 1868, 6 M. 878.

which interest would run from the date of the legal demand, *i.e.* the date of citation.[1]

(ii.) *Rate of Interest.*—Legal interest used to be 5 per centum per annum, but this rate has been departed from, and it would appear that the rate to be allowed is now a matter in the discretion of the Court. Lord M'Laren thus explained the situation in the year 1896:[2] "There is at present no statutory rule of legal interest; 5 per cent. was only a maximum rate, and there is no statutory rule obliging the Court to award 5 per cent. in perpetuity. It may not be beyond the powers of the Court to reduce the rate usually awarded in case of a permanent fall in the rate of interest obtainable in this country." The Court has accordingly, in awarding interest, been guided by the average rate of interest obtainable in circumstances similar to those of the particular case. This, of course, has no application to cases where either the creditor or debtor is at fault, nor where there is an agreement as to the rate of interest.

The following *cases* may be of service in claiming interest:—Where a *claimant for legitim* is in minority at the testator's death and cannot elect until majority, the rate of interest due on *legitim* from the testator's death is only what has been actually earned.[3] The same rate is allowed where the claimant delays to claim from any cause.[4] In one case[5] the claimant delayed for twenty-seven years, and he was not allowed interest. Where the executor fails to pay without reasonable excuse the rate has been held to be 5 per cent.[6] In one case[7] where the claim for *legitim* was made by the wife of the son of the testator, who had survived his father but died before the period of vesting, the Court allowed 5 per cent. from the father's death, although the funds in the hands of the trustees were only earning 2 per cent. In another case,[8] where the children were in minority at their father's death, and the funds were employed in the father's business and earned more than 5 per cent., only the latter rate was allowed.

Where *trustees* placed money on deposit-receipt for nineteen years,

[1] Napier *v.* Gordon, 1831, 5 W. & S. 745; Maclean *v.* Campbell, 1856, 18 D. 609; Douglas *v.* Douglas' Trs., 1867, 5 M. 827, per Lord Justice-Clerk Patton, p. 836.

[2] Ross *v.* Ross, 1896, 23 R. 802, at p. 806.

[3] Ross *v.* Ross, 1896, 23 R. 802; Grant *v.* Grant's Trs., 1898, 25 R. 948.

[4] Inglis' Trs. *v.* Breen, 1891, 18 R. 487; M'Call's Tr. *v.* M'Call's Curator Bonis, 1901, 3 F. 1065. See, however, Mason *v.* Mitchell, 1895, 3 S. L. T. 3, where 4 per cent. was given.

[5] Wick *v.* Wick, 1898, 1 F. 199.

[6] Gilchrist *v.* Gilchrist's Trs., 1889, 16 R. 1118.

[7] Bishop's Trs. *v.* Bishop, 1894, 21 R. 728.

[8] M'Murray *v.* M'Murray's Trs., 1852, 14 D. 1048.

3 per cent. was held to be a fair rate of interest.[1] Where, however, the trustees, two of whom were the law agents, failed to invest the trust funds, 5 per cent. was allowed.[2] The same rate was allowed where trustees immixed their own funds and the trust funds.[3] Where trustees have been held personally liable to replace trust funds lost through unauthorised investment the rate of interest has varied from 3 per cent.[4] to 4 per cent.[5] Where, however, trustees in *bonâ fide* appointed one of their number a manager at a fixed salary, the salary was allowed to be repaid without interest.[6] Where trustees delay payment of legacies without excuse the rate is 5 per cent.[7]

Where a *judicial factor* failed to invest some small sums which he left with his law agent for seven years, the average rate of interest on trust investment was charged.[8] Where he made cash advances he was held entitled to charge 5 per cent.[9]

A firm of *law agents and factors* who did not invest money for some years were held bound to debit themselves with 4 per cent. interest, although the fact was within the knowledge of the trustees.[10] Where law agents raised an action for their account they were allowed 4 per cent. interest on the account until citation and 5 per cent. from citation until payment.[11]

Money lying in *factor's* hands bears interest at 4 per cent.[12]

In *breach of contract*, 5 per cent. interest has been allowed from the date of the breach.[13]

Where the holder of a fund in a *multiplepoinding* fails to lodge it, 4½ per cent. interest has been charged.[14] Where, however, he consigns the fund, he is only liable in bank interest.[15]

[1] Melville *v.* Noble's Trs., 1896, 24 R. 243.

[2] Bryson *v.* Bryson's Trs., 1907, 14 S. L. T. 750.

[3] Jopp *v.* Johnston's Trs., 1905, 13 S. L. T. 522. See also Buchanan *v.* Mackersy, 1847, 9 D. 700.

[4] Heritable Securities Investment Association, Ltd. *v.* Miller's Trs., 1892, 20 R. 675; Cowan (Ferrie's Curator), 1897, 5 S. L. T. 62; Ferguson *v.* Paterson, 1900, 2 F. (H. L.) 37.

[5] Baird's Trs. *v.* Duncanson, 1892, 19 R. 1045; Hardie's Trs. *v.* Graham, 1896, 3 S. L. T. 277; Mustard *v.* Mortimer's Trs., 1899, 7 S. L. T. 71.

[6] Mills *v.* Brown's Trs., 1901, 3 F. 1012.

[7] Kirkpatrick *v.* Bedford; Bedfords *v.* Kirkpatrick, 1878, 6 R. (H. L.) 4; Paterson *v.* Danson, 1897, 5 S. L. T. 64.

[8] Morrison *v.* Dryden, 1890, 17 R. 704.

[9] Mason's Trs. (Dundee Suburban Rly.), 1902, 9 S. L. T. 464.

[10] Fortune's Trs. *v.* Gillies and Others, 1830, 2 D. 59.

[11] M'Lelland *v.* Redfearn, 1844, 7 D. 179.

[12] Robarts *v.* Court, 1838, 3 S. & M'L. 317; Wellwood's Trs. *v.* Hill, 1856, 19 D. 187.

[13] Dunn *v.* Anderston Foundry Co., 1894, 21 R. 880.

[14] Graham *v.* M'Nab's Trs., 1822, 2 S. 22 (N. E. 19).

[15] Williamson *v.* Suttie, 1843, 15 Jur. 637.

Where there was a *suspension of a charge* upon a bond and the sum was consigned and the charger was successful, he was held entitled to interest upon the consigned money, not at bank interest but at legal interest.[1]

The rate of interest upon the price of *property sold* is 5 per cent. from the entry until date of payment.[2] In one case,[3] 4 per cent. interest was allowed for the period during which the validity of the title was in dispute.

(iii.) *Compound Interest.*—Compound interest is usually restricted to cases where persons are in breach of their duty, where banks lend money, and where it is allowed by usage or acquiescence or by special agreement. As Lord Justice-Clerk Patton has said, "A claim for compound interest, with annual rests, is a demand which can only be maintained, either in the case of a fixed usage in commercial dealings, or where there has been an abuse in a party trusted with funds and violating his trust. In dealing with money in a bank, interest is accumulated because the course of practice in reference to banks dealing in money is fixed. Where there is a fiduciary relation constituted between the parties, so that the party who is trustee is either bound to recover or to account for sums of money and fails in his duty, or, it may be, used the property held by him in trust for his own purposes, he shall be held to account upon the very strictest system of accounting."[4] Accordingly, *tutors or curators*,[5] *factors*,[6] *trustees*,[7] *agents*,[8] and others[9] who have retained money for which they were bound to account or to invest are liable in compound interest from the date they ought to have done so.

Where there is a *course of dealing* in which compound interest has been sanctioned and approved of, the Court will give effect to such an arrangement.[10]

In a *cash credit bond* to the bank it is competent to accumulate

[1] Findlay *v.* Donaldson's Trs., 1849, 11 D. 569.

[2] Grandison's Trs. *v.* Jardine, 1895, 22 R. 925. See, however, Greenock Harbour Trs. *v.* Glasgow and South-Western Rly. Co., 1909, S. C. (H. L.) 49, where 3½ per cent. given.

[3] Traill *v.* Connon, 1877, 5 R. 25.

[4] Douglas *v.* Douglas' Trs., 1867, 5 M. 827, at p. 836.

[5] Hamilton *v.* Marshall, 25th February 1813, F. C.; Ralston *v.* Eaton, 1826, 4 S. 421 (N. E. 425); Lambe *v.* Ritchie, 1837, 16 S. 219; Blair *v.* Murray, 1843, 5 D. 1315.

[6] Graham *v.* Freer, 1824, 2 S. 606 (N. E. 518).

[7] Campbell *v.* Keith, 1840, 2 D. 1367.

[8] Lady Montgomerie *v.* Wauchope, 1822, 1 S. 453 (N. E. 421); Wellwood's Trs. *v.* Boswell or Hill, 1856, 19 D. 187.

[9] Plaine *v.* Thomson, 1836, 15 S. 194.

[10] Boswell *v.* Montgomerie, 1836, 14 S. 554; Findlay, Bannatyne & Co.'s Assignee *v.* Donaldson, 1864, 2 M. (H. L.) 86, at p. 105. See also Blair *v.* Russell, 1829, 8 S. 72.

interest annually.[1] Where four persons granted a cash credit bond to enable one of their number to operate to the extent of £600, with interest, and the principal debtor became insolvent, it was held that the bank was only entitled to interest upon the sum advanced from the date of the annual balance preceding the insolvency.[2]

In *accounts current* between a principal and his agent the balance due to the principal is accumulated annually and bears interest.[3]

Advances by a factor in a trust estate bears accumulated interest.[4]

In the case of an *ordinary debtor and creditor* there is no accumulated interest.[5] Where, however, there is interest overdue *ex lege* or *ex pacto* or otherwise at the date of citation, the principal sum and the interest may be accumulated as one sum, and interest upon the sum so accumulated asked for from the date of citation until payment.[6]

There is no compound interest upon the *cash advances of a law agent;*[7] nor can compound interest be charged on a lawyer's account in a trust which is not rendered yearly.[8]

(iv.) *Interest on a Verdict or a Decree in an Action of Damages.*—"All the cases in which interest has been given on sums of damages are cases where the interest has run upon the damages after being liquidated by a verdict or a decree. There is no other case in which interest has been found due on damages."[9] Accordingly in actions for damages there should be no conclusion for interest either from a date prior to citation or from citation. The practice of the Court has been to give interest only from the date of the application of the verdict.[10] The Court, however, has a discretion to award interest from the date of the verdict in cases where the defender has, by unreasonable obstruction, caused delay in the application of the verdict,[11] or at least from the date

[1] Cruickshank *v.* British Linen Co., 1834, 13 S. 91.

[2] Gilmour *v.* Bank of Scotland, 1880, 7 R. 734.

[3] Queensberry's Exrs. *v.* Tait, 1826, 5 S. 180 (N. E. 167).

[4] Hall *v.* Jerdon, 23rd November 1813, F. C.; Scott *v.* Handyside's Trs., 1868, 6 M. 753.

[5] M'Neill *v.* M'Neill, 1826, 4 S. 620 (N. E. 628); 1830, 4 W. & S. 455; Jolly *v.* M'Neill, 1829, 7 S. 666.

[6] Napier *v.* Gordon, 1831, 5 W. & S. 745; Maclean *v.* Campbell, 1856, 18 D. 609; Douglas *v.* Douglas' Trs., 1867, 5 M. 827, per Lord Justice-Clerk Patton, p. 836.

[7] Bunten *v.* Hart, 1902, 9 S. L. T. 476.

[8] Munro's Trs. *v.* Murray and Ferrier, 1871, 9 S. L. R. 174.

[9] Martin & Sons *v.* Robertson, Ferguson & Co., 1872, 10 M. 949, per Lord President Inglis, p. 951. See also Denholm *v.* London and Edinburgh Shipping Co., 1865, 3 M. 815, per Lord Neaves, p. 816.

[10] Lenaghan, etc. *v.* Monkland Iron and Steel Co., 1858, 20 D. 848, per Lord Cowan, p. 849.

[11] Taylor & Co. *v.* M'Farlane & Co., 1868, 40 Jur. 332. See also Lenaghan, etc. *v.* Monkland Iron and Steel Co., 1858, 20 D. 848.

when the verdict might have been reasonably applied.[1] If the conduct of the defender has not been unreasonable, but has only been induced by a reasonable chance of overturning the verdict, even by bills of exception taken to the House of Lords, interest will only run from the affirmance of the verdict.[2] In a recent action of damages[3] tried by the Lord Ordinary without a jury, the Lord Ordinary awarded the pursuer £1500. The Inner House recalled that interlocutor and assoilzied the defenders, but on appeal the House of Lords restored the judgment of the Lord Ordinary. In his petition to apply the judgment of the House of Lords, the pursuer moved for an award of interest on the £1500 from the date of the Lord Ordinary's judgment. The House of Lords (which by the Court of Session Act, 1808, sec. 19, may, in its discretion, give decree for interest, simple or compound) made no order as to interest, and the Court, in respect that the defenders had quite reasonably exercised their right to reclaim, refused to award interest.

(v.) *Foreign Interest.*—Where transactions take place in a foreign country, interest, if allowed, is calculated according to the *lex loci contractus*. Thus where an action was raised in this country for the balance due, with interest, on a mercantile transaction which had taken place in South Carolina, the rate of interest in South Carolina—7 per cent.—was allowed until payment;[4] and where an account for furnishings was contracted in England and sued for, with interest, in Scotland, where the defender had become domiciled, and the law of England, as the *lex loci contractus*, was that interest is not due on book accounts, it was held that interest was not payable.[5] If, however, the debtor on an English debt on open account comes to reside in Scotland, and makes no objection to an application by his creditor for the debt, with interest, but asks and gets delay, the debtor thereby waives his right to object and must pay interest.[6] A contract made with an English company through their agents in Scotland, who had no authority to finally conclude binding contracts, was held to be an English contract and regulated by the law of England.[7] Where, however, a Scottish agent of a foreign company has power to bind his company, and concludes

[1] Flensburg Steam Shipping Co. *v.* Seligmann, 1871, 9 M. 1011.

[2] Hurlet and Campsie Alum Co. *v.* Earl of Glasgow, 1850, 13 D. 370; Taylor & Co. *v.* Macfarlane & Co., 1868, 40 Jur. 332.

[3] Roger *v.* J. & P. Cochrane & Co., 1910, S. C. 1.

[4] Wilkinson *v.* Monies, 1821, 1 S. 90 (N. E. 91). See also Price and Logan Wise, 1861, 24 D. 491.

[5] Gillow & Co. *v.* Burgess, 1824, 3 S. 45 (N. E. 29).

[6] Evans *v.* Earl of Buchan, 1845, 8 D. 296.

[7] Parken *v.* Royal Exchange Assurance Co., 1846, 8 D. 365.

a contract in Scotland, the contract is a Scottish one.[1] A bill drawn by a freighter in India on merchants in Scotland and dishonoured is a Scottish and not an Indian debt.[2]

There has been some divergence regarding the period during which foreign interest may be exacted. Thus where an action was raised in respect of a foreign debt for a single sum, which consisted of (1) a principal sum; and (2) a sum of foreign interest (7 per cent.), with legal interest from the date of citation during the non-payment of the same, the House of Lords, while giving foreign interest to the date of citation, only gave 5 per cent. interest, being Scottish legal interest from the date of citation until final judgment.[3] In another case[4] decree was given at the foreign rate of interest (9 per cent.) from a date prior to citation until final judgment, and from the date of final judgment until payment the rate was the ordinary Scottish legal rate, viz. 5 per cent.[4] In another case,[5] where a person deposited Indian bonds bearing interest at 8 per cent. with an Indian firm, which converted the bonds to its own use, it was held that the pursuer was entitled to 8 per cent. interest until the date of conversion of the bonds, thereafter to the Indian rate of interest (12 per cent.) until the judgment of the House of Lords establishing liability, and thereafter the British rate of interest (5 per cent.) upon accumulated principal and interest. (*For Interest upon Expenses*, see Maclaren on Expenses, p. 505 *et seq.*)

(5) THE WILL.—(a) *Generally.*—The wills of summonses shall specify the *inducicæ legales*, according to the nature of the summons and residence of the defender, without mentioning any particular day of compearance, or leaving blanks for filling up days of compearance; and shall direct the messenger to cite the defender to appear in Court on the last day of the legal *inducicæ* applicable to the case, the *inducicæ* in all cases running from the date of citation, and shall be conceived as nearly as may be in the following terms :—

OUR WILL IS HEREFORE.—And we charge you that on sight hereof ye pass, and in our name and authority lawfully summon, warn, and charge the said defender personally, or at his dwelling-place [*or if more than one*, the said defenders personally, or at their respective dwelling-places, *or if a company*, at its place of business], to compear before the Lords of our Council and Session at Edinburgh, or where they may happen to be for the time, the

[1] St. Patrick Assurance Co. *v.* Brebner, 1829, 8 S. 51.

[2] Cochrane *v.* Gilkison, 1857, 20 D. 213.

[3] Hyslops *v.* Gordon, 1824, 2 Shaw's App. 451.

[4] Fyffe *v.* Fergusson, 1838, 16 S. 1038; 1841, 2 Robinson, 267. See also Wilkinson *v.* Monies, 1821, 1 S. 90 (N. E. 91); Palmer & Co. *v.* Glas' Tr., 1835, 13 S. 308.

[5] Graham *v.* Keble, 1820, 2 Bligh, 126; 6 Pat. App. 616.

seventh day next after the date of your citation, in the hour of cause, with continuation of days, to answer at the instance of the pursuer in the matter libelled; That is to say, to hear and see the premises verified and proven, and decree and sentence pronounced by our said Lords, or else to allege a reasonable cause to the contrary, with certification as effeirs.[1] [*If warrant to arrest on the dependence is desired, add*—Attour that in the meantime ye lawfully fence and arrest All and Sundry the whole readiest moveable goods and gear, debts and sums of money, and other moveable effects belonging or addebted to the defender wherever or in whose hands soever the same can be found; all to remain under sure fence and arrestment, aye and until sufficient caution and surety be found acted in the Books of our Council and Session, that the same shall be made furthcoming to the pursuer as accords of law.] [*If warrant of inhibition is desired, add*—And also that ye lawfully inhibit the said personally or at his dwelling-place, if within Scotland, and if furth thereof, at the office of the Keeper of the Record of Edictal Citations at Edinburgh, from selling, burdening, disponing, alienating, or otherwise affecting his lands or heritages, to the prejudice of the pursuer; and that ye cause register this summons and the execution thereof in the General Register of Inhibitions at Edinburgh for publication to our lieges.]

According to justice, as ye shall answer to us hereupon; Which to do we commit to you, conjointly and severally, full power by these our letters, delivering them by you, duly executed and endorsed, again to the bearer.—Given under our signet at Edinburgh.[1]

The date of signeting is added by the official representing the Keeper of the Signet.

Where a will contained a warrant to summon the defender "to compear before the said Lords of our Council and Session in either of the Divisions of the said Court at Edinburgh" instead of as above, the summons was sustained.[2]

The wills of all summonses passing His Majesty's Signet, where it may be necessary to cite the defender as furth of Scotland, shall be conceived, so far as regards such defender, in the following terms:—

Summon, warn, and charge the said , personally or at his dwelling-place, if within Scotland, upon seven days' warning, and if furth thereof, by delivery of a copy hereof at the office of the Keeper of Edictal Citations, in terms of the statute thereanent, and that upon fourteen days' warning [*and if such defender shall be a minor the following words shall be added*—and also the tutors and curators of the said , if he any has, for their interest, by the same delivery, for them, of a copy hereof at the

[1] C. A. S., C, i. 3.
[2] Brown *v.* Blaikie, 1849, 11 D. 474.

said office, and, in either case, upon the same *inducice* as required for the said himself.[1]]

And the same form of words, *mutatis mutandis*, shall be adopted in all other letters passing His Majesty's Signet bearing a citation, charge, publication, or service against persons furth of Scotland; and in all cases in which one and the same writ shall be executed at one and the same time against two or more persons as furth of Scotland, such execution may be made by delivery at the said office of one copy only, provided that such copy bear upon its face that it is delivered for all and each of such persons.[2]

(b) *Warrant to Arrest.*—The warrant to arrest on the dependence contained in the will may be executed before executing the summons, and is effectual "provided the warrant of citation shall be executed against the defender within twenty days after the date of the execution of the arrestments, and the summons called in Court within twenty days after the diet of compearance; or where the expiry of the said period of twenty days after the diet of compearance falls within the vacation, or previous to the first calling day in the session next ensuing, provided the summons be called on the first calling day next thereafter."[3]

There is a similar provision with regard to summonses at the instance of the Crown.[4]

The summons must contain pecuniary conclusions other than those for expenses in order to make arrestment on the dependence competent.[5] Thus, a summons of divorce against the defender alone will not warrant such arrestment;[6] but if a co-defender is called and damages are asked against him, arrestment of his funds appears competent.[7] Again, arrestment is competent on the dependence of an action of declarator of marriage with conclusions for aliment;[8] or of an action for declarator of marriage with alternative conclusions for damages for seduction.[9] Such arrestment is also competent in actions of adherence and aliment,[10]

[1] C. A. S., C, i. 4 (*a*); C. A. S., C, i. 5.
[2] C. A. S., C, i. 4 (*b*); C. A. S., C, i. 5.
[3] Debtors (Scotland) Act, 1838 (1 & 2 Vict. cap. 114), sec. 17.
[4] 19 & 20 Vict. cap. 56, sec. 10.
[5] Weir *v.* Otto, 1870, 8 M. 1070; Ketchen *v.* Grant, 1871, 9 M. 966; Stafford *v.* M'Laurin, 1875, 3 R. 148; Burns *v.* Burns, 1879, 7 R. 355, per Lord President Inglis.
[6] Fraser, Husband and Wife, i. 579; Burns *v.* Burns, 1879, 7 R. 355.
[7] Fraser *v.* Fraser, 1870, 8 M. 400.
[8] Wylie *v.* Smith, 1834, 12 S. 903.
[9] Gordon *v.* Duncan, 1827, 5 S. 544 (N. E. 511).
[10] Macgregor *v.* Macgregor, 1836, 14 S. 707.

or of separation and aliment,[1] but as the conclusion in these actions is not for immediate payment, but imposes only a prospective obligation, and there must be something special, such as that the debtor is *vergens ad inopiam, in meditatione fugæ*, or putting away his funds, to justify such arrestment, Mr. Graham Stewart is of opinion that the proper procedure in such cases is by bill.[2] An ordinary arrestment on the dependence is not sufficient to arrest a vessel to work out a maritime lien. A special application must be made in the Bill Chamber.[3]

(c) *Warrant to Inhibit.*—The warrant to inhibit contained in the will "may be executed either at the same time as the summons is served or at any time thereafter,[4] and it shall not be necessary to publish such warrants, or to intimate letters of inhibition passing the signet, to the lieges in any other way than by registration in the General Register of Inhibitions; and in registration, it shall be sufficient to register the summons, including the warrant of inhibition, and the execution of such warrant, without registering any condescendence or note of pleas in law which may follow the summons, or where letters of inhibition are used, then such letters, with the execution thereof, shall be registered; and from and after registration as aforesaid, the inhibition, whether contained in a summons or by separate letters of inhibition, shall be held to be duly intimated and published to all concerned."[5] An incompetent warrant of inhibition is not fatal to the summons, but may be deleted on payment of expenses.[6]

(d) *Miscellaneous.*—An arrestment on the dependence covers the expenses of the action even though decree for expenses has been taken out in the name of the agent disburser,[7] but arrestments and inhibitions on the dependence do not cover the expense of using them, and the pursuer, if successful, is not entitled to include such expense in the expenses of process.[8] Interest on the debt is covered by an arrestment.[9]

[1] Thompson *v.* Sharp, 1828, 7 S. 1; Symington *v.* Symington, 1875, 3 R. 205; Burns *v.* Burns, 1879, 7 R. 355, per Lord President Inglis; James *v.* James, 1886, 13 R. 1153.

[2] Graham Stewart on Diligence, p. 20.

[3] M'Connachie, Petr., 1914, S. C. 853. See also Lucovich, Petr., 1885, 12 R. 1090; Clan Line Steamers, Ltd. *v.* Earl of Douglas Steamship Co., Ltd., 1913, S. C. 967, per Lord President Dunedin, p. 973.

[4] Heron *v.* Heron, 1774, Mor. 7007; Bell's Comm. ii. 138.

[5] Court of Session Act, 1868 (31 & 32 Vict. cap. 100), sec. 18.

[6] Mackenzie *v.* Young, 1859, 21 D. 304.

[7] May *v.* Malcolm, 1825, 4 S. 76 (N. E. 79).

[8] Taylor *v.* Taylor, 25th January 1820, F. C.; Symington *v.* Symington, 1874, 1 R. 1006; Roy *v.* Turner, 1891, 18 R. 717.

[9] M'Donald and Halket *v.* Wingate & Others, 1825, 3 S. 494 (N. E. 344).

Notwithstanding the Citation Amendment Act of 1882,[1] it is safer (and is the invariable practice) to execute arrestments by an officer in the former manner than to do so by registered letter.[2] Where the arrestee is furth of Scotland, the arrestment is executed by delivery of a schedule of arrestment at the Record Office of Edictal Citations.[3] In addition, it is advisable, in order to interpel the arrestee from paying away the fund, that intimation of the arrestment should be made to him or his known agent by registered letter, as it is necessary that the arrestee should have such knowledge.[4]

(6) The Condescendence.—"The allegations in fact which form the grounds of action shall be set forth in an articulate condescendence."[5] In the condescendence the pursuer should set forth his title,[6] and the circumstances under which he is compelled to assert it, or the grounds of the defender's liability and the necessity for raising an action against him. In the ordinary case the condescendence should be as brief and pointed as is consistent with clearness, and should contain no argument[7] or irrelevant or impertinent and scandalous averments.[8] The pursuer may state alternative grounds of action which are inconsistent with each other;[9] but if not alternative the averments must not be self-contradictory.[10] Care must also be taken that there is no disconformity between the condescendence and the conclusions.[11] The condescendence must not be vague, otherwise the action may be dismissed. Thus, where the pursuer failed to distinguish between a joint right of property and a joint right of use;[12] where he averred that he had right to "the free

[1] 45 & 46 Vict. cap. 77, secs. 3 and 4.

[2] Graham Stewart on Diligence, p. 30.

[3] 1 & 2 Vict. cap. 114, sec. 18; 6 Geo. IV. cap. 120, sec. 51; C. A. S., C, i. 5.

[4] 19 & 20 Vict. cap. 91, sec. 1; 54 Geo. III. cap. 137, sec. 3; Leslie *v.* Ashburton, 1827, 6 S. 165.

[5] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 1.

[6] Pollock *v.* Mather, 1829, 7 S. 675; Mackintosh *v.* Mackintosh, 1835, 13 S. 884; Hutchison *v.* Ferrier, 1846, 8 D. 1228; Young *v.* Tennant & Co., 1860, 22 D. 1415; Anderson *v.* Duncan, 1861, 23 D. 258; Traill *v.* Traill, 1873, 1 R. 61.

[7] Sproat *v.* Mure, 1826, 5 S. 66 (N. E. 61); Connell *v.* Ferguson, 1861, 23 D. 683, per Lord Neaves (Ordinary), p. 686.

[8] Wardrope *v.* Duke of Hamilton, 1876, 3 R. 876, at p. 878; A. *v.* B., 1895, 22 R. 402; Paton *v.* Clydesdale Bank, 1896, 33 S. L. R. 533, per Lord Watson, p. 535; Thomson *v.* Landale, 1897, 5 S. L. T. 204; Heriot-Hill *v.* Heriot-Hill, 1906, 14 S. L. T. 182; M. *v.* S., 1909, 1 S. L. T. 192; Oliver *v.* Borland, 1911, 2 S. L. T. 46.

[9] London and Caledonian Marine Insurance Co. *v.* London and Edinburgh Shipping Co., 1867, 5 M. 982; Clarke *v.* Edinburgh and District Tramways Co., 1914 S. C. 775.

[10] M'Sourley *v.* Paisley Mags., 1902, 10 S. L. T. 86.

[11] Ewing's Trs. *v.* Farquharson, 1829, 7 S. 464; Muir *v.* Braidwood, 1831, 10 S. 83; Wilson *v.* Walker, 1856, 18 D. 673.

[12] Young *v.* Tennant & Co., 1860, 22 D. 1415.

use" of a muir;[1] and where his averment was that a contract was entered into "in England,"[2] the action was either dismissed or he had to amend. While thus the defender is entitled to fair notice of the case which he will be required to meet, this does not extend to the manner in which the pursuer intends to prove his case. Accordingly, the pursuer is entitled to confine his condescendence to matters which he avers he can prove, and is not compelled to set forth the specific items of evidence by which these averments are to be established.[3] Sections of statutes, deeds, letters, or other written or printed documents should not be incorporated *ad longum* in the condescendence, nor should even quotations be made from them,[4] except the action is based upon a private Act of Parliament—when the relevant portions may be set forth at length—or where the documents constitute the ground of action, such as a libellous letter in an action of damages for slander, or where they are likely to be frequently referred to in the course of the discussion. Mention of such statutes and documents should only be by reference. Public general statutes are not required to be specially condescended on if the facts averred are sufficient to bring the cause within such statutes.[5]

In consistorial causes[6] and actions inferring fraud[7] most specific averments are required.

Where the statement in the conclusion of a summons is not inconsistent with the statement in the condescendence, they may be read together in dealing with relevancy.[8] (See *Preliminary Defences*, Chap. vii. (11), *infra*.)

(7) The Pleas in Law.—By sec. 9 of the Judicature Act[9] it was enacted that "each of the parties shall, along with the copy of his revised condescendence or answer, lodge with the clerk, previous to the final adjustment of the record, *a short and concise note*, drawn and signed

[1] Henderson *v.* Earl of Minto, 1860, 22 D. 1126.

[2] Jackson *v.* Earl of Cassilis, 1833, 11 S. 908.

[3] Tulloch *v.* Davidson, 1858, 20 D. 1045, per Lord Cowan, p. 1056.

[4] Roy *v.* Wright, 1826, 5 S. 107 (N. E. 98). Notice by Lords Ordinary, dated 6th March 1839, sec. 4. This notice is printed in full in Shand's Practice, i. 328 (note).

[5] Glasgow, Airdrie, and Monklands, etc., Rly. Co. *v.* Tennent, 1848, 11 D. 212; Carruthers *v.* Caledonian Rly. Co., 1854, 16 D. 425; Granger *v.* Geils, 1857, 19 D. 1010.

[6] Fraser, Husband and Wife, pp. 1239, 1245-48; Walker *v.* Walker, 1869, 41 Jur. 502.

[7] Wright *v.* Guild and Wyllie, 1893, 30 S. L. R. 785; Thomson & Co. *v.* Pattison, Elder & Co., 1895, 22 R. 432, per Lord Low (Ordinary), p. 435, and Lord President Robertson and Lord Kinnear.

[8] M'Coll *v.* Gibson, 1868, 5 S. L. R. 267; Brown's Trs. *v.* Hay, 1897, 24 R. 1108, per Lord President Robertson.

[9] Court of Session Act, 1825 (6 Geo. IV. cap. 120).

by counsel, *of the pleas in law on which the action or defence is to be maintained; and in such notes the matter of law so to be stated shall be set forth in distinct and separate propositions, without argument,* but accompanied by a reference to the authorities relied on."

By sec. 1 of the Court of Session Act, 1850,[1] it was enacted "that the allegations in fact which form the grounds of action shall be set forth in an articulate condescendence, *together with a note of the pursuer's pleas in law, which condescendence and pleas in law shall be annexed to such summons and shall be held to constitute part thereof.*"

The provision of the former Act above quoted has been repealed;[2] but the form of the pleas in law still continues, with this difference—that the pursuer's pleas in law are now annexed to the condescendence, as provided for by the latter Act, instead of being the subject of a separate paper, and it is no longer the practice to make reference to authorities.

In one case[3] the Court refused to receive notes of pleas in law containing argument, and expressed its determination to enforce the statute that pleas in law should be short and concise and without argument. In another case[4] Lord Justice-Clerk Inglis said: "A plea in law ought to be a distinct legal proposition, applicable to the facts of the case. . . . It must be understood by the profession that the Court will not sustain a loose and unmeaning statement like this as a plea." The plea referred to was in the following terms:—"In the circumstances above set forth the pursuers are entitled to decree in terms of the conclusions of the libel, with expenses," and was the pursuers' only plea in law. Accordingly, as the pleas stated on record are the sole grounds of action in point of law,[5] the pursuer must have at least one specific plea, though it may be advisable *ob majorem cautelam* to have a general plea in addition.

The Lord Ordinary, at adjustment, may suggest a new plea,[6] and the Lord Ordinary, the Court, and parties may, after the record is closed, suggest new pleas;[7] but these matters will be dealt with later in their proper place. (See *Adjustment*, Chap. viii., *infra*; *Motion for Leave to Amend*, Part v. Chap. iv., *infra*.)

(8) Productions.—Along with the summons the pursuer must produce the deeds or writings on which he founds, so far as the same are in

[1] 13 & 14 Vict. cap. 36. See also A. S., 11th July 1828, sec. 49, as to suspensions.
[2] 36 & 37 Vict. cap. 91 (S. L. R.).
[3] Fraser *v.* M'Kenzie, 1826, 4 S. 699 (note) (N. E. 706, note).
[4] Young & Co. *v.* Graham, 1860, 23 D. 36.
[5] 6 Geo. IV. cap. 120, sec. 11.
[6] Ibid., sec. 10. [7] Ibid., sec. 11.

his possession or within his power.[1] It is not now competent, however, to object to the production of any writing after a record is closed on the ground that it was in the possession or under the control of the party producing it at the time that the record was closed, provided that the Court or Lord Ordinary may attach such conditions as to expenses or otherwise to the receiving of such documents as to them or him shall seem proper.[2] (See Chap. ix., *infra.*)

(9) Supplementary Summons. — Until recently a supplementary summons was necessary, *inter alia*, where the plea had been sustained that all parties had not been called, or that the original pursuer had not a complete title without the concurrence of other parties, or if it was desired to introduce additional defenders or pursuers or to enlarge or change the grounds of action.[3] The Act of Sederunt, 20th March 1907, however, seems to have rendered a supplementary summons unnecessary, for it is now competent to sist any other person as pursuer in substitution for or in addition to the original party, to alter the capacity in which a pursuer or defender sues or is sued, to insert the name of any additional defender who has an interest in the cause, to increase the sum sued for, to introduce additional funds or property, or to allow any amendment of the summons or other writ, provided the Court is satisfied that such amendment or amendments are necessary for the purpose of determining in the existing action the real question in controversy between the parties, and upon such terms as to expenses as to the Court shall seem proper.[4] This Act of Sederunt does not apply to Sheriff Court cases appealed to the Court of Session.[5] There is a similar right given in the Sheriff Courts (Scotland) Act, 1907.[6]

Where all parties have not been called in the original summons, a supplementary summons may be raised, in which the original defenders are called along with the new defender,[7] or in which the only conclusion is for a new party to be called as a new defender in the original action.[8]

Where the supplementary summons concludes for a larger sum on the same facts as in the original summons, it is incompetent.[9] It was

[1] Court of Session Act, 1825, sec. 3.

[2] Court of Session Act, 1868, sec. 99.

[3] Mackay's Manual, pp. 192, 193.

[4] A. S., 20th March 1907, sec. 2; C. A. S., B, i. 1-7; Klein *v.* Lindsay, 1909, 1 S. L. T. 89; The Doughty Shipping Co., Ltd. *v.* North British Rly. Co., 1909, 1 S. L. T. 267; Kennedy *v.* Shotts Iron Co., 1910, 2 S. L. T. 329; Summerlee Iron Co., Ltd. *v.* Caledonian Rly. Co., 1911, S. C. 458.

[5] Paterson *v.* Wallace, 1909, S. C. 20.

7 Edw. VII. cap. 51, First Schedule, rule 79.

[7] Thomson's Trs. *v.* Livingstone, 1863, 2 M. 114.

[8] Bryson *v.* Muir, 1841, 4 D. 58.

[9] Bryan *v.* Glasgow and South-Western Rly. Co., 1869, 6 S. L. R. 445; Parker *v.* North British Rly. Co., 1899, 1 F. 872.

held, however, in exceptional circumstances of great difficulty, competent to raise a supplementary action which concluded for a larger sum on the same grounds, but under deduction of such sum as might be decerned for in the original action.[1] It is not competent, after the record is closed, to ask by supplementary summons for interest on the sums concluded for in the original libel.[2]

The averments in the supplementary summons must not be inconsistent with those in the original summons.[3] Thus, where the original summons was based on the fraud of one person, it was held competent to raise a supplementary summons based on the fraud and conspiracy of two persons.[4]

It is not competent to amend a supplementary summons so as to make it into a substantive one.[5]

There cannot be a summons supplementary to a summons totally inept,[6] nor can a supplementary summons be raised when the period during which by statute an action must be brought has expired.[7]

It is competent to raise a supplementary action for the purpose of stating the conclusions of the original action alternatively with other conclusions not embraced by that action.[8]

The following is a form of a supplementary summons:—

GEORGE THE FIFTH, ETC.—Whereas it is humbly meant and shewn to us by our lovite *A.*,—*Pursuer;* against *B.*, *C.*, and *D.*,—*Defenders;* in terms of the condescendence and note of plea in law hereunto annexed; Therefore upon the present action being called in Court, it ought and should be remitted to and conjoined with the action now in dependence between the pursuer and the defenders *B.* and *C.*, the summons in which was signeted at Edinburgh the day of 19 ; and the said summons being conjoined, or whether the same shall be conjoined or not, the defenders ought and should be decerned and ordained [*if only a new defender is called, take in the conclusions as in the original summons; if the conclusions are altered, insert the whole conclusions as amended*].—Our will is herefore, etc.

A supplementary summons requires to be signeted and served, and fee fund dues require to be paid as in the case of an ordinary summons.

(10) REPEATING A SUMMONS.—Where the defence in an action is objected to by the pursuer on the ground that the defence to be successful will necessitate a cross action, the defender may, with the

[1] Roy *v.* Hamiltons & Co., 1868, 6 M. 422.

[2] Edinburgh and Glasgow Union Canal Co. *v.* Carmichael, 1842, 1 Bell's App. 316.

[3] Cargill *v.* Baxter, 1826, 5 S. 48 (N. E. 44); Scott *v.* Napier, 1829, 7 S. 338; M'Dougall *v.* Campbell, 1829, 7 S. 460; Howatson *v.* Murdoch, 1831, 9 S. 534.

[4] Shedden *v.* Patrick, 1850, 12 D. 694.

[5] Bartolomeo *v.* Morrison and Milne, 1866, 2 S. L. R. 100.

[6] M'Indoe *v.* Lyon, 1826, 5 S. 92 (N. E. 85).

[7] Paul *v.* Inglis & Co., 1824, 2 S. 628 (N. E. 533).

[8] White *v.* Finlay, 1863, 1 M. 786.

consent of the Court and of the pursuer,[1] raise an action in which the defence in the original action is repeated as a substantive action against the original pursuer. The latter action is signeted, but does not require to be executed, called, or enrolled, and when produced in Court an interlocutor is issued holding the summons repeated, and, if necessary, it is conjoined with the original action. The repeated summons can go no further than the libel of the other process into which it is repeated.[2] As a repeated summons is purely an incidental process, if the original summons is held to be incompetent, the defender is not allowed to repeat a summons.[3]

In an action of reduction of certain provisions by a deceased debtor in favour of his wife and daughter against the latter, the pursuers pleaded that the deceased was insolvent when the provisions were made, and that in any event the defenders could not compete with onerous creditors. The pursuers subsequently admitted that the deceased died solvent. Other creditors then came forward and stated that they had raised a separate action of reduction against the same defenders on the ground of insolvency, and the Lord Ordinary allowed the latter process to be repeated in the first action, but the Inner House refused to allow the second set of pursuers to interfere.[4]

Where formerly an action of reduction was necessary in any action where a deed or writing is founded on by either party, all objections thereto may now be stated and maintained by way of exception unless the Court or Lord Ordinary considers that the matter would be more conveniently tried in a separate action of reduction.[5]

(11) Summons Lost.—Where a summons, petition, or other original writ or pleading is lost or destroyed, a copy thereof, proved in the cause to the satisfaction of the Court before whom the cause is depending at the time, and authenticated in such manner as he or they shall require, may be substituted, and shall be held equivalent to the original for the purposes of the action.[6] This provision has been extended to lost interlocutor sheets.[7]

[1] Mackay's Practice, i. 386, 387.
[2] Weir *v.* White, 1747, Mor. 4034.
[3] Bridges *v.* Elder, 1822, 1 S. 373 (N. E. 351).
[4] Remington, Crawford & Co. *v.* Bruce, 1829, 7 S. 692.
[5] A. S., 20th March 1907, sec. 6; C. A. S., C, iv. 4 (*d*); Oswald *v.* Fairs, 1911, S. C. 257.
[6] Court of Session Act, 1868, sec. 15.
[7] A. S., 20th March 1907, sec. 12; C. A. S., A, iii. 8.

CHAPTER II

CITATION

(1) GENERALLY.—(a) *Definition.*—Citation is the judicial notice served upon a person in order to convene him to the Court, or other judicial tribunal, as a party, a witness, a haver, or a juror, or to do some other judicial act. The date of citation is the date of the commencement of the cause.[1] Thereafter the cause is in dependence,[2] and motions may be made therein even though the summons has not been called. Where procedure, such as asking for a commission to lie *in retentis*, is necessary before the case has been called, the motion requires to be made in the Inner House.[3]

(b) *Acceptance of Service.*—Service may be accepted by the defender's agent, and the usual *inducice* may also be dispensed with. This is done by the defender's agent making a holograph or probative indorsation to that effect on the principal summons.[4] In one case,[5] however, a correspondence between the agents was held sufficient to instruct acceptance of service. While service may be accepted in a personal action, it cannot be departed from where enjoined by an Act of Parliament,[6] and in actions destined to affect a title to heritage such an expedient should never be resorted to.[7]

(c) *Dispensing with Citation.*—The Inner House, in the exercise of its *nobile officium*, sometimes dispenses with the citation of next of kin where such citation is required, as in actions for choosing curators,[8] and for making up tutorial and curatorial inventories.[9]

[1] Erskine's Inst. iii. 6. 3; Alston *v.* Macdougall, 1887, 15 R. 78; Stewart *v.* North, 1890, 17 R. (H. L.) 60, per Lord Watson, p. 63.

[2] Aitken *v.* Dick, 1863, 1 M. 1038.

[3] Hansen *v.* Donaldson, 1873, 1 R. 237.

[4] Cullen *v.* Campbell, 1829, 8 S. 197. See also Graham, Petr., 1858, 20 D. 436. *Form of Acceptance of Service.*—I (*or*, I, as agent for the defender) acknowledge to have received a service copy of the summons, accept service, and dispense with the *inducice*.—*A. B.*

[5] Wilson *v.* Pattie, 1826, 4 S. 623 (N. E. 631).

[6] Littlejohn *v.* Hamilton, 1829, 7 S. 563.

[7] Campbell on Citation, p. 67.

[8] Act 1555, cap. 8 (record edition), cap. 35 (12mo edition).

[9] Act 1672, cap. 2.

Procedure is by petition, which must be printed,[1] and the Court has dispensed with service where there are no next of kin on the mother's [2] or the father's [3] side, or in the case of bastards [4] resident in Scotland.

Where there are next of kin resident in Scotland but the nearest of kin reside abroad, it is still necessary to present a petition to the Inner House asking for dispensation with the citation of the nearest of kin.[5]

(d) *Shortening Inducice.*—In a petition for the appointment of a judicial factor with special powers in room of a deceased judicial factor to whom the same special powers had been granted, the Court refused to shorten the usual *inducice* of service on a beneficiary who was abroad.[6] In such a petition all parties interested should be cited.[7] The Court, however, dispensed with the *inducice* in an action brought by a creditor to constitute a debt in order that he might adjudge and rank *pari passu* with another creditor of their common debtor who had previously raised an action of adjudication.[8] The refusal by a Sheriff to grant warrant to cite to the Court at the head burgh of his county a defender belonging to another district of the county cannot be appealed.[9]

(e) *Service Within Year and Day of Signeting.*—The instance of a summons falls unless it is served within year and day of its signeting, and be called within year and day of the day of compearance.[10]

Citation may be made in several ways :—

(2) Personal Citation.—(a) *Description of.*—This method of service is usually made by the delivery to each defender personally by a messenger-at-arms of a full copy, excepting the will, of the summons, with a schedule annexed thereto, containing an intimation to the defender to compear in the Court of Session at the expiry of a certain number of days from the date of citation to answer at the instance of the pursuer in the matter libelled in the summons.[11] Where the

[1] Duthie, Petr., 1854, 17 D. 143.

[2] Hobbs, Petrs., 1831, 9 S. 841.

[3] Thomson and Others, Petrs., 1855, 18 D. 193.

[4] Wilson and Alexander, Petrs., 1859, 21 D. 736 ; Kyle, Petr., 1861, 23 D. 1104.

[5] Buchan and Others, Petrs., 1873, 11 M. 662, and cases there cited.

[6] Stodart, Petrs., 1854, 16 D. 883.

[7] Lawson, etc., Petrs., 1894, 2 S. L. T. 308.

[8] M'Kidd, Petr., 1890, 17 R. 547. See also Bell's Com. (5th ed.), 725 ; Bontine *v.* Graham, 1829, 8 S. 87, 263 ; Scott *v.* Scott, 1832, 10 S. 253 ; Gregg, etc., Petrs., 1839, 1 D. 544 ; Parker on Adjudications, pp. 36, 42.

[9] Davidson *v.* Davidson, 1891, 18 R. 884.

[10] A. S., 8th July 1831, sec. iii. ; Allan *v.* Commercial Bank, 1842, 4 D. 842 ; M'Kidd *v.* Manson, 1882, 9 R. 790.

[11] Act 1693, cap. 21 (record edition), cap. 12 (12mo edition) ; A. S., 15th February 1723. See also A. S., 19th March 1897 ; C. A. S., A, ix.

defender resides within any county, or within any district of a county subject to the jurisdiction of the ordinary Court of any Sheriff-Substitute of such county, in which county or district of any county there is not at the time a resident messenger-at-arms, or within any of the islands of Scotland, it is competent for a sheriff-officer of such county or of the sheriffdom within which such island is situated (as the case may be) to serve such summons or to make such service or citation upon such defender within such county or island, and such service or citation and execution thereof has the same effect as if done or made by a messenger-at-arms.[1]

(b) *Consistorial Causes.*—In consistorial actions, where the defender is not resident in Scotland, the summons must be served upon him personally,[2] and it is sufficient compliance with such provision if the personal service is made by the delivery to the defender personally of the summons by a person (although not a messenger-at-arms or other officer of the law) duly authorised by the pursuer for that purpose.[3] Where a defender had been absent from his residence in Scotland for less than forty days, and left no information where he had gone, it was held that the Judicature Act created no presumption that in such circumstances the defender was still resident in Scotland, and therefore that citation in a consistorial cause must, in terms of the Conjugal Rights Amendment Act, be made upon him personally.[4] Intimation must now be made to the person with whom the defender is alleged to have committed adultery when the said person has not been called as a co-defender.[5] (See *Consistorial Actions, infra,* Part. vii. Chap. vi.)

(c) *Citation of Minors, etc.*—A minor cannot be cited by delivery of a copy summons to his curator,[6] nor a wife by personal delivery to her husband, though it may be sufficient if the copy is left at their mutual dwelling-place.[7]

(d) *Full Copy.*—In certain cases a full copy is not necessary to be served. Thus, "where there are more defenders than one, each of them shall receive a full copy of such part thereof as concerns them *respectivè*, excepting always summons of adjudication, of maills and duties, of ranking and sale, of exhibition *ad deliberandum*, summons for chusing of curators, of transumpt, of wakening, of multiplepoinding, and of

[1] Court of Session Act, 1868 (31 & 32 Vict. cap. 100), sec. 19.
[2] Conjugal Rights (Scotland) Amendment Act (24 & 25 Vict. cap. 86), sec. 10.
[3] Court of Session Act, 1868, sec. 100.
[4] Laughland *v.* Laughland, 1882, 19 S. L. R. 645.
[5] A. S., 17th July 1908 ; C. A. S., C, iv. 2.
[6] Earl of Galloway *v.* Hamilton, 1700, Mor. 3759.
[7] Keir *v.* Robertson, 1702, Mor. 3757.

poinding of the ground, the heritors getting always a full copy of the said summons of poinding of the ground,"[1] and summons of furthcoming.[2] It is not "a full copy of such part thereof as concerns" him if one of several defenders is served with a copy from which the names of the other defenders are omitted.[3] In serving a copy of a multiplepoinding upon the nominal raiser it is not necessary to set forth the name of the real raiser.[4]

(e) *Original Summons not Needed for Citation.*—It is not necessary that a messenger-at-arms or sheriff-officer (as the case may be) serving a summons, petition, appeal, or notes of suspension or interdict should have the original document in his hands at the time of such service, provided that a copy, certified as correct by the agent in the cause, is at the time in possession of such messenger or officer, and is exhibited to the party on whom the service is made if required.[5]

(f) *Inducicæ.*—The *inducicæ legales*, or days of grace which intervene between the citation of the defender and the day ordained for his appearance in the cause, and which are set forth in the will of the principal summons and the schedule annexed to the service copy, are seven days where the defender is within Scotland, unless in Orkney or Shetland or in any other island of Scotland, and fourteen days where he is in Orkney or Shetland or such other island, provided that in all cases where any shorter *inducicæ* than the *inducicæ* above mentioned are at present sufficient, such shorter *inducicæ* shall continue to be sufficient.[6] This applies equally to foreigners personally cited in Scotland as to domiciled Scotsmen.[7]

(g) *Privileged Processes.*—In the Act of Sederunt of 29th June 1672 is given a list of summonses privileged to proceed on a six days' *inducicæ*, and these are as follows:—Summons of spuilzie raised within fifteen days after committing the spuilzie, summons of ejection, intrusion, succeeding in the vice, removing, aliment, exhibition, furthcoming, transference, poinding of the ground, wakening, special declarator, suspension, preventor, and transumpt; and to these must now be added in practice summonses of multiplepoinding.

(h) *Forms of Schedules.*—The following is the usual form of a citation attached to the service copy of a summons:—

[1] A. S., 15th February 1723.
[2] A. S., 1st January 1726.
[3] Allardice *v.* Blakey, 1847, 9 D. 314.
[4] Miller *v.* Ure, 1838, 16 S. 1204.
[5] Court of Session Act, 1868, sec. 16.
[6] Ibid., sec. 14.
[7] Horne *v.* Smith, 1823, 2 S. 500 (N. E. 441); Dickson & Co. *v.* Wilkin, 1859, 31 Jur. 595.

I, *A. D.*, messenger-at-arms, by virtue of a summons of , whereof the above and the preceding pages are a full double, excepting the will, signeted the day of nineteen hundred and years, raised at the instance of the therein designed *A. B.*, pursuer, in His Majesty's name and authority lawfully summon, warn, and charge you, the also therein designed *C. D.*, defender, to compear before the Lords of Council and Session, at Edinburgh, or where it may happen them to be for the time, the seventh day next after the date of this citation, in the hour of cause, with continuation of days, to answer at the instance of the said pursuer in the matter libelled in the said summons, with certification, conform to the principal summons. This I do upon the day of nineteen hundred and years, before and in presence of *E. F.*, residenter in , witness to the premises. (*Signed*) *A. D.*

The following is the form of notice of citation where an additional defender is allowed to be called :—[1]

X. Y.

[*Designation and address.*]

Take notice that in the action in which *A. B.* is the pursuer and *C. D.* is the defender, the record in which, as now amended, is herewith enclosed, your name has, by order of Lord , Ordinary, dated , been added as a defender; and the conclusions of the action, originally directed against the said *C. D.*, are now also directed against you. If you desire to defend the said action you will require to lodge defences within days from the date of service hereof, under certification that, if you fail to do so, the said *A. B.* will be entitled to take decree against you in the undefended roll in terms of the conclusions of the said action [*or* obtain decree in absence against you, *in cases of suspension and interdicts, etc.*].[2]

(i) *Requisites of Schedule.*—It is not absolutely necessary that the schedule of citation should be attached to the service copy of the summons.[3] It is usually attached, however, as it thereby saves the trouble of describing at length the whole parties to the case, which would otherwise be necessary for the purpose of identification. Whether attached or not, it must "bear at length, and not in figures, the day and date of the delivery thereof, as also the names and designations of the witnesses, in such sort as the execution and indorsation did and doth bear the same."[4] One witness only is now required.[5] It is not necessary that the schedule of citation on the

[1] A. S., 20th March 1907, sec. 2 (*e*); C. A. S., B, i. 5.

[2] Ibid.; Schedule.

[3] Hamilton *v.* Monkland Iron and Steel Co., 1863, 1 M. 672, per Lord Jerviswood (Ordinary), p. 674, and Lord President M'Neill, p. 676.

[4] Act 1693, cap. 21 (record edition), cap. 12 (12mo edition). See also A. S., 8th July 1831; *cp.* Connel, Wright & Co. *v.* Fairlie, 1824, 2 S. 664 (N. E. 558); Holmes *v.* Reid, 1829, 7 S. 535; Thomson *v.* Gavin, 1830, 8 S. 921.

[5] Debtors (Scotland) Act, 1838, sec. 32.

service copy should be signed by the witness,[1] but it must be signed by the messenger.[2] The latter, however, does not require to sign separately the copy of the summons as distinct from the copy of the citation.[3] A slight clerical error in, or addition to, the citation will not make it invalid.[4] (See *Objection to Citation by Person Entering Appearance, infra,* p. 342.)

(j) *Refusal to Accept Service.*—If the defender refuses to accept service of the copy summons the messenger should mention the fact in his execution, and the refusal is no objection to the citation;[5] and if he deliberately obstructs or prevents personal service, the Court will dispense with service.[6]

(k) *Service on Incapax.*—The Court has also dispensed with personal service upon an *incapax* where the latter might be excited and injured by such service.[7] Formerly, where a petition for the appointment of a *curator bonis* to an *incapax* was served personally, the Sheriff or his Substitute had to be present,[8] but this is no longer the practice.

(l) *Effect on Jurisdiction.*—Personal service is necessary to complete jurisdiction where the ground of jurisdiction is *ratione contractus,*[9] *ratione delicti,*[10] or *ratione originis.*[11] (See *Jurisdiction, supra,* p. 34 *et seq.*)

(m) *Effect on Decree in Absence.*—Personal service may also have the effect of making a decree in absence unchallengeable after the defender's death;[12] and where a decree in absence after personal service has not been recalled, such decree after extract and upon the lapse of sixty days after the expiry of a charge upon it not brought under review by suspension is entitled to all the privileges of a decree *in foro;* and

[1] Beattie *v.* Lee, 1823, 2 S. 220 (N. E. 194); *cp.* Act 1686, cap. 5 (record edition), cap. 4 (12mo edition).

[2] Act 1592, cap. 59 (record edition), cap. 141 (12mo edition); Stair, iv. 38. 15; Holmes *v.* Reid, 1829, 7 S. 535, per Lord M'Kenzie, p. 541.

[3] Izatt *v.* Robertson, 1840, 2 D. 476. See also Bruce *v.* Hill, 1836, reported 2 D. 478 (note).

[4] Brodie *v.* Smith, 1836, 14 S. 983. See also Mackintosh *v.* Munro, 1854, 17 D. 99.

[5] Stair, iv. 38. 15.

[6] Busby *v.* Clark, 1904, 7 F. 162.

[7] M'Kechnie and Others, Petrs., 1890, 27 S. L. R. 261.

[8] Scott, Petr., 1855, 17 D. 362.

[9] Johnston *v.* Strachan, 1861, 23 D. 758. See also Sinclair *v.* Smith, 1860, 22 D. 1475, at p. 1480; Kermick *v.* Watson, 1871, 9 M. 984, at p. 985; Bird *v.* Brown, 1887, 25 S. L. R. 1; *cp.* Glasgow Corporation *v.* Johnston, 1915, S. C. 555.

[10] Parnell *v.* Walter, 1889, 16 R. 917; *cp.* Glasgow Corporation *v.* Johnston, 1915, S. C. 555.

[11] Sinclair *v.* Smith, 1860, 22 D. 1475, per Lord President Inglis, p. 1480. See also Ritchie *v.* Fraser, 1852, 15 D. 205; M'Arthur *v.* M'Arthur, 1842, 4 D. 354, per Lord Fullerton, p. 360; *cp.* Tasker *v.* Grieve, 1905, 8 F. 45; *cp.* Glasgow Corporation *v.* Johnston, 1915, S. C. 555.

[12] Blair *v.* Common Agent in Sale of Kinloch, 1789, Mor. 12196; 1790, Mor. 12198.

a decree of declarator or other decree on which a charge is not competent, obtained in absence after personal service, is final after the lapse of twenty years from its date unless lawfully recalled or brought under review by suspension or reduction.[1]

(n) *Execution of Citation.*—Every execution of a summons and every execution of intimation of a note of suspension, or of suspension and interdict, or of suspension and liberation, must be written at the end of the summons itself or at the end of the usual certified copy of such note of suspension, or of suspension and interdict, or of suspension and liberation, and, where necessary, on continuous sheets, but not on a separate paper, unless the same is securely stitched to the summons or writ, and such execution must be in the following form, or as nearly as possible thereto.[2]

(o) *Form of Execution* :—

This summons [*or* note of suspension, *or* note of suspension and interdict, *or* note of suspension and liberation] executed [*or* intimated] by me [*insert name*], messenger-at-arms, against [*or* to] [*insert name* or *names*], defender [*or* defenders, *or* respondent, *or* respondents] [*state whether personally* or *otherwise*], in presence of [*insert name and designation of witness*] this day of nineteen hundred and years.

C. D., witness. [*Signature of messenger.*[3]]

The above statutory provision has no reference to the messenger's citation on service copies.[4]

More than one witness is not required for the service or execution of citations.[5]

(p) *Requisites of Execution.*—The provisions of the 20th section of the Court of Session Act, 1850, as to the execution of summonses, and the direction contained in the relative schedule—"state whether personally or otherwise"—as above set forth, made no alteration in the formalities appropriate to the various modes of executing summonses, and it was held by a majority of the whole Court that it made no alteration in the requisites of the messenger's execution so far as regards specification in describing the mode of execution. Accordingly an execution was bad and liable to challenge *ope exceptionis* which

[1] Court of Session Act, 1868, sec. 24.

[2] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 20; A. S., 15th July 1909, sec. 2; C. A. S., C, i. 7.

[3] Court of Session Act, 1850, Schedule B.

[4] Hamilton *v.* Monkland Iron and Steel Co., 1863, 1 M. 672.

[5] Debtors (Scotland) Act, 1838 (1 & 2 Vict. cap. 114), sec. 32; Citations (Scotland) Act, 1846 (9 & 10 Vict. cap. 67), sec. 1. See also Calder *v.* Forbes, 1847, 9 D. 592; Robb *v.* Menzies, 1859, 21 D. 277.

bore that the summons was "executed by me" as "against *A. B.*, defender, personally before *C. D.*," but did not set forth that a copy had been delivered.[1]

By the Act 1672, cap. 6, it is ordained "that in tyme comeing all executions of summonds shall beir expressly the names and designations of the pairties, pursuers and defenders. And that it shall not be sufficient that the same doe relate generally to the summonds, otherwise the excutione shall not be sustained."[2] In an early case,[3] where the execution was written on a blank sheet originally stitched to the summons, and bearing reference to the foregoing summons, but did not contain the designations of the parties, the Court held the execution to be valid. In a later case,[4] however, where an objection was taken to the execution of citation, originally written on a paper apart and afterwards stitched to the summons, that it did not contain the designations of the parties, the Court sustained the objection. In similar circumstances, but where, in addition, the execution specified the date and signeting of the prefixed summons, a similar result was arrived at.[5] Again, where the execution was written on a blank leaf upon which no part of the summons was written, and which was stitched up with the summons, and the pursuer was not designed, the execution was held to be bad;[6] and where in an action of wakening and transference against several different parties the execution of the summons against one of the defenders made no special mention of the names and designations of the other defenders, a similar result was arrived at.[7] Where, however, a summons was raised by a company and certain individuals as "all of the Globe Insurance Company aforesaid" and as "trustees for the Globe Insurance Company," and the execution, which was on a paper apart, did not mention the designation of the pursuers as trustees for said company, it was held that, as the character of trustees was not an essential part of the designation, the execution was good.[8] In a recent case it was held by Lord Guthrie (Ordinary) that it was not a valid objection to the execution of a petition that it was partly printed and annexed to the petition by gumming.[9] It has, however,

[1] Stewart *v.* Macdonald, 1860, 22 D. 1514.

[2] See also Act 1686, cap. 5 (record edition), cap. 4 (12mo edition), which also applies to executions.

[3] Watt *v.* M'Intosh, 1827, 5 S. 334 (N. E. 309).

[4] Stewart *v.* M'Ra, 1831, 9 S. 261.

[5] Creightons *v.* Deans, 1832, 11 S. 30.

[6] Collier *v.* Paterson, 1834, 12 S. 674.

[7] Clason *v.* Campbell, 1837, 16 S. 289.

[8] Globe Insurance Co. *v.* Tytler, 1842, 5 D. 294.

[9] Hunter, Petr., 1908, 15 S. L. T. 716.

to be observed that neither the aforesaid provisions of the Act of 1672 nor of the Court of Session Act, 1850, have reference to petitions. (See *Objection to Citation by Person Entering Appearance, infra*, p. 342.)

(q) *Objections to Execution.*—Where the execution of citation was dated prior to the summons the action was dismissed, although the objection was not taken by the defender, but by the Court *ex proprio motu*.[1] Where, however, the execution was on the third page of a petition and referred to it, but omitted to state that the citation proceeded in virtue of the deliverance of the Court, it was held that the blunder was not in the body of the deed, but was a clerical error in the description of the warrant, and it was allowed to be amended.[2] In the same way where the messenger's execution of a petition bore that he had "passed and in Her Majesty's name and authority, etc.," whereas the fact was that his warrant was only an order or interlocutor of Court, the execution was allowed to stand.[3] The omission of the witness and his designation is fatal to the validity of the execution.[4]

The Court will receive a new execution in place of a former erroneous one, provided it is lodged *de recenti*.[5] If, however, the cause is debated, and thereafter it is decided that the execution is bad, it is too late to receive an amended execution.[6]

In an action of reduction of a decree in absence where objection was taken that an execution of personal service was false, the Court *hoc statu* allowed parole proof without the execution being put into process.[7] In a later case,[8] where a suspension of a decree in absence was raised on the ground that the citation in a service copy bore *in gremio* that it was executed by *A. B.*, but was not signed by *A. B.*, but by *C. D.* for *A. B.*, the Court held that the objection to the citation could not be sustained as the execution returned had not been reduced.

In a suspension of a decree *in foro* it is too late to object for the first time that the execution of citation was not signed before witnesses.[9]

[1] Hamilton *v.* Murray & Co., 1830, 9 S. 143. See also Rankine *v.* Corson, 1825, 4 S. 127 (N. E. 128).

[2] Brown, Petr., 1870, 7 S. L. R. 643.

[3] M'Intosh, Petr., 1870, 8 S. L. R. 50.

[4] Henderson *v.* Thomson, 1828, 7 S. 51. See also Act 1686, cap. 5 (record edition), cap. 4 (12mo edition).

[5] Cullen's Trs. *v.* Watson, 1825, 4 S. 133 (N. E. 135). See also May *v.* Malcolm, 1825, 4 S. 76 (N. E. 79); Henderson *v.* Richardson, 1848, 10 D. 1035; Hamilton *v.* Monkland Iron and Steel Co., 1863, 1 M. 672.

[6] Stewart *v.* M'Ra, 1831, 9 S. 261.

[7] Kay *v.* Rodger, 1832, 10 S. 831.

[8] Tait *v.* Johnston, 1891, 18 R. 606. See also Reid *v.* Clark, 1914, 2 S. L. T. 68.

[9] Limond *v.* Reid, 1821, 1 S. 232 (N. E. 220).

Where a defender wrote to the messenger acknowledging that he had received two summonses and informed him that "you are hereby authorised to return your execution as personally apprehended," it was held that he was barred *personali exceptione* from objecting to any irregularity.[1] (See *Objection to Citation by Person Entering Appearance, infra*, p. 342.)

(r) *Extent of Warrant.*—Where warrant for personal citation only is given, edictal citation thereupon is inept.[2] A warrant for edictal citation, however, has been held to include a warrant for personal service if the defender is found in Scotland.[3]

(3) CITATION AT THE DWELLING-PLACE.—(a) *Description.*—If personal service cannot be effected, the messenger-at-arms may cite the defender by leaving a copy of the summons at his dwelling-place. This service is made in the following way:—The messenger must first go to the door of the defender's principal dwelling-place and demand admittance. If this is granted, the messenger shows the cause of his coming and asks for the defender. If the defender is at home the messenger must insist upon seeing him in order to serve the summons personally. If he cannot get the defender personally, the messenger then offers a copy of the summons to any of the servants or other person within the dwelling-house. If the copy is refused, it is then affixed by the messenger upon the principal door of the house. If entrance cannot be obtained by the messenger, he gives six knocks on the door and either affixes a copy of the summons to the door or, as is most commonly done in practice, puts it into the keyhole.[4]

In an early case,[5] where the copy was left with a servant in the morning while the defender was asleep, the citation was held to be null. In practice, however, "personal service is not insisted on wherever the officer has not seen the defender on going to look for him at his principal dwelling-place."[6]

The person with whom the copy summons may be left may be the defender's wife, daughter, servant, or, indeed, any person residing in the defender's principal dwelling-place.[7]

[1] Fraser and Barnetson *v.* Reid, 1826, 4 S. 773 (N. E. 781).

[2] Miller and Others, Petrs., 1853, 16 D. 109.

[3] Kirkonnel *v.* Barnbarroch, 1628, Mor. 3682; Cochran and Dykes *v.* Urquhart, 1705, Mor. 3686; Cowies *v.* Airdrie Mineral Oil Co., 1869, 7 S. L. R. 131, per Lord Barcaple (Ordinary), pp. 132, 133.

[4] Act 1540, cap. 10 (record edition), cap. 75 (12mo edition). Lockhole citation has been abolished in writs issued by the Small Debt Court (34 & 35 Vict. cap. 42).

[5] Bruce *v.* Hall, 1708, Mor. 3696.

[6] Dove Wilson, Sheriff Court Practice, p. 112.

[7] Erskine's Inst. ii. 5. 55; A. *v.* B., 1834, 12 S. 347.

(b) *Defender with Several Houses.*—Where the defender has several furnished and staffed residences a citation left at any one of them is good.[1] Where, however, an advocate had hired a house in Edinburgh for the winter until Whitsunday, and the citation was made at the hired house in Edinburgh during the spring vacation when he had gone to reside with his family at his home in the country, the citation was held to be invalid.[2]

(c) *Staying in Lodgings, etc.*—Where the defender has not been residing in his own house, citation at the place where he has been staying is good provided he has been residing there for forty days previous to citation. This has been so held where the defender was staying with a friend,[3] in lodgings,[4] or at an inn.[5]

(d) *Temporary Absence from Home.*—Absence from home, even for a considerable period, will not affect the validity of a citation at his dwelling-place if the absence is merely temporary. Thus, where the defender was abroad for over six months and the citation was made at the house where his wife and part of his family resided, the citation was held good;[6] and where the copy was left under the door of a house from which the defender had been absent for two months for a temporary purpose, but of which she was still tenant, a similar result was arrived at.[7] Again, where a petition by a landlord was served on a tenant, who was at the time temporarily absent abroad, by leaving a copy at the farmhouse where his family continued to reside, the Court held the citation good.[8]

(e) *Permanent Absence.*—Where, however, the absence of the pursuer is of a permanent character, service at his house in Scotland where his wife and family continued to reside will be invalid, at least if service is made more than forty days after the defender has left the country.[9] Again, where the defender intimated to the pursuer that he intended to sell his house and effects, and thereafter went to England with his wife and family, and the pursuer cited him edictally, the citation was

[1] M'Culloch *v.* Gordon, 1674, Mor. 3701; Irvine *v.* Deuchar, 1707, Mor. 3703; Douglas and Heron *v.* Armstrong, 1779, Mor. 3700; Home *v.* Lady Eccles' Creditors, 1725, Mor. 3704; Spottiswood *v.* Morison, 1701, Mor. 4790; Scott *v.* Carnegy, 1826, 4 S. 667 (N. E. 674); Macdonald *v.* Sinclair, 1843, 5 D. 1253.

[2] Gordon *v.* Campbell, 1702, Mor. 3702.

[3] Baillie *v.* Menzies, 1710, Mor. 3704.

[4] Calder *v.* Wood, 19th January 1798, F. C.

[5] Paterson *v.* Fermour, 1672, Mor. 3724.

[6] Fraser *v.* Reid, 1821, 1 S. 76 (N. E. 77).

[7] Thomson *v.* Handyside, 1833, 12 S. 557.

[8] Gibson *v.* Clark, 1895, 23 R. 294.

[9] Cribbes *v.* Ross, 1851, 13 D. 1369, per Lord Rutherfurd (Ordinary), p. 1370, and Lord Cockburn, p. 1371.

held good, although at the time his house in Scotland had not been displenished and two servants remained there.[1] A citation was held good where, in the defender's absence at sea, the copy was left at the house of the defender's father, with whom the defender lived when not at sea.[2] (In supplement, see *Citation by Registered Letter, infra*, p. 329; and *Edictal Citation, infra*, p. 334.)

(f) *Place of Citation.*—The place of citation must be the dwelling-place, and not a shop,[3] a counting-house,[4] or writing chamber not contiguous to the defender's house.[5] If, however, the defender is a company, corporation, society, or firm, the citation is properly made at the principal place of business.[6]

Where the messenger omitted to give six knocks the citation was held to be null,[7] except where anyone receives delivery.[8]

(g) *Execution of Citation.* — The execution of a citation at the dwelling-house is in the same form as the execution of a personal citation (*q.v. supra*, p. 323), with the necessary difference in essentials, which must be entered. Thus, where admission has been obtained by the messenger, it is essential to be stated that the copy of the summons and citation was left by the messenger *within* the dwelling-house.[9] It is also necessary to state with whom the copy was left;[10] and the dwelling-house must be sufficiently described as to be identified.[11] If entrance has been refused to the messenger, it must be stated that the defender could not be found personally; that access could not be obtained to the dwelling-house, which should be described; that six audible knocks were given;[12] and that the copy was affixed to the

[1] Brown *v.* Blaikie, 1849, 11 D. 474. See also Morrison *v.* Vallance's Exrs., 1907, S. C. 999, and cases there cited. See also *infra*, p. 331.

[2] Brown *v.* M'Callum, 1845, 7 D. 423. See also Ballinten *v.* Connon, 1852, 15 D. 35.

[3] Anderson *v.* Anderson's Tenants, 1684, Mor. 3695.

[4] Fraser, Reid & Sons *v.* Lancaster and Jamieson, 1795, Mor. 3706; Sharp *v.* Garden, 1822, 1 S. 337 (N. E. 314).

[5] Nisbet *v.* M'Lelland, 1686, Mor. 3696.

[6] Young *v.* Livingston, 1860, 22 D. 983.

[7] Threapland *v.* Strachan, 1684, Mor. 3756; Duff *v.* Gordon, 1707, Mor. 3775.

[8] Biggar *v.* Wallaces, 1702, Mor. 3775.

[9] Countess of Cassills *v.* Earl of Roxburgh, 1679, Mor. 3695.

[10] Threapland *v.* Strachan, 1684, Mor. 3756; A. *v.* B., 1834, 12 S. 347. See also Wilsons, 1826, Syme's Just. Reports, 38; Grant, 1827, Syme's Just. Reports, 138.

[11] King's Advocate *v.* Burnet, 1582, Mor. 3748; Johnston *v.* Johnston, 1609, Mor. 3748; Adam *v.* Baillies of Ayr, 1626, Mor. 3748; Gulman *v.* Watson, 1693, Mor. 3752; Erskine's Inst. ii. 5. 55; Scott *v.* Fisher, 1825, 4 S. 261 (N. E. 266).

[12] Menzies, 1589, Mor. 3773; Hay *v.* Laird of Pourie, 1680, Mor. 3773; Duff *v.* Gordon, 1707, Mor. 3775; Erskine's Inst. ii. 5. 55.

principal door of the house, or inserted in the keyhole of the same.[1]

(4) CITATION BY REGISTERED LETTER.—(a) *Method Described.*—By the Citation Amendment (Scotland) Act, 1871,[2] a new method of citation was introduced, whereby an officer of a Small Debt Court, who was satisfied that the defender named in any small debt writ was refusing access, or concealing himself, to avoid citation or service, or had within a period of forty days removed from the house or premises occupied by him, and who had affixed to the gate or door of such house or premises, or had left with an inmate there a copy of said writ, was allowed to post by registered letter a copy of said writ to the defender's last known address, or where it was most likely to find the defender. This mode of citation, which was only in supplement of the existing mode, and was confined to small debt writs, was by the Citation Amendment (Scotland) Act, 1882,[3] made a substantive mode of citation and extended to all writs issuing from any Court in Scotland. By sec. 3 of the last-mentioned Act it is provided that "in any civil action or proceeding in any Court or before any person or body of persons having by law power to cite parties or witnesses, any summons or warrant of citation of a person, whether as a party or witness, or warrant of service or judicial intimation, may be executed in Scotland by an officer of the Court from which such summons, warrant, or judicial intimation was issued, or other officer who, according to the present law and practice, might lawfully execute the same, or by an enrolled law agent, by sending to the known residence or place of business of the person upon whom such summons, warrant, or judicial intimation is to be served, or to his last known address, if it continues to be his legal domicile or proper place of citation, or to the office of the Keeper of Edictal Citations, where the summons, warrant, or judicial intimation is required to be sent to that office, a registered letter by post containing the copy of the summons or petition or other document required by law in the particular case to be served, with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation."

(b) *Schedule of Citation.* — The citation subjoined to the service

[1] Blair *v.* Mein and Chatto's Creditors, 1697, Mor. 3757.
[2] 34 & 35 Vict. cap. 42. [3] 45 & 46 Vict. cap. 77.

copy must specify the date of posting and *inducicæ*, and the latter are reckoned from twenty-four hours after the time of posting. The execution of citation should be in the form annexed to the Act, and must be accompanied by the post office receipt for the registered letter, and the execution returned by a law agent is for all purposes equivalent to an execution returned by an officer of Court. On the back of the registered letter, besides the address, there must be written or printed the following notice, or a notice to the like effect:—

(c) *Docquet on Letter*—

This letter contains a citation to or intimation from [*specify the Court*]. If delivery of the letter cannot be made, it is to be returned immediately to [*give the official name and office or place of business of the Clerk of Court*].

(d) *Delivery not Made.*—If for any reason the delivery of the letter is not made, the letter is immediately returned through the post office to the Clerk of Court, with the reason marked thereon, and the clerk makes intimation to the pursuer, and, where the order for service is made by a Judge, presents the letter to such Judge, who may order service of new or hold it equal to a good citation.[1] This mode of service is optional, provided that if the older method is adopted, no higher fees will be exigible on taxation than those laid down in Schedule II. of the Act, unless the Judge is of opinion that it is not expedient that service should be made by registered letter.[2]

(e) *Date of Posting.*—The date of posting is the date of the execution of the summons, and, therefore, the date of the commencement of the action.[3] Where in the citation appended to the service copy it was stated that the *inducicæ* were reckoned from the date of posting, and not from twenty-four hours thereafter, the Court held that as the citation explicitly followed the words of subsec. (1) of sec. 4 of the statute of 1882, it was quite valid.[4]

(f) *Agent is also Party.*—It is quite competent for a law agent to sign and serve by registered letter a judicial intimation in a cause to which he is himself a party.[4] He must, however, be not only an enrolled law agent in the sense of sec. 7 of the Law Agents (Scotland) Act, 1873, but must also be on the roll of agents practising in the Court of Session kept in terms of sec. 12 of that Act.[5] Service by registered letter and the

[1] 45 & 46 Vict. cap. 77, sec. 4.
[2] Ibid., sec. 6.
[3] Alston *v.* Macdougall, 1887, 15 R. 78.
[4] Addison *v.* Brown, 1906, 8 F. 443.
[5] Kerr, Petr., 1906, 14 S. L. T. 412.

execution of the service must be made by an enrolled law agent himself and not by his apprentices.[1]

(g) *Letter actually Received.*—If it is shown that the defender received the registered letter, or that it was delivered to a person authorised by him to receive it, proof that the letter was not tendered or delivered to the known dwelling-place, place of business, or last known address of the defender will not invalidate the citation.[2]

(h) *Letter Returned.*—Where the registered letter was returned to the Clerk of Court with the single word "*refused*" written upon it, the Lord Ordinary, in respect that he was not satisfied that the letter had been tendered at the defender's proper address and refused by him, refused to give decree on the undefended roll.[3] Where, however, two registered letters were produced, the first of which had been opened by the defender and returned to the post office, and the second of which the defender had refused to accept from the postman, and a letter was produced from the post office to that effect, the Lord Ordinary held that what had been done was equivalent to a good citation.[4] In a recent case where a registered letter was returned by the post office marked (1) "not in," (2) "refused," and a subsequent unregistered letter was not returned, the Court held the citation good.[5]

(i) *Cost of Service.*—The cost of service by an officer of Court in ordinary form will be allowed where the defender does not reside in a postal delivery district, and where it is improbable that a letter of citation will reach him.[6]

(j) *Execution Regular and Unreduced.*—Where the citation on a service copy of a petition bore *in gremio* to be executed by one law agent, but was not signed by him but by another law agent for him, the Court held that as the execution returned of the citation was in the statutory form and was unreduced, the defender was barred from objecting to the citation, while Lord Rutherfurd-Clark was of opinion that the citation was valid.[7]

(k) *Morrison* v. *Vallance's Exrs.*—In a comparatively recent case[8] where a brother who resided with his sister while in this country had gone abroad on a voyage as a ship's doctor to the knowledge of his

[1] Liquidator of the North British Lactina Manufacturing Co., Ltd., Petr., 1885, 13 R. 342.

[2] Steuart *v.* Ree, 1885, 12 R. 563.

[3] Roberts *v.* Crawford, 1884, 22 S. L. R. 135.

[4] Spaulding & Co. *v.* Marjoribanks, 1903, 11 S. L. T. 71.

[5] Matheson *v.* Fraser, 1911, 2 S. L. T. 493.

[6] Macleod *v.* Davidson, 1887, 14 R. 298.

[7] Tait *v.* Johnston, 1891, 18 R. 606.

[8] Morrison *v.* Vallance's Exrs., 1907, S. C. 999.

sister, and the latter had, within forty days of her brother's departure, served a summons by registered letter at her own address, as being her brother's last known place of residence, an important question was referred to, involving the interpretation to be put upon sec. 1 of the Act of Sederunt, 11th December 1805, which is as follows:—"Where any person against whom legal diligence is meant to be executed, or who is to be cited as a party in any judicial proceeding, has left the ordinary place of his residence, which may render it doubtful whether he is within the kingdom of Scotland or not, and consequently whether the charge or citation against him ought to be executed at his dwelling-house or at the Market Cross of Edinburgh and pier and shore of Leith, when he is not personally found, it shall in time coming be held and presumed that the said person, after forty days' absence from his usual place of residence, but not sooner, is furth of the kingdom of Scotland; and, therefore, that within the said forty days the citation or charge may be at his dwelling-house, but after that period must be at the Market Cross of Edinburgh and pier and shore of Leith unless he be personally found, or prior to the execution shall have taken up some other known and fixed residence in Scotland."

At the date of the case much doubt had already been expressed as to whether the said Act of Sederunt was still in force.[1] Notwithstanding this, however, Lord President Dunedin was of opinion that the question whether "the last known address" of the defender continued to be "his legal domicile or proper place of citation[2] depended on sec. 1 of that Act of Sederunt, and he proceeds as follows:—"It was argued for the pursuer that the effect of that section is that after a person goes from his last known place of residence in Scotland, his domicile of citation remains for forty days at that residence. On the other hand, it is argued for the defenders that this is so only if there is a doubt in the mind of the pursuer whether the person to be cited has gone from Scotland or not, but that if the pursuer knows for a fact that he has gone from Scotland then the citation must be edictal even within the forty days. The point does not seem to have been decided, and there are conflicting *dicta*. On the one side there is the *dictum* of Lord Jeffrey in *Brown* v. *Blaikie*;[3] on the other, that of Lord President Robertson in *Corstorphine* v. *Kasten*.[4] I do not think it necessary to decide this point, though as far as my own view is concerned it coincides

[1] Alexander's Abridgement; Corstorphine *v.* Kasten, 1898, 1 F. 287, per Lord President Robertson, p. 293.

[2] Citation Amendment (Scotland) Act, 1882 (45 & 46 Vict. cap. 77), sec. 3.

[3] 1849, 11 D. 474, at p. 482.

[4] 1898, 1 F. 287, at p. 293.

with the *dictum* of Lord President Robertson and not with that of Lord Jeffrey." The case was decided against the validity of the citation of the defender on other grounds, however, and Lord Kinnear reserved his opinion until that question should arise in a case where it was necessary to decide it.

On a careful consideration of these two *dicta* there seems to be reasonable ground for doubt whether they are really conflicting. The situation contemplated by Lord Jeffrey seems to have been that of a pursuer who knew that the defender, who was a domiciled Scotsman, had left Scotland permanently, whereas in Lord Robertson's *dictum* there is no suggestion that he was discussing anything but the general case, and that he had in his mind the case of a defender known to the pursuer to be furth of Scotland. However that may be, the question can no longer arise, as the Act of Sederunt has now been repealed, and sec. 53 of the Judicature Act[1] is now the sole statutory guide in such matters. That section is as follows:—"Where a person not having a dwelling-house in Scotland occupied by his family or servants shall have left his usual place of residence and have been therefrom absent during the space of forty days without having left notice where he is to be found within Scotland, he shall be held to be absent from Scotland, and be charged or cited according to the forms herein prescribed accordingly." In two particulars this section differs from sec. 1 of the Act of Sederunt of 1805. In the first place, there is the introduction of the words "not having a dwelling-house in Scotland occupied by his family or servants," and, in the second place, there is an absence of the inference drawn in the Act of Sederunt, that within forty days of the absence of a person from his ordinary place of residence where it is doubtful whether he is within Scotland or not citation may be at his dwelling-house, and as this inference is absent no presumption is created with regard to the residence of the defender for the purposes of citation within the said forty days.[2]

(1) *Foreigners with Forty Days' Residence.*—With regard to foreigners against whom jurisdiction has been founded *ratione domicilii* by forty days' residence alone, as "citation supposes jurisdiction constituted antecedently,"[3] and as jurisdiction against such foreigners ceases immediately they leave Scotland,[4] citation at the last known residence

[1] The Court of Session Act, 1825 (6 Geo. IV. cap. 120).

[2] Laughland *v.* Laughland, 1882, 19 S. L. R. 645.

[3] Johnston *v.* Strachan, 1861, 23 D. 758, per Lord Kinloch, p. 764.

[4] Shand's Practice, pp. 238, 239; Corstorphine *v.* Kasten, 1898, 1 F. 287, per Lord Robertson, overruling International Exhibition, 1890 *v.* Bapty, 1891, 18 R. 843, per Lord Stormonth-Darling, p. 845; Watt *v.* Watt, 1902, 9 S. L. T. 400;

of such a foreigner who has left Scotland will be inept.[1] In the same way, where a domiciled Scotsman, the sole jurisdiction against whom rests upon residence, is known to have left the country permanently with all his goods and gear, it is thought that jurisdiction *ratione domicilii* ceases upon his departure and does not endure for forty days thereafter, and consequently a citation at his last known address would be of no avail.[2] (See *Jurisdiction*, p. 34 *et seq.*; *Citation at the Dwelling-Place*, p. 326.)

(m) *Forms.*—The following are forms for (1) the citation subjoined to the service copy of a summons sent by registered letter; and (2) the execution of the citation, each by a law agent:—

(1) I, *A. B.*, enrolled law agent, Edinburgh, by virtue of a summons of , whereof the above and the preceding pages are a full double, excepting the will, signeted the day of nineteen hundred and years, raised at the instance of the therein designed *C. D.*, in His Majesty's name and authority lawfully summon, warn, and charge you, the also therein designed *E. F.* [*if called in any particular character, cite also in that character*], to compear before the Lords of our Council and Session at Edinburgh, or where it may happen them to be for the time, the day next after the date of this citation, in the hour of cause, with continuation of days, to answer at the instance of the said pursuer in the matter libelled in the said summons, with certification, conform to the principal summons.

This I do upon the day of nineteen hundred and years, being the date of the posting of this citation, and from which the *inducie* or period for appearance is reckoned.

[*Signature of enrolled law agent*],
Law Agent.

(2) This summons executed by me, *A. B.*, enrolled law agent, Edinburgh, against *C. D.*, defender, by posting on the day of between the hours of and at the Street Post Office, Edinburgh, a copy of the same to him, with citation subjoined, in a registered letter addressed as follows, viz.: [*copy address as on letter*]; and the post office receipt for said registered letter accompanies this execution.

A. B. [*signature of enrolled law agent*].

(5) Edictal Citation.—(a) *Method Described.*—Edictal citation is the mode of citation employed where a defender is either really or constructively furth of Scotland. It is made by a messenger-at-arms or by an enrolled law agent sending to the office of the Keeper of Edictal Citations a registered letter by post containing a copy of the

Colley *v.* Cameron, 1902, 9 S. L. T. 462; Buchan *v.* Grimaldi, 1905, 7 F. 917. See also Pickering *v.* Aitken, 1883, 20 S. L. R. 574.

[1] Corstorphine *v.* Kasten, 1898, 1 F. 287.

[2] Brown *v.* Blaikie, 1849, 11 D. 474; Cribbes *v.* Ross, 1851, 13 D. 1369, per Lord Rutherfurd (Ordinary), p. 1370, and Lord Cockburn, p. 1371.

summons, with the proper citation;[1] or by a messenger-at-arms delivering a copy of the summons with the proper citation at such office.[2] When the copy is sent by registered letter it is thought that the proper course to pursue is to address the letter directly to the Keeper of Edictal Citations at the Register House, Edinburgh, who would thus be empowered to open the letter and to have upon the face of the copy summons the name of the person for whom it is intended. When the copy is received, an entry is made in a register kept for the purpose at the office of the Keeper of Edictal Citations of an abstract of the copy of the summons, exhibiting the time of service, the nature of the writ, the names and designations of the parties, and the day against which the party is called upon to make appearance.[3] There are no statutory schedules of citation, but the citation subjoined to the service copy by a messenger-at-arms serving edictally in the ordinary way is in similar terms to the schedule in personal service (*supra*, p. 321), except that the *inducicæ* are fourteen days instead of seven. The edictal citation by an enrolled law agent or messenger by registered letter is in similar terms to the citation already mentioned (*supra*, p. 329, 330) for citation by registered letter where the defender is in Scotland, with the same alteration as above.

(b) *Judicature Act, sec.* 53.—"Where a person not having a dwelling-house in Scotland occupied by his family or servants shall have left his usual place of residence, and have been therefrom absent during the space of forty days without having left notice where he is to be found within Scotland, he shall be held to be absent from Scotland."[4] (See *Citation by Registered Letter, supra*, p. 329 *et seq.*) In such a case citation must be edictal, as also where the lieges generally are cited.[5]

(c) *Several Defenders.*—Where one and the same summons is executed at one and the same time against two or more persons as furth of Scotland, such execution may be made by delivery at the office of Edictal Citations of one copy only, provided that such copy bears upon its face that it is delivered for all and each of such persons.[6]

(d) *Defender with Known Residence in England or Ireland.*—Where

[1] The Citation Amendment (Scotland) Act, 1882 (45 & 46 Vict. cap. 77), sec. 3.

[2] 6 Geo. IV. cap. 120, sec. 51; 1 & 2 Vict. cap. 114, Schedule No. 1; 1 & 2 Vict. cap. 118; A. S. to Regulate the Form of Extracts, etc., 24th December 1838, sec. 7; C. A. S., C, i. 5.

[3] 6 Geo. IV. cap. 120, sec. 51.

[4] Court of Session Act, 1825 (the Judicature Act) (6 Geo. IV. cap. 120), sec. 53; Brown *v.* Blaikie, 1849, 11 D. 474; Cribbes *v.* Ross, 1851, 13 D. 1369; Morrison *v.* Vallance's Exrs., 1907, S. C. 999.

[5] Campbell on Citation, p. 85.

[6] A. S., 11th July 1828, sec. 22; C. A. S., C, i. 4 (*b*).

a defender who has been edictally cited has a known residence or place of business in England or Ireland, reasonable notice of the summons must be given either to the defender's known agent in Scotland, if he has any, or to the defender himself at his residence or place of business within England or Ireland.[1] A registered letter posted at the General Post Office in Edinburgh fourteen days prior to the enrolment of the cause, addressed to such defender at his residence or place of business within England or Ireland, enclosing a full copy of the summons, with warrant of citation and citation following thereon, is held to be reasonable notice.[2] In *undefended* actions where a defender is designed in the summons as resident or carrying on business within England or Ireland, the Lord Ordinary, before pronouncing decree in absence, must require proof of such reasonable notice, and cannot pronounce decree until he is satisfied that such reasonable notice has been given;[3] and in pronouncing decree in absence in such circumstances the interlocutor of the Lord Ordinary must expressly bear that the Lord Ordinary has been so satisfied; provided that nothing contained in said interlocutor shall operate to prevent such defender from showing, in a reduction of said decree in absence, or in any subsequent proceeding, that such reasonable notice was not in fact given.[4]

(e) *Defender de facto in Scotland.*—If the defender is *de facto* in Scotland edictal citation is invalid,[5] except in the aforementioned cases where he is presumed to be furth of Scotland. In one case,[6] however, where an Englishman had resided more than four months in Scotland prior to the edictal execution of a summons against him as being furth of Scotland, the citation was sustained in respect that letters of arrestment to found jurisdiction against the defender had been executed and that this was known to the defender's agent, who allowed the pursuer to proceed in error. This was held to be "a very special case" in a later action, where the Court sustained a preliminary defence of "no process," the defender having been edictally cited as furth of Scotland when he was *de facto* residing in Glasgow, although his father and brother, who were also defenders and regularly cited, had refused to inform the pursuer where he was to be found.[7]

[1] A. S., 18th December 1868, sec. 1; C. A. S., C, i. 6 (*a*); Duke of Atholl *v.* Robertson, 1872, 10 M. 298.

[2] A. S., 18th December 1868, sec. 2; C. A. S., C, i. 6 (*b*).

[3] A. S., 18th December 1868, sec. 4; C. A. S., C, i. 6 (*c*).

[4] A. S., 18th December 1868, sec. 5; C. A. S., C, i. 6 (*d*).

[5] Lord Cardross, 8th December 1680, 2 Brown's Supp. 261; Little *v.* Tundergarth's Creditors, 1783, Mor. 3700.

[6] Sandbach & Co. *v.* Caldwell, 1825, 4 S. 171 (N. E. 173).

[7] Robertson *v.* M'Culloch, 1836, 14 S. 950.

(f) *Consistorial Causes.*—In *consistorial* causes, where the defender is furth of Scotland, the summons must be served upon him personally, but "if it be shown to the satisfaction of the Court that the defender cannot be found, edictal citation shall be deemed sufficient; but in every case where the citation is edictal the pursuer shall also serve the summons on the children of the marriage, if any, and on one or more of the next of kin of the defender, exclusive of the children of the marriage, when the said children and next of kin are known and resident within the United Kingdom. . . ."[1]

(g) *Execution of Citation.* — The execution of an edictal citation must notify that all the essentials necessary for a good edictal citation have been carried out. It must be signed by the executor and one witness,[2] where made in the ordinary way by a messenger. The witness is not required where executed by registered letter.[3] Attesting by means of initials is not sufficient.[4] The designation of the witness must be inserted in the execution where citation is made in the ordinary way by a messenger,[5] and the other essentials may be gathered from the following examples:—

(h) *Forms of Execution*—

1*st. Execution by an Enrolled Law Agent of an Edictal Citation by Registered Letter.*

This summons, executed by me, *A. B.*, enrolled law agent, against *C. D.*, defender, as being furth of Scotland, by posting on the day of 19 , between the hours of and , at the Post Office, Edinburgh, a copy of the same to the Keeper of the Record of Edictal Citations at Edinburgh, which copy did on the face of it bear to be for the said *C. D.*, with citation subjoined (and also by posting on the date, between the hours and at the place all above specified, a full copy of said summons, including the warrant of citation and of the citation following thereon to the said *C. D.*, defender, at his known residence in England [*or* Ireland]) [both] in a registered letter [*or* registered letters] addressed as follows:—

[*Signature of Law Agent.*]

(Part in brackets to be omitted where not applicable.)

[1] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 10; Court of Session Act, 1868, sec. 100; M'Callum *v.* M'Callum, 1865, 3 M. 550; Clark-Kennedy *v.* Clark-Kennedy, 1908, 15 S. L. T. 844.

[2] Act 1686, cap. 5 (record edition), cap. 4 (12mo edition); 1 & 2 Vict. cap. 114, sec. 32; 9 & 10 Vict. cap. 67; 13 & 14 Vict. cap. 36, Schedule B; Moir and Morison *v.* Don, 1711, Mor. 16893; Orrock *v.* Peter, 1769, 5 Brown's Supp. 435; Baillie *v.* Doig, 1790, Mor. 11286; Henderson *v.* Thomson, 1828, 7 S. 51.

[3] 45 & 46 Vict. cap. 77, First Schedule.

[4] Meek *v.* Dunlop, 1707, Mor. 16806.

[5] 13 & 14 Vict. cap. 36, Schedule B.

2nd. Execution by a Messenger of an Edictal Citation in the Ordinary Way.

This summons, executed by me, *A. B.*, messenger-at-arms, against *C. D.*, defender, as being furth of Scotland, by delivery of a full double thereof, excepting the will, having a just copy of citation subjoined, and bearing on the face of it to be for the said *C. D.*, at the office of the Keeper of the Record of Edictal Citations, within the New Register House, Edinburgh, in presence of *E. F.*, residenter in Edinburgh, this day of nineteen hundred and .

E. F., witness. *A. B.*

[*Signature of witness in full*]. [*Signature of messenger*].

(6) Special Cases of Citation. — (*a*) Corporations. — As it is impossible in the strict sense of the word to make personal service upon a corporation, it has been held as equivalent to personal service if a copy of the summons or other writ is left by a messenger-at-arms at the business domicile of the corporation.[1] Where a special official is appointed by statute to receive a citation on behalf of a corporation, the service must be upon him, as where a burgh must be cited by service on the town clerk;[2] but where there is no such official appointed, service in the hands of any servant of a corporation at its business domicile is good.[3] A corporation may also be cited in the name in which it is incorporated by Act of Parliament, Charter, Letters-Patent, or other instrument of incorporation, by sending to the known place of business of the corporation, or to its last known address, if it continues to be its legal domicile or proper place of citation, a registered letter by post containing a copy of the summons with citation subjoined, addressed to its corporate name;[4] and the minority of the individual members cannot dissociate themselves, by disclaimer, from the instance or incidence of an action by or against the corporation.[5]

(i.) *County Council.*—A county council is incorporated under the name of the county council of the county.[6]

(ii.) *District Committee of a County Council.*—This body is designated according to the district within which it acts, and may sue and be sued under that designation.[7]

(iii.) *Parish Council.*—This is a corporate body under the name of

[1] Corporation of Glasgow *v.* Watson, Junior, 1898, 35 S. L. R. 508; Campbell and Others *v.* MacAlister, 1898, 5 S. L. T. 334.

[2] Town Councils (Scotland) Act, 1900 (63 & 64 Vict. cap. 49), sec. 9.

[3] Corporation of Glasgow *v.* Watson, Junior, 1898, 35 S. L. R. 508.

[4] Citation Amendment (Scotland) Act, 1882 (45 & 46 Vict. cap. 77), secs. 3 and 7.

[5] Eadie *v.* Glasgow Corporation, 1908, S. C. 207.

[6] Local Government (Scotland) Act, 1889 (52 & 53 Vict. cap. 50), sec. 72.

[7] Ibid., sec. 79.

the parish council of the parish, with power to sue and be sued in that name.[1]

(iv.) *Landward Committee of a Parish Council.*—This is a body corporate, and may sue and be sued as such landward committee.[2]

(v.) *School Board.*—This is a body corporate by the name of the school board of a parish or burgh.[3]

(vi.) *Industrial and Provident Society.*—Whenever registered this body becomes a body corporate by the name described in the acknowledgment of registry, by which it may sue and be sued, and may be cited at its registered address in its registered name.[4]

(vii.) *Building Society.*—Upon receiving a certificate of incorporation under the Building Societies Act, 1874, this body becomes a body corporate by its registered name.[5]

(viii.) *Company.*—A company under the Companies Clauses Act, 1845,[6] or a railway company under the Railway Clauses Act, 1845,[7] may be cited by a service copy being "left at, or transmitted through the post directed to, the principal office of the company, or one of their principal offices where there shall be more than one, or being given personally to the secretary, or, in case of there being no secretary, by being given to any one director of the company." With regard to railway companies, service at a branch office may be good,[8] especially if the action relates to branch business.

A company, on the registration of its memorandum, becomes a corporate body, and a limited company becomes a limited corporation;[9] and each may be cited by leaving a writ at, or sending a writ by post to, the registered office.[10] All the Scottish banks, with the exception of the Bank of Scotland, the Royal Bank of Scotland, and the British Linen Company, are limited companies. The Bank of Scotland is incorporated by Act of Parliament;[11] the other two are incorporated by Royal Charter.[12]

[1] Local Government (Scotland) Act, 1894 (57 & 58 Vict. cap. 58), sec. 32.

[2] Ibid., sec. 23.

[3] Education (Scotland) Act, 1872 (35 & 36 Vict. cap. 62), sec. 22.

[4] Industrial and Provident Societies Act, 1893 (56 & 57 Vict. cap. 39), secs. 11 and 21.

[5] 37 & 38 Vict. cap. 42, sec. 9.

[6] 8 & 9 Vict. cap. 17, sec. 137.

[7] 8 & 9 Vict. cap. 33, sec. 130; Stewart *v.* Scottish Midland Junction Rly. Co., 1852, 14 D. 594.

[8] Dick *v.* Great North of Scotland Rly. Co., 1860, 33 Jur. 2.

[9] The Companies (Consolidation) Act, 1908 (8 Edw. VII. cap. 69), sec. 16.

[10] Ibid., sec. 116.

[11] Act 1695, 17th July, cap. 88 (Thomson's Acts).

[12] Royal Bank Charter, dated 31st May 1727; British Linen Company Charter,

Promoters of companies under the Lands Clauses Act[1] may be cited by a copy left at, or transmitted through the post directed to, the principal office of the promoters of the undertaking, or one of the principal offices where there shall be more than one, or being given personally or transmitted through the post directed to the secretary, or, in case there be no secretary, then by being given to the solicitor of the said promoters.

(*b*) Unincorporate Bodies.—(i.) *Commissioners of Supply* are not a corporation, but they may sue and be sued in name of the Clerk of Supply or Collector, and accordingly they may be cited by service on such clerk or collector.[2]

(ii.) *Trade Union.*—This body may sue and be sued in the name of trustees or other officer who may be authorised to do so by the rules, and "the summons to be issued to such trustee or other officer may be served by leaving the same at the registered office of the trade union."[3]

(iii.) *Friendly Society.*—Where registered, a friendly society is sufficiently cited by personally serving a copy of the summons upon the officer or other person sued on behalf of the society or branch, or by leaving it at the registered office of the society or branch, or at any place of business of the society or branch within the jurisdiction of the Court in which the proceeding is brought, or, if that office or place of business is closed, by posting the copy on the outer door of that office or place of business. If not so served, the copy may be posted in a registered letter addressed to the committee at the registered office of the society or branch.[4]

(iv.) *Proper Firm.*—This body may be cited by delivery at, or posting to, the place of business of the firm one copy of the summons.[5]

(v.) *Descriptive Firm.*—This body must be cited by delivery at, or posting to, the business premises one copy of the summons, and by personal, dwelling-house, or registered letter citation of each of three of the partners, if so many, and if not, of so many as there are.[6]

(vi.) *Voluntary Association.*—Such a body may be cited by the

dated 6th July 1746. The Commercial Bank of Scotland and the National Bank of Scotland, besides being limited companies, are also each incorporated by Royal Charter, dated 5th August 1831.

[1] 8 & 9 Vict. cap. 19, sec. 128.

[2] Police (Scotland) Act, 1857 (20 & 21 Vict. cap. 72), sec. 51.

[3] The Trade Union Act, 1871 (34 & 35 Vict. cap. 31), sec. 9.

[4] Friendly Societies Act, 1896 (59 & 60 Vict. cap. 25), sec. 94.

[5] Forsyth *v.* Hare & Co., 1834, 13 S. 42; Young *v.* Livingston, 1860, 22 D. 983.

[6] Antermony Coal Co. *v.* Wingate & Co., 1866, 4 M. 1017. See also Bishop *v.* Mersey and Clyde Navigation Steam Co., 1830, 8 S. 558.

service of a copy of the summons on each of its officials, and on the association itself at its usual domicile or place of business.[1]

(vii.) *Heritors* may be cited by service on their clerk.[2] In a presbyterial process for providing a manse, edictal citation of the heritors is sufficient.[3]

(viii.) *General Assembly.*—This body should be cited by service on the Moderator, the first and second clerks, and the procurator.[4]

(ix.) *Presbytery.*—As this body must be sued by the individual names of its members, citation must be made on each member and on the clerk on behalf of the presbytery.[5]

(x.) *Kirk-Session.*—Service is required on each member, as above.[6]

(*c*) Crown.—Actions against the Crown or against any Public Department are directed against the Lord Advocate, who should be cited personally or at the Exchequer Office. The writ should also be served upon the particular department concerned.[7]

(*d*) Merchant Shipping.—Where for the purposes of the Merchant Shipping Act, 1894,[8] any document is to be served on any person, that document may be served (*a*) in any case by delivering a copy thereof personally to the person to be served, or by leaving the same at his last place of abode; and (*b*) if the document is to be served on the master of a ship, where there is one, or on a person belonging to a ship, by leaving the same for him on board that ship with the person being or appearing to be in command or charge of the ship; and (*c*) if the document is to be served on the master of a ship, where there is no master, and the ship is in the United Kingdom, on the managing owner of the ship, or, if there is no managing owner, on some agent of the owner residing in the United Kingdom, or where no such agent is known or can be found, by affixing a copy thereof to the mast of the ship.[9]

(*e*) Local and Personal Acts.—In certain of these Acts statutory bodies created under their provisions are allowed to sue and be sued and cited in name of their clerk, as in the Tweed Fisheries Act, 1857.[10]

[1] Renton Football Club *v.* M'Dowall, 1891, 18 R. 670; Skerret *v.* Oliver, 1896, 23 R. 468; Bridge *v.* South Portland Street Synagogue, 1907, S. C. 1351.

[2] Bathgate Heritors *v.* Russell, 1908, 46 S. L. R. 714.

[3] Mags. of Elgin *v.* Gatherer, 1841, 4 D. 25.

[4] Cruickshank *v.* Gordon, 1843, 5 D. 909.

[5] Buist *v.* Taylor, 1856, 18 D. 596, at p. 602. See also Clark *v.* Stirling, 1839, 1 D. 955.

[6] Kirk-Session of North Berwick *v.* Sime, 1839, 2 D. 23; School Board of Glasgow *v.* Kirk-Session of Anderston, 1910, S. C. 195.

[7] 19 & 20 Vict. cap. 56, sec. 22; 20 & 21 Vict. cap. 44, secs. 1 and 2

[8] 57 & 58 Vict. cap. 60.

[9] Ibid., sec. 696.

[10] 20 & 21 Vict. cap. cxlviii.

(*f*) Absent Trustees.—Where, owing to the absence of certain trustees, a beneficial act of management could not be performed, the Court ordered a petition for their removal to be intimated to the absent trustees through the post office, and also intimation to their last known agents, with certification; and no appearance having been made, they removed the two absent trustees.[1]

(7) Objection to Citation by Person Entering Appearance.—"No party appearing in any action or proceeding in the Court of Session shall be entitled to state any objection to the regularity of the execution or service as against himself of the summons or other pleading or writ whereby he is convened."[2] In a case[3] where a foreigner, against whom arrestments had been used *jurisdictionis fundandæ causa* and who had left Scotland after a temporary residence, was cited as a defender in an action at the house he had occupied in Scotland, the defender appeared and pleaded that the citation was bad, as he should have been cited edictally. The Court, however, held that the Act of 1868 excluded the objection. There seems to have been no reported case about this section previously.[4] In a subsequent case which turned upon the interpretation of sec. 12 (2) of the Sheriff Courts (Scotland) Act, 1876,[5] which is in similar terms to sec. 21 of the Court of Session Act, 1868, the Court held that executors who appeared and stated objections to the regularity of the service, not as against themselves but as against another person, *i.e.* the deceased, were entitled to do so, as in this sense an executor is not *eadem persona cum defuncto*.[6]

Where the defender does not appear, a trifling error in the instance will not invalidate the citation in a suspension or reduction of the decree.[7] (See, however, *supra, Personal Citation; Citation at the Dwelling-Place; Citation by Registered Letter; Edictal Citation.*)

(8) Citation of Witnesses.—(a) *Generally.*—A copy of the interlocutor granting a commission or diligence, or fixing the trial of a cause, certified by the clerk to the process or by his assistant, is a sufficient warrant to any messenger-at-arms to cite, personally or at their dwelling places, witnesses either for the pursuer or defender.[8] Cita-

[1] Walker and Another, Petrs., 1868, 6 M. 973.

[2] Court of Session Act, 1868, sec. 21.

[3] Corstorphine *v.* Kasten, 1898, 1 F. 287.

[4] Ibid., per Lord Kincairney (Ordinary), p. 289. See also Cowies *v.* Airdrie Mineral Oil Co., 1869, 7 S. L. R. 131.

[5] 39 & 40 Vict. cap. 70.

[6] Morrison *v.* Vallance's Exrs., 1907, S. C. 999, per Lord President Dunedin, p. 1003.

[7] Steuart *v.* Ree, 1885, 12 R. 563.

[8] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), secs. 25 and 43.

tion may also be made by registered letter.[1] Should the trial be before a Lord Ordinary without a jury, the said certified interlocutor is generally used in place of letters of first diligence to cite witnesses. If, however, previous to the trial there is reason to believe that the citation will not be obeyed, letters of second diligence may be applied for. Where the trial is by jury and there is any doubt about the attendance of a witness, it is usual to take out letters of first and second diligence, which are combined in one writ. In practice, therefore, letters of first diligence are seldom used alone, except where a certified copy interlocutor is not available, as in jury trials at the sittings, and there is no doubt about the witness obeying the citation. The letters are issued by the Clerk of Court and must pass the signet.

(b) *Forms of Letters of First and Second Diligence.*—The following is a form for letters of first and second diligence:—

George the Fifth, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith; To messenger-at-arms, our Sheriffs in that part, conjunctly and severally, specially constituted, greeting.—Forasmuch as in an action raised at the instance of *A. B.* [*name and designation*], pursuer, against *C. D.* [*name and designation*], defender, a certain issue [*or* certain issues] is [*or* are] to be tried by a jury before the Lord President of the Court of Session [*or*, the Lord President of the Second Division of the Court of Session] at Edinburgh, and within the Court room of the Division of the Court of Session there [*or*, *if the cause is to be tried on Circuit*, before Lord at in the Court room of the Court of Justiciary there] on the day of next, at o'clock, at which time and place all witnesses and havers who may be lawfully cited by the parties are required to attend, in order to be examined on oath.—Our Will is herefore, and we charge you that ye lawfully summons, warn, and charge personally, or at their respective dwelling-places, to compear before the said Court, time and place aforesaid, with continuation of days, to answer at the instance of the said pursuer [*or* defender]; That is to say, to bear honest and true testimony upon oath, in so far as they know, or shall be inquired at, regarding the matters to be then and there tried; As also to bring with them, exhibit, and produce before the said Court, upon oath, all such writings as they may have in their hands, custody, or keeping, which they may be required so to exhibit and produce, in evidence of any of the matters aforesaid, and that at their highest peril, with certification as effeirs. (*A*) And in case the persons to be summoned as aforesaid as witnesses and havers shall fail to appear before the said Court, time and place aforesaid, and pay obedience to the citation given them, in that event we further command and charge you that ye, in our name and authority, command and charge the Sheriffs of our sheriffdom, the bailies of

[1] Citation Amendment (Scotland) Act, 1882 (45 & 46 Vict. cap. 77), sec. 3.

our regalities and bailieries, the stewards of our stewartries, the provosts and bailies of our burghs, and their respective deputes and substitutes, and also messengers-at-arms, and all others, officers and executors of our laws within Scotland, to pass, search for, and apprehend the persons who shall be summoned in manner foresaid, but who shall have failed to have compeared before the said Court and paid obedience to the citation given them; and being apprehended, to put them in sure ward, firmance, and captivity, within their tolbooths, or other warding places, keep, hold, and detain them therein, upon their proper charges and expenses, aye and until they find sufficient caution and surety, to compear before said Court, and pay full obedience to the citation given them by deponing, exhibiting, and producing in manner abovementioned (*B*).—According to justice, as ye shall answer to us hereupon, which to do we commit to you and such of you full power, by these our letters, delivering them by you duly executed and endorsed again to the bearer. Given under our signet at Edinburgh, the day of in the year of our reign 19 .

[*Signed by Clerk of Court.*]

[*Should letters of first diligence alone be desired, omit the part from* (*A*) *to* (*B*).]

(c) *Warrant to Arrest Witness in Cases of Emergency.*—Within the last few years a practice has grown up, which has much to commend it, with regard to the case of a witness who has been cited by virtue of a certified copy interlocutor to appear at a proof, and who upon the day of the proof fails to appear, or possibly who comes to the diet of proof and disappears before giving evidence. In such circumstances, in order to avoid the delay incidental to taking out letters of second diligence, the practice is for the Lord Ordinary, upon production of the execution of the citation of the witness, and on a note signed by counsel that the witness has failed to appear, or has disappeared, as the case may be, to sign an interlocutor granting warrant for the instant apprehension of the witness and his conveyance to the Court.

The note is usually in the following terms:—

Note for ,

in causâ

A. B.,—Pursuer;

against

C. D.,—Defender.

The Lord Ordinary appointed a trial in this case to take place on , the day of , 19 .

That , a necessary witness for the pursuer [*or* defender], has failed to appear after being duly cited in terms of Execution of Citation, No. of Process.

May it therefore please your Lordship to grant warrant to messengers-at-arms to apprehend the said , and bring him to the

adjourned trial on , the , day of
19 . [*Counsel's signature.*]

The following is the usual form of interlocutor when the prayer of the note is granted:—

Edinburgh, .—The Lord Ordinary, in respect that , a necessary witness for the pursuer [*or* defender], has failed to appear after being duly cited in terms of the Execution of Citation, No. of Process, grants warrant to messengers-at-arms to apprehend the said , and to bring him to the adjourned trial on , the day of 19 , at ten o'clock forenoon.

(d) *Expenses should be Tendered.*—Letters of second diligence should never be put in force unless sufficient money to convey the person to the place where he is to depone has previously been tendered to him.[1] If letters of second diligence are required, witnesses get no expenses.[2]

(e) *Citing Defender's Witnesses.*—In a case which is likely to last several days the whole of the witnesses for the defender should not be cited for the first day. Agents should exchange communications so as to ascertain the length of the pursuer's proof and act accordingly.[3]

(f) *Witness out of Jurisdiction.*—The citation of witnesses out of the jurisdiction is provided for by the Attendance of Witnesses Act, 1854.[4] The Court before which any action is pending, or the Lord Ordinary on the Bills in vacation, may, in order to compel the personal attendance at any trial of any witness who may not be within the jurisdiction of the Court in which such action is pending, order that a warrant of citation shall issue in special form commanding such witness to attend such trial wherever he may be within the United Kingdom; and the service of such warrant of citation in any part of the United Kingdom shall be as valid and effectual, to all intents and purposes, as if the same had been served within the jurisdiction of the Court from which it has issued.[4] Every such writ must have at the foot thereof a statement or notice that the same is issued by the special order of the Court or Judge, as the case may be, and no such writ shall issue without such special order.[5] If the witness does not obey such citation, the Court, upon proof of the notice and default, may transmit a certificate to the Supreme Court of the jurisdiction where the service was made, and the

[1] Campbell on Citation, p. 120; *cp.* Jamieson *v.* Main, 1830, 5 Murray, 127.

[2] Mason, 1830, reported in 5 Murray, 129 (note).

[3] Kelvin *v.* Whyte, Thomson & Co., 1909, 1 S. L. T. 477, per Lord Salvesen, p. 478.

[4] 17 & 18 Vict. cap. 34, sec. 1; Northern Garage, Ltd. *v.* North British Motor Manufacturing Co., Ltd., 1908, 16 S. L. T. 573.

[5] 17 & 18 Vict. cap. 34, sec. 2.

latter Court may punish such witness in the same way as if said witness had disobeyed one of its own writs,[1] but not until it be shown that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such witness at the time of citation.[2] The Act does not affect the issuing of a commission for the examination of witnesses out of the jurisdiction,[3] nor does it affect the admissibility of any evidence.[4]

Where a party, applying under this statute, presented to the Court a note which consisted of a signed statement by the agent that the witnesses designed would not attend without special citation, and concluded for a warrant to cite, signed by counsel, it was held that this was a proper form of application, and that an affidavit was unnecessary.[5] In a later case it was held that an affidavit by the agent, to the effect that witnesses desired to be cited under the above statute were necessary and material, must be lodged and sworn to.[6]

The following is a form of a note to cite witnesses in England or Ireland:—

Unto the Honourable Lord ,

Note for *A. B.* [*designation*],—Pursuer;

in the action at his instance against

C. D. [*designation*],—Defender.

My Lord,—This case is set down for proof before your Lordship on , the day of next.

E. F. [*designation*], *G. H.* [*designation*], and *I. J.* [*designation*] are necessary witnesses for the pursuer, and are resident in England [*or* Ireland]. The pursuer has reason to believe that said witnesses will not attend said proof unless commanded by your Lordship in the special form prescribed by the Act 17 & 18 Vict. cap. 34.

May it therefore please your Lordship to grant warrant to cite said witnesses in terms of said Act.

In respect whereof,

[*Signed by Counsel.*]

The granting of such a warrant is entirely in the discretion of the Court; and while in the ordinary case it is usual to grant the warrant,[7] the Court has refused to do so where the witness is to speak only to matter of opinion,[8] or where the witness will incur loss and incon-

[1] 17 & 18 Vict. cap. 34, sec. 3. [2] Ibid., sec. 4.
[3] Ibid., sec. 5. [4] Ibid., sec. 6.
[5] Pirie *v.* Caledonian Rly. Co., 1890, 27 S. L. R. 490.
[6] Macdonald *v.* Highland Rly. Co., 1892, 20 R. 217.
[7] Duke of Athole *v.* Robertson, 1878, 5 R. 845.
[8] Macdonald *v.* Highland Rly. Co., 1892, 20 R. 217.

venience to himself by being compelled to attend, and may possibly have disastrous consequences to his patients.[1]

(g) *Witness in Prison.*—Where a person in prison is a material witness for either of the parties in a cause, a special warrant is required. To obtain this a minute in the following terms is lodged:—

[*Counsel's name*], for the pursuer [*or* defender], stated to the Court that [*name and designation*], presently a prisoner in the prison of , is a material witness for the pursuer [*or* defender] in the cause, and he respectfully moves the Court to grant warrant to and ordain the governor of said prison of to deliver the said to officers of Court, who shall be answerable for his safe re-delivery to the said governor, in order that he may attend and give evidence for the pursuer [*or* defender] at the diet of proof appointed to proceed before the Court on ; and to grant warrant to officers of Court to bring the said from the prison of on to the Court-house at , and thereafter to reconvey him to said prison.

[*Signed by Counsel.*]

(9) Citation to Interrupt Prescription.—Citation in an action directed against a person to recover possession of property, or in an action by a creditor to recover a debt, is sufficient to interrupt either the positive or the negative prescription, but all such interruptions, whether in real or personal rights, must be renewed every seven years, otherwise the citation as an interruption is extinguished. If, however, the parties be minors, the years of minority are not included.[2] For the security of purchasers and singular successors the summons and execution must be registered in the General Register of Sasines within sixty days of the date of execution.[3] The citation is by messenger-at-arms upon the defender personally, or at his dwelling place, and at the parish church in the time of service or immediately thereafter, or at the office of the Record of Edictal Citations.[4] The church publication must be at the most patent door,[5] and is unnecessary if the citation is personal.[6]

[1] Henderson *v.* North British Rly. Co., 1870, 8 M. 833.

[2] Act 1669, cap. 15 (record edition), cap. 10 (12mo edition); Act 1685, cap. 15 (both editions).

[3] Act 1696, cap. 19 (both editions); 31 & 32 Vict. cap. 64, sec. 15.

[4] Act 1669, cap. 15 (record edition), cap. 10 (12mo edition); 6 Geo. IV. cap. 120, sec. 51; Erskine's Inst. iii. 7. 38 and 43.

[5] Act 1685, cap. 15 (both editions).

[6] Stair, iv. 35. 15.

CHAPTER III

OUTER HOUSE ROLLS AND ENROLLING

(1) GENERALLY.—Rolls of the Court of Session are printed and published, under the authority and directions of the Court, by a printer appointed by the Lord President,[1] every afternoon during session; on box days during vacation or recess; previous to each opening day of session after vacation or recess; and previous to each Vacation Court. The rolls for the ensuing week in session are published on Fridays.[2] The rolls consist of Outer House Calling Lists, Outer House, Inner House, and Bill Chamber Rolls, and, when required, the Court of Teinds Calling List and Rolls, the Rolls of the High Court of Justiciary, the Criminal Appeal Court, the Registration Appeal Court, the Lands Valuation Appeal Court, the Valuation Appeal Court, the Court for the trial of Election Petitions, and the cases before reporters *probabilis causa litigandi.* They may be purchased from the printer at a charge fixed by certain of the officers of Court.[3]

So far as the Outer House is concerned, they consist of the Calling Lists, Rolls of Undefended Causes, Motion Rolls, Adjustment Rolls, Procedure Rolls, and Lists of Proofs and Jury Trials, Hearings, Hearings on Evidence, and Judgments.

Formerly each Lord Ordinary had a blank day each week, but this was abolished by the Court of Session Act, 1868,[4] which provided that upon one of the sederunt days in each week the Lords Ordinary "in rotation shall not call their debate or motion rolls, but shall sit for the purpose of taking proofs or presiding at jury trials." Since the commencement of the Summer Session of 1913, however, blank days have been completely abolished "and the Lords Ordinary will call their rolls on each day the Court sits."[2]

(2) THE CALLING LISTS.—After the expiry of the *inducie* the pursuer may enrol the summons for calling. Calling now consists of

[1] C. A. S., A, iv. 1.

[2] Minute of Court, 20th March 1913.

[3] A. S., 14th October 1868, secs. 7 to 16; A. S., 9th July 1872, sec. 3; C. A. S., A, iv. 3.

[4] Sec. 9.

the publication on the walls of the Parliament House of an officially printed paper named the Outer House Calling Lists, containing the names and designations of the parties to the summons, preceded by the names of the Depute and Assistant Clerks of Session attached to the particular Lord Ordinary selected by the pursuer to hear the cause, and the names of the pursuer's counsel and agent. The order in which summonses are printed on the Calling Lists is according to the seniority, not of the Lords Ordinary, but of the Depute-Clerks of Session. In the daily rolls the Calling List shall precede the other enrolments.[1]

A summons may be called on any sederunt day during session and any box day in vacation.[2] A box day is a day in vacation or recess appointed by the Court for the receipt of papers. To enable the summons to be called, the pursuer's agent prepares the *partibus*, which is a note written on the margin of the principal summons containing (1) the name of the Lord Ordinary and the Division of the Court to which the cause shall belong; (2) the names and designations of the pursuer and defender; and (3) the names of the pursuer's counsel and agent. A *partibus* is in the following terms :—

Division, Lord , Ordinary. Mr. , Clerk.
Call per Esq., Advocate. , Agent. Sum.
[*here enter name and designation of the pursuer; if two pursuers, the name and designation of each pursuer; if more than two, then the name and designation of the first-named pursuer, with the words "and others"*] *against* [*here enter the name and designation of each defender, if not more than three; if more than three, the name and designation of the first-mentioned defender, with the words "and others, as per roll."*][3]

Thereafter the pursuer's agent, on the day previous to the calling,[4] or, when it is to call on a box day, on the second day preceding the box day,[5] lodges at the office of the Depute-Clerk of Session attached to the Lord Ordinary selected (*a*) the principal summons;[6] (*b*) a copy of the summons certified as correct by the agent, called the "process" copy;[7] (*c*) a copy of the *partibus* in plain legible writing;[4] (*d*) an inventory of process;[8] (*e*) a duplicate inventory of process;[9] (*f*) a

[1] A. S., 14th October 1868, sec. 14; C. A. S., A, iv. 7.
[2] Court of Session Act, 1868, secs. 22 and 93.
[3] A. S., 11th July 1828, sec. 27; C. A. S., C, i. 9.
[4] A. S., 14th October 1868, sec. 8; C. A. S., C, i. 10 (*a*).
[5] Ibid., sec. 10; C. A. S., C, i. 10 (*b*).
[6] Ibid., sec. 8; C. A. S., C, i. 10 (*a*).
[7] A. S., 11th July 1828, sec. 104; C. A. S., A, iii. 20.
[8] A. S., 11th July 1828, sec. 27.
[9] A. S., 7th July 1858, sec. 1.

separate roll of all the defenders if more than three [1]—a copy of which the agent puts on the walls of the Parliament House; (*g*) an inventory of productions [2] along with the productions; [3] and (*h*) an interlocutor sheet.[4] The copy of the *partibus* is not exactly in the terms already set forth, but is rearranged for printing in the Calling Lists in the following way:—

Division, Lord , Ordinary. Mr. , Clerk.
Sum. [*names and designations as before*] *ag.* [*names and designations as before*] per [*insert the name of Counsel*]. , *Agent.*

A separate Calling List is printed and published on each box day.[5]

A summons may be called in the name of one of several pursuers.[6] The marking in the *partibus* fixes the Division.[7] In one case where the *partibus* omitted to state the character in which the defender was called, authority was granted to the Extractor to insert in the extract the words omitted in the *partibus*.[8] Where, however, an action was raised against a pupil and his father's trustees *nominatim* (who had been appointed tutors by the father and accepted), and in terms of the will it was executed against the pupil and his tutors and curators, if he any had, but in the *partibus* there was no mention of tutors and curators, it was held that the pupil had not been competently made a party to the action, and the interlocutors pronounced *quoad* the pupil were reduced.[9] Where there is evidence from the *partibus* that the summons was called, it is to be presumed, after a lengthy period has elapsed, that everything was *rite et solemniter actum*, and consequently that the execution either was produced or ready to be produced.[10]

As the execution of a summons is the commencement of an action,[11] where the pursuer of an action dies or becomes bankrupt after service of the summons but before calling, the summons may be called in the name of his representatives;[12] and where an action is raised and the

[1] A. S., 11th July 1828, sec. 27; C. A. S., C, i. 9.

[2] A. S., 7th July 1858, sec. 1.

[3] 6 Geo. IV. cap. 120, sec. 3.

[4] A. S., "To Regulate the Enrolment of New Causes, etc.," 24th December 1838, 11mo.

[5] A. S., 14th October 1868, sec. 10.

[6] Shaw *v.* Gibb's Trs., 1893, 20 R. 718.

[7] Boag *v.* Fisher, 1848, 11 D. 129; Ledingham *v.* Elphinstone, 1859, 21 D. 844; A. S., 7th December 1871, sec. 1; C. A. S., B, iv. 1.

[8] M'Kellar and Others, Petrs., 1856, 19 D. 34.

[9] Earl of Craven *v.* Lord Elibank's Trs., 1854, 16 D. 811.

[10] Walker *v.* Earl of Eglintoun's Tutors, 1827, 5 S. 240 (N. E. 224).

[11] Alston *v.* Macdougall, 1887, 15 R. 78.

[12] Act 1693, cap. 24 (record edition), cap. 15 (12mo edition); Gallie *v.* Lockhart, 1840, 2 D. 445; Barstow *v.* Taylor, 1840, 2 D. 446 (note).

summons executed in the name of a pursuer whose title has been taken away before the date of calling, the summons cannot be called in his name.[1] In like manner, where the defender dies after execution of the summons but before calling, the summons may be called against his representatives,[2] after a minute of transference has been lodged.[3]

(3) Rolls of Undefended Causes.—When the defender has not entered appearance on or before the second day after the summons has been called in Court, or where the defender has timeously entered appearance, but has failed to lodge defences within ten days of the calling of the summons, the cause may be immediately enrolled in the Lord Ordinary's Motion Roll as an undefended cause for decree in absence, except in consistorial causes, proving of the tenor, adjudication for debt, and reductions.[4] It cannot be enrolled as an undefended cause before either of these two dates respectively.[5] Notwithstanding the former provision, the practice of the Court, as interpreting the Act of Sederunt, 14th October 1868, has been to confine the pursuer to taking a decree in absence on the Roll of Undefended Causes. During the session a Roll of Undefended Causes is taken up daily when necessary by the Clerk of each Lord Ordinary, and is printed and published in the daily rolls. During vacation or recess a similar roll is taken up by the Clerk of the Lord Ordinary officiating for the time on the Bills on the third lawful day following each box day between the hours of 11 forenoon and 12 noon, and is printed and published on that day, and the said roll is disposed of by the Lord Ordinary officiating on the Bills on the fifth lawful day after each box day.[6]

The manner in which the pursuer's agent puts the cause on the Roll of Undefended Causes is by a slip in the following terms:—

Lord .

Undefended Roll.

Sum. [*or* Divorce, C., R., and P., Reduction, *or as the case may be*].—Rae (Gordon's Trustee) *ag.* Maggie Robertson Gordon, residing at , *Defender*, and others, as per roll [*or as the case may be*].

E. F., Agent.

This slip is marked by the Clerk of the Lord Ordinary before whom the case is called, handed to the enrolling clerk, and the notice duly appears in

[1] Lords of the Treasury *v.* Campbell's Trs., 1836, 14 S. 657.

[2] M'Intosh *v.* Macandrew, 1829, 7 S. 649; Cameron *v.* Chapman, 1838, 16 S. 907.

[3] Court of Session Act, 1868, sec. 96.

[4] Ibid., sec. 22.

[5] Zizinias, Petr., 1867, 5 M. 1077; A. S., 11th July 1828, sec. 29.

[6] A. S., 14th October 1868, sec. 13; C. A. S., C, ii. 3; Court of Session Act, 1868, sec. 93.

the rolls under the head "Undefended Cause" in the roll of the particular Lord Ordinary. When the cause is so enrolled the Lord Ordinary, without the attendance of counsel or agent, grants decree in absence.[1]

It is not competent to grant decree in absence unless the cause has been enrolled in terms of the 22nd section of the Court of Session Act, 1868. Thus, where only one of several defenders entered appearance, and the case was debated, and the Lord Ordinary pronounced an interlocutor in favour of the pursuers, and on the same interlocutor decerned in absence against the other defenders, the Division recalled the interlocutor.[2]

It is sometimes necessary to enrol both on the Roll of Undefended Causes and in the Motion Roll. On the former roll no person is allowed to appear or make an explanation. Accordingly, where the summons concludes for a certain thing to be done by the defender, failing which the Court is asked to grant decree against him for a sum of money, it is necessary to enrol the cause in the Motion Roll to explain the particular decree required.

Decree against non-compearing defenders may be refused in certain cases.[3]

(4) Motion Rolls.—Each Lord Ordinary has a motion roll in which, after the summons has been called, or, in proceedings originating in the Bill Chamber, as soon as the cause has become an action depending in the Court of Session before said Lord Ordinary,[4] all applications incidental to the cause are enrolled and dealt with. According to Act of Sederunt, 11th August 1787, sec. 9, it was necessary that the motion should be enrolled and fixed up in the Parliament House at 12 o'clock noon two days previously by the party desiring to make the motion. One authority[5] states that this section of the Act of Sederunt has been superseded, whereas other authorities seem to think that it is still in force.[6] However this may be, the present practice is that, in ordinary circumstances, motions should be enrolled two days before being heard, and that written notice to the opposite agent of the enrolling and of the purpose of the enrolment should be made at the same time.[7] It is also the practice in a case of urgency,

[1] Court of Session Act, 1868, sec. 23.
[2] Mackenzie's Trs. *v.* Fletcher, 1873, 1 R. 45.
[3] Morrison *v.* Somerville, 1860, 22 D. 1083.
[4] Court of Session Act, 1868, sec. 90.
[5] Alexander's Abridgement of the Acts of Sederunt (1838).
[6] Shand's Practice, p. 299; Mackay's Manual, p. 208; Balfour's Court of Session Practice, p. 29.
[7] See also C. A. S., F, iv. 6; C. A. S., H, i. 8; C. A. S., K, i. 2 (*d*)

or where there is to be no opposition, or possibly where the party enrolling undertakes to justify his enrolment to the Lord Ordinary, that the latter's clerk, in the exercise of the discretion entrusted to him in making up the rolls, may accept the enrolment of a motion upon the day previous to the day when it is desired to be moved. In such cases the opposite counsel may object that forty-eight hours' notice of motion has not been given. Such an objection, however, seems no longer fatal to the motion, as it is the practice of some Lords Ordinary, if the opposite party has suffered no inconvenience or disadvantage, to consider the motion on its merits, and to grant or refuse it as the case may be.

The enrolment is made by a slip prepared by the agent and handed to the Lord Ordinary's Clerk in the Enrolling Room at the Parliament House before 12 o'clock noon. The slip may be in such a form as the following:—

Red.—Murray (Curle's Cur.) *v.* Cheves and Laurence, *per* Macfarlane *et* Fraser (the parties' counsel).

When a cause is enrolled in the Motion Roll and the case is dropped without any motion being made, the motion may be continued until the roll of the next sederunt day, but no longer. If the next sederunt day is not suitable, there must be a re-enrolment. When the case is dropped without any motion being made, the Auditor, on taxing the account of expenses, either as between agent and client or as between party and party, must disallow the expenses occasioned by such enrolment unless he is satisfied that the cause was properly enrolled and properly dropped.[1]

The Motion Roll is first called,[2] but the Lord Ordinary may, in special circumstances, order a hearing before the Motion Roll.

The Judge who sits at each Vacation Court may deal at such Courts with every motion which could competently be made in causes depending in the Outer House during session, and may postpone the same until the meeting of the Court if in his opinion they can conveniently be postponed.[3]

In ordinary cases only one counsel on each side appears in the Motion Roll, but in motions of difficulty senior counsel are allowed to be heard.[4]

(5) Adjustment Rolls.—Each Outer House Judge has a separate Adjustment Roll, which is numbered in continuation of his Motion

[1] A. S., 15th July 1865, sec. 9; C. A. S., C, ii. 2 (*b*).
[2] A. S., 15th July 1865, sec. 8; C. A. S., C, ii. 2 (*a*).
[3] A. S., 20th March 1907, sec. 10; C. A. S., A, i. 3 (*a*).
[4] Mackay's Practice, ii. 591.

Roll. It is divided into two parts—(*a*) Adjustment of Record; and (*b*) Adjustment of Issues.

(a) *Adjustment of Record.*—After defences have been lodged, and if no motion has been made for a revisal of pleadings, or if such motion is refused, or after the lapse of the period within which the revised pleadings fall to be lodged where a revisal has been allowed or ordered, the pursuer must print the pleadings which are to form the record, and within eight days from the lodging of the defences or revised pleadings deliver two printer's proofs thereof to the agent or each of the agents of the other parties and also to the Clerk of Process. Thereupon the Lord Ordinary directs the cause to be put to the Adjustment Roll on a day not less than four days and not more than six days after the prints have been received by the Clerk of the Process, and upon such day the Lord Ordinary requires parties to adjust their pleadings and close the record. If the pursuer fails to deliver the printer's proofs as aforesaid, the defender may enrol the cause, and move for decree of absolvitor by default, which decree the Lord Ordinary must grant unless the pursuer shall show good cause to the contrary; provided that it shall not be competent of consent of parties to prorogate the time for complying with any statutory enactment or order of the Court, whether with reference to the making up and closing of the record or otherwise.[1]

The provision regarding the lodging of prints applies in vacation or recess.[2] Mere overtures for a settlement will not justify a failure to print;[3] nor is it good cause to appear with the prints when the motion for absolvitor is being moved and tender them at the bar.[4] In one case [5] where no prejudice seems to have been done to the defenders, the motion to grant absolvitor was refused. Prints are timeously delivered to the agent for the defender if they are lawfully introduced into his office at any hour of the day on which they are due, but prints for the Clerk of Court must be delivered at the Register House within business hours.[6] The pursuer may be reponed on a reclaiming note, and in one case this was done on payment of £3, 3s.[7]

[1] Court of Session Act, 1868, sec. 26.

[2] Simpson *v.* Young, 1913, 1 S. L. T. 474; *cp.* Brogan *v.* James Henderson, Ltd., 1911, 2 S. L. T. 324.

[3] Semple *v.* Semple, 1904, 12 S. L. T. 404; Ogilvie *v.* Wearwell Cycle Co., 1904, 12 S. L. T. 423.

[4] Halligan *v.* Scottish Legal Life Assurance Society, 1883, 10 R. 972. See also Forrest *v.* Dunlop, 1875, 3 R. 15.

[5] Swan & Son *v.* Fairholme's Trs., 1894, 1 S. L. T. 464.

[6] M'Lauchlan *v.* Chalmers, 1913, 2 S. L. T. 85.

[7] Halligan *v.* Scottish Legal Life Assurance Society, 1883, 10 R. 972.

If from any cause the parties, or either of them, are unable to adjust on the day fixed, a continuation may be allowed, and the cause will subsequently appear on the roll under the heading "Continued Adjustment of Record." A first continuation is usually allowed on the motion of either party if any reasonable excuse is given,[1] but a further continuation is only granted upon cause shown.[2] At the adjustment the pursuer has large powers of extending, amplifying, and revising his condescendence and note of pleas in law without the necessity of a motion to amend, and similar powers are given to the defender with regard to his defences.[3]

The usual practice is for counsel for the pursuer, so soon as the open record has been printed, to make his, or their, adjustments upon a print which counsel mark as adjusted with counsel's initials and the date. A copy of these adjustments is then sent by the pursuer's agent to the defender's agent, whose counsel make his, or their, adjustments in a like manner, so that on the day of closing the record the adjustments are complete and the record is ready for closing. These adjustments must be added forthwith to the principal pleadings and initialed by counsel.[4] In some cases, however, the record is closed without the adjustments being complete on an honourable understanding between the opposite agents that facilities will be afforded for further adjustment up to the time when the closed record requires to be printed. Sometimes, again, it happens that the pursuer fails to make his adjustments in time and does not send them to the defender. In such a case, if the Lord Ordinary refuses a continuation and the defender refuses facilities, the pursuer will be compelled to allow the record to be closed as it appears in the open record, and any adjustment will require to be made by amendment under sec. 29 of the Court of Session Act. It is therefore advisable to take the earliest opportunity of exchanging adjustments after the print of the open record has been thrown off.

Again, the defender may, in addition to his answers to the pursuer's condescendence, have a separate statement of facts for the defender, and the pursuer or defender may ask an order for this to be answered, in which case the adjustment will be continued for this purpose. The Court, *ex proprio motu*, may also order the pursuer to answer a statement of facts for defender.[5]

[1] Morgan, Gellibrand & Co. *v.* Dundee Gem Line Steam Shipping Co., 1890, 18 R. 205.

[2] A. S., 15th July 1865, sec. 10.

[3] Cairns *v.* Lee, 1892, 20 R. 16.

[4] Dalrymple *v.* Turner, 1901, 8 S. L. T. 437.

[5] A. *v.* B., 1899, 36 S. L. R. 533.

Fees of senior and junior counsel are allowed at the adjustment of a record.[1]

(b) *Adjustment of Issues.*—If the pursuer is of opinion that the cause is one for jury trial, he, at the closing of the record, asks the Lord Ordinary to close the record and order issues. Issues are thereupon, as a matter of course, ordered to be lodged and to be adjusted on a day fixed not later than eight days thereafter, and the cause duly appears in the Adjustment Roll under the heading "Adjustment of Issues." The parties are required to lodge the issues and counter issues (if any) respectively proposed by them two days before the day appointed for their adjustment.[2] It was formerly held that the appointment of lodging issues was peremptory, and that the party in default could only be reponed on lodging a reclaiming note,[3] but it is now held that the Lord Ordinary has a discretion to allow to be adjusted issues not timeously lodged.[4] If there is to be no discussion at the adjustment of issues, the cause may be mentioned by counsel to the Lord Ordinary at the time of the calling of the Motion Roll, and the Lord Ordinary will in due course sign and authenticate the issue and approve of the same.[5] If there is to be a discussion, the fact that the Lord Ordinary has ordered issues to be lodged does not preclude the defender from discussing the relevancy or any other preliminary plea, or contending that the action is not a suitable one for a jury.

The ordering of issues where the question of relevancy has not been disposed of is not an allowance of proof, and accordingly cannot be reclaimed against within six days without leave of the Lord Ordinary.[6]

At the discussion on the Adjustment Roll the cause may either be dismissed as irrelevant, *or* a proof may be allowed upon some preliminary plea, *or* the case may be held to be unsuitable for jury trial and a proof or a proof "before answer" before a Judge alone granted, or issues may be adjusted for the trial of the cause. In the last case the Lord Ordinary approves of the issues by interlocutor, and signs and authenticates the issues as relative thereto.[5]

[1] Sandilands *v.* Mercer, 1833, 11 S. 733; Hall *v.* Whillis, 1852, 14 D. 626; Stott *v.* M'William, 1856, 18 D. 716; Arthur *v.* Lindsay, 1895, 22 R. 904; Gunn *v.* Muirhead, 1899, 2 F. 10.

[2] A. S., 10th March 1870, sec. 1 (5); C. A. S., C, ii. 4 (*e*).

[3] A. S., 15th July 1865, sec. 12; Glen *v.* Thomson, 1901, 4 F. 154.

[4] Wyllie *v.* Wyllie, 1911, S. C. 1. See also Weston *v.* Caledonian Rly. Co., 1895, 3 S. L. T. 154; Miller *v.* J. M. Smith, Ltd., 1908, 16 S. L. T. 268.

[5] Court of Session Act, 1850, sec. 39.

[6] Kennedy *v.* Wise, 1890, 17 R. 1036.

The expense of senior and junior counsel is allowed upon this roll.[1]

(6) PROCEDURE ROLL.—(a) *Generally.*—By the Act of Sederunt, 10th March 1870, sec. 1 (3),[2] it is enacted that "if the parties are at variance as to whether there shall be proof or as to what proof ought to be allowed, or if they or any of them shall maintain that one or more of the pleas stated on the record should be disposed of before determining on the matter of proof, the Lord Ordinary shall appoint the cause to be enrolled in a roll to be called the Procedure Roll."

The present practice of the Court seems to be in accordance with the above section, except where the pursuer is of opinion that the cause is one for trial before a jury. In such a case the practice seems to have crept in that when the record is closed issues are ordered to be adjusted on a day not later than the eighth day thereafter, and on that day a discussion may take place in all points similar to a Procedure Roll discussion. The Lord Ordinary seems now very loth to send such cases to the Procedure Roll, and it is accordingly seldom done unless the discussion is to be a prolonged one or to interfere with other appointed business. By the above-mentioned section power is given to the Lord Ordinary to appoint the cause to be heard on the Debate Roll, but this roll is now in desuetude, and any cases appropriate thereto[3] are now heard on the Procedure Roll.

The Lord Ordinary cannot send a case to proof without a motion to that effect, and, if any party objects, without a discussion.[4] It is always competent for parties having a cause standing in the Procedure Roll in regard to which they have come to be agreed that it should be disposed of by a proof before the Lord Ordinary, or a trial by jury, or otherwise, to enrol the cause in the Motion Roll in order that the matter may be brought under the consideration of the Lord Ordinary, and such interlocutor be pronounced as he shall think right in the circumstances.[5]

The Procedure Roll may be called on any sederunt day.[6]

(b) *Prints of Closed Record.*—Within four days from the date of the interlocutor closing the record the agent for the pursuer, or for the party appointed to print the record, shall lodge with the Clerk to

[1] Stevenson *v.* M'Ilwham & Co., 1832, 10 S. 337; Dunlop *v.* Lambert, 1840, 2 D. 646; Gardiner *v.* Black, 1851, 13 D. 843.

[2] C. A. S., C, ii. 4 (*c*).

[3] Court of Session Act, 1868, sec. 27, repealed by S. L. R. Act, 1893 (56 Vict. cap. 14); A. S., 10th March 1870, sec. 1 (1); C. A. S., C, ii. 4 (*a*).

[4] Reid *v.* Frederick Johnston & Co., 1911, 2 S. L. T. 122 and 149.

[5] A. S., 10th March 1870, sec. 1 (4); C. A. S., C, ii. 4 (*d*).

[6] A. S., 20th June 1890; C. A. S., C, ii. 7.

the Process two printed copies of the record as finally adjusted and closed, one of which shall be marked by the clerk as the process copy, and the other shall be appropriated to the use of the Lord Ordinary. And failing the said agent lodging such copies within the prescribed period, the clerk shall record such failure by a note on the interlocutor sheet, and the said agent's fee for trouble connected with the closing of the record shall be disallowed by the Auditor, to the extent of one-half, in taxing his account either between party and party or between agent and client, unless the Auditor be satisfied that the said agent's failure has arisen from unavoidable accident. And failing the two copies of the printed record being lodged as aforesaid, the cause shall be deleted from the Procedure Roll, and shall be restored to the roll only on a motion made to the Lord Ordinary by any party to the cause lodging the said two printed copies as aforesaid. Provided that, if none of the parties to the cause move the Lord Ordinary to restore the same to the roll, and lodge the two printed copies as aforesaid within twenty-one days of the date of the interlocutor closing the record, the Lord Ordinary shall pronounce an interlocutor dismissing the action, and finding neither party entitled to expenses, which shall not be recalled by the Lord Ordinary of consent, but may be recalled only in the manner and on the conditions foresaid.[1]

It is humbly suggested that some provision should be made whereby a defender may be enabled to obtain decree of absolvitor by default in respect of the pursuer's failure to lodge prints of the closed record.

The usual number of copies of the closed record printed is thirty for boxing and fifteen to each party, but more copies can be had by arrangement between the parties. The expense is borne equally by the parties at the outset.

The dismissal of an action in respect of failure to lodge prints within four days of closing the record seems in practice to have depended upon whether the cause had been deleted from the roll by the clerk or not. In two cases [2] where the clerk had not deleted the cause from the roll the motion for dismissal was refused. In a later case [3] the Court came to the same conclusion, but intimated that it was the imperative duty of the clerks, without further authority, at their own hands to note such failure on the interlocutor sheet and to delete the case from the roll. The rule should accordingly be strictly followed.

A party is not reponed as a matter of course where there is a failure

[1] A. S., 2nd November 1872, sec. 5; C. A. S., C, ii. 6.

[2] Brown *v.* Brown, 1897, 4 S. L. T. 226; M'Lintock *v.* Stubbs, Ltd., 1902, 9 S. L. T. 449.

[3] Mordell *v.* Macandrew and Jenkins, 1904, 6 F. 950.

to lodge prints. In one case,[1] although the pursuer was reponed without payment of expenses, it was intimated that the payment of expenses would be exacted in future except on good cause shown. Again, there is no obligation on the Inner House to recall an interlocutor either dismissing the action in respect of the non-attendance of counsel on both sides, or a decree by default in respect of the absence of counsel on one side.[2] The Court has been known to refuse to repone in such circumstances.[3] In one case the Court allowed a defender to be reponed on payment of fourteen guineas of expenses.[4]

(c) *Attendance of Counsel.*—When a cause is called in the Procedure Roll and no counsel attends on either side, and no admissible excuse is made for their non-attendance, the Lord Ordinary shall pronounce an interlocutor dismissing the action, and finding neither party entitled to expenses, and the said interlocutor shall not be recalled by the Lord Ordinary of consent, but may be recalled only on reclaiming note to the Inner House, upon such conditions as to expenses or otherwise as may be imposed by the Court, or by the Lord Ordinary under remit.[5]

When on the calling of a cause counsel shall appear on one side only, and no admissible excuse shall be made for the non-attendance of counsel on the other side, it shall be competent for the counsel appearing to take decree by default in favour of his client; and, if he shall not do so, the Lord Ordinary shall pronounce an interlocutor dismissing the action, finding neither party entitled to expenses; and the said interlocutor shall not be recalled by the Lord Ordinary of consent, but may be recalled only in the manner and on the conditions foresaid.[6]

Unless where the Court shall direct, the Auditor shall, in taxing an account of expenses incurred to his agent by the party against whom such decree by default is taken, disallow the expenses of having such decree opened up.[7]

No excuse in respect of another engagement shall be admissible for the non-attendance of counsel, except his being at the time engaged in a case before the Inner House, and being the sole counsel on his own side in attendance, or if not sole counsel, being the counsel addressing

[1] Liquidator of the Gael Iron Co., Ltd. *v.* Orr, 1884, 12 R. 345. See also Robertson *v.* Johnston, 1908, S. C. 383.

[2] Ferguson *v.* M'Duff, 1878, 5 R. 1016.

[3] M'Kean *v.* Lorimer and Moyes, 1877, 14 S. L. R. 274; Yeaman *v.* Caledonian Property Investment Building Society, 1883, 20 S. L. R. 777.

[4] Bedfordshire Loan Co. *v.* Russell, 1909, 47 S. L. R. 116.

[5] A. S., 2nd November 1872, sec. 1; C. A. S., C, ii. 9 (*a*).

[6] A. S., 2nd November 1872, sec. 2; C. A. S., C, ii. 9 (*b*).

[7] A. S., 15th July 1865, sec. 3; A. S., 10th March 1870, sec. 1 (6); C. A. S., C ii. 9 (*c*).

the Court, or about to reply to the counsel on the opposite side; or his being engaged in a jury trial, or at another Lord Ordinary's bar; but, in the last-mentioned case, only if either actually addressing the Lord Ordinary, or about to reply to the counsel on the opposite side.[1] This provision has been since altered and amended to the effect that it shall be no excuse for the non-attendance of a counsel "that he is engaged at a proof or jury trial," unless he be the sole counsel engaged on one side at the said proof or jury trial, or be actually addressing the Court or jury, or examining a witness at the time.[2]

Every Procedure Roll discussion shall be proceeded with and brought to a close by the counsel at the time in attendance; and, except on special cause shown, no delay or adjournment of any debate shall be allowed. But it shall always be competent to the Lord Ordinary, on special cause shown, to continue or adjourn any debate to another day, not more than eight days afterwards, when the debate shall be proceeded with and completed by the counsel then in attendance.[3]

The counsel who is addressing the Lord Ordinary, or who is about to reply to the counsel on the other side, shall not be entitled to leave the bar for any other Lord Ordinary's bar, but only if called to attend a jury trial, or the Inner House; and, in the last-mentioned case, only if no other counsel on the same side be in attendance in the Inner House; and the distinction of preference bars in the Outer House shall no longer prevail.[4] This provision is now altered and amended to the effect that no counsel shall be entitled to leave the Lord Ordinary's bar on the ground that he is called to a proof or jury trial, or to a cause in the Inner House, unless he be the sole counsel engaged in the said proof, jury trial, or cause in the Inner House, or unless the services of the other counsel, if any, engaged along with him, cannot, for reasons stated to, and held satisfactory by, the Lord Ordinary, be obtained at the time.[5]

(d) *Number of Cases on Roll and Additional Roll.*—Each Lord Ordinary shall put out in his weekly Procedure Roll not more than eight cases at a time; but it shall be competent to put out additional Procedure Roll cases in the course of the week, the same being put out in the roll two days before they are called.[6]

[1] A. S., 15th July 1865, sec. 4; A. S., 10th March 1870, sec. 1 (6).
[2] A. S., 2nd November 1872, sec. 3; C. A. S., C, ii. 9 (*d*).
[3] A. S., 15th July 1865, sec. 5; A. S., 10th March 1870, sec. 1 (6); C. A. S., C, ii. 9 (*e*).
[4] A. S., 15th July 1865, sec. 6; A. S., 10th March 1870, sec. 1 (6).
[5] A. S., 2nd November 1872, sec. 4; C. A. S., C, ii. 9 (*f*).
[6] A. S., 15th July 1865, sec. 7; C. A. S., C, ii. 8.

(e) *Debate on Preliminary Defences.* — Preliminary or dilatory defences are discussed upon this roll. If the dilatory defences are sustained the case comes to an end, and the Lord Ordinary determines the matter of expenses in the usual way. If, however, the dilatory defences are repelled, the Lord Ordinary cannot competently determine the matter of expenses[1] unless the defender intimates that it is his intention to reclaim against the judgment, in which case the Lord Ordinary determines the expenses of the preliminary discussion. These expenses he usually modifies. If, notwithstanding such intimation, the defender does not reclaim within twenty-one days, an *interim* decree, with expenses of extract, will be allowed to go out for the expenses of the preliminary discussion. If he does reclaim, and the judgment of the Lord Ordinary is adhered to, with additional expenses, the *interim* award for both sets of expenses may be allowed to go out, on which *interim* execution may proceed.[2]

If instead of the Lord Ordinary himself deciding upon the dilatory defences he reports the case to the Inner House, who decide against the defender, it is quite competent for the Court to give the pursuer the expenses of the discussion, notwithstanding that, if the same judgment had been pronounced by the Lord Ordinary and the defender had acquiesced, no expenses could have been given.[3]

If the dilatory pleas are repelled and the interlocutor is not reclaimed against, the expenses of the preliminary discussion on this roll are reserved, to be disposed of along with the rest of the expenses on the final decision of the cause.[2] A general finding for expenses in favour of the defender will carry the expenses incurred in the Procedure Roll discussion in which he was unsuccessful.[4] If, however, instead of being so reserved, the expenses of the Procedure Roll discussion have been awarded against the defender and paid by him in pursuance of *interim* execution, a general finding for expenses in his favour will not entitle him to repetition of the sum paid under the *interim* decree.[5]

(f) *Number of Counsel Allowed.*—The expense of both senior and junior counsel is allowed on this roll, and the question of refreshers to counsel is one of circumstances.[6]

[1] Steel *v.* Steel and Buchanan, 1826, 4 S. 527 (N. E. 535).

[2] Judicature Act, 1825 (6 Geo. IV. cap. 120), sec. 5.

[3] Sinclair *v.* Smith, 1860, 22 D. 1475.

[4] Earl of Lauderdale *v.* Wedderburn, 1911, S. C. 4; Bank of Scotland *v.* Morrison, 1911, S. C. 593.

[5] M'Kenzie *v.* Houston, 1830, 8 S. 526.

[6] Treacher *v.* Galloway, 1845, 7 D. 1099; Lord Advocate *v.* Dunlop's Trs., 1894, 2 S. L. T. 375.

(7) List of Proofs or Jury Trials.—On the first box day in each vacation a list of the proofs and jury trials at that date fixed by each Lord Ordinary for the ensuing session is published in the Rolls of the Court of Session; and thereafter on each Friday in session a list of proofs and jury trials before each Lord Ordinary for the ensuing week is published. The jury trials for the spring, summer, and Christmas sittings of the Inner House are also timeously published in the rolls.

(8) Hearings and Hearings on Evidence.—These are usually published in the rolls each Friday for the ensuing week, or as the occasion arises.

(9) Judgments are put out on the rolls as the occasion requires.

CHAPTER IV

PROTESTATION

(1) Definition.—Protestation is the judicial act by which a person who has been summoned to appear as a defender in a cause in the Court of Session compels the pursuer either to proceed with his action or to end it.

(2) For not Calling and Insisting.—By sec. 22 of the Court of Session Act, 1868, it is enacted that "in case a pursuer shall not call his summons in Court on the first sederunt day after the expiration of the *inducice* thereof, or on one of the two sederunt days next ensuing, the defender shall be entitled to the like remedy by protestation as is now competent, and subject to the like conditions." Accordingly, if the pursuer in a cause does not call his summons on one of the three sederunt days immediately succeeding the expiry of the *inducice*, the defender may present to the Outer House Clerk a note in the following terms:—

P., for not calling and insisting in summons of *A. B.* [*state designation*] against *C. D.* [*state designation*]. Summons signeted on last.

Per [*counsel's name*]. *E. F.* [*name of Agent*].[1]

If there are several defenders, and protestation is made by only one or not all of the defenders, it is the practice to specify at whose instance protestation is being made, thus—

P., at the instance of etc.

The clerk marks this note with his office mark and returns it to the defender's agent, who delivers it to the Keeper of the Minute-Book to be inserted therein of the date on which it was received. This date is the date of the protestation,[2] and the date must be that of a sederunt day.[3] When protestation is put up in the Minute-Book, the Keeper of the Minute-Book must *score* the same on production to him (before a warrant is issued for extract of the protestation) of a certificate from

[1] A. S., 13th February 1787.

[2] Mackay's Manual, p. 215.

[3] Shand's Practice, p. 277; Graham *v.* Graham, 1852, 15 D. 19.

a Depute-Clerk of Session, or his assistant, that the summons has been duly lodged with him for calling, but not otherwise; and after granting such certificate the clerk is bound to see that the proper procedure is regularly and immediately followed out in calling the same.[1] Scoring is a marking on the entry in the Minute-Book that a certificate of the production of the summons with a view to calling has been exhibited.[2]

If no such certificate is produced to the Keeper of the Minute-Book within nine free days from the date of the entry in the Minute-Book, the Keeper, on the application of the defender, will give out the protestation to be extracted by writing on it—

Edinburgh, [*date*]. Given out to be extracted.

[*Signature of Keeper.*]

After protestation has been given out to be extracted it cannot be scored, nor can the Extractor be interdicted from extracting the protestation.[3]

In a case where the summons was called upon the same day as protestation was given out to be extracted, the defender entered appearance under protest and asked for dismissal of the action in respect of no instance, but the Lord Ordinary refused the motion in respect that the summons had been lodged with the clerk with a view to calling on the day previous to protestation being given out for extract, and that if the pursuer had communicated with the Keeper of the Minute-Book (which inadvertently he had not done), the protestation would have been scored.[4]

Where several defenders are called jointly in a process and the *inducice* of the summons have run against one of them, but not against the rest, it is incompetent for the Keeper of the Minute-Book to give out a protestation until the *inducice* against the whole have expired;[5] and where there are several defenders, protestation is only available to those defenders in whose name it is put up, or who authorise and concur in the same, the summons being still good *quoad* the remainder.[6]

A defender is not precluded from taking protestation where the pursuer has been sequestrated subsequent to the execution of a summons at his instance.[7]

[1] A. S., 11th July 1828, sec. 30; C. A. S., C, i. 8.

[2] Lee *v.* Duncan Smith and Maclaren, 1897, 4 S. L. T. 323, per Lord Kincairney.

[3] Craigie, Suspender, 1829, 8 S. 113; Graham *v.* Boosies, 1831, 9 S. 566; Creightons *v.* Deans, 1832, 10 S. 695.

[4] Lee *v.* Duncan Smith and Maclaren, 1897, 4 S. L. T. 323.

[5] Grant, Petr., 3rd June 1809, F. C.

[6] Sceales *v.* Commercial Bank, 1839, 1 D. 465.

[7] Love *v.* Menzies, 1830, 8 S. 380.

The extract contains a decerniture for £3, 3s. of protestation money as expenses.[1] In a couple of cases previous to the Court of Session Act of 1850 the pursuer was held entitled to bring a new action without having first paid his protestation money in the former action,[2] but it is doubtful if it would now be allowed.

A protestation has no effect in transferring the lead in the cause from the raiser of the summons or letters to the party entering protestation.[3]

(3) Reponing.—A pursuer may be reponed against a protestation for not calling at any time not later than ten days after the same has been given out for extract, whether extract shall have been issued or not, by lodging with the clerk, in order to calling, his summons or other writ, with the relative documents, accompanied by the receipt of the agent for the defender for the sum of £3, 3s. of protestation money, or consigning the money itself in the hands of the clerk, for the use of the agent for the defender, and payable to him on demand.[1]

After protestation has been extracted the Lord Ordinary, if the pursuer has not been reponed as aforesaid, dismisses the action.[4]

(4) Failure of Instance without Protestation.—If the summons is not called within year and day of the day of compearance the instance falls, and consequently protestation is unnecessary.[5]

(5) For not Enrolling and Insisting.—It was formerly the practice where a summons had been called to use protestation for not enrolling and insisting, and protestation might be put up at any time within forty years. When, however, a year had elapsed from the date of calling, the process fell asleep and required to be wakened before putting up protestation. The protestation then bore "P. upon an awakening, etc.," and if there was protestation without such awakening, it was liable to be scored upon production of the summons, which proved that the cause was asleep. The pursuer could be reponed against this protestation in much the same way as where the protestation was for not calling.[6] It was also formerly provided by statute, where a pursuer after enrolling his action forbore to insist, that the defender could, by production of the copy served upon him,

[1] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 23.

[2] Laidlaw *v.* Smith, 1834, 12 S. 538; Williams *v.* Allan, 1841, 3 D. 600.

[3] A. S., 11th July 1828, sec. 30; C. A. S., C, i. 8.

[4] Small *v.* Small, 1897, 5 S. L. T. 193.

[5] A. S., 8th July 1831, sec. 3; Drummond *v.* Stuart, 1708, Mor. 11980; Cumming *v.* Munro, 1833, 12 S. 61; Allan *v.* Commercial Bank, 1842, 4 D. 842; M'Kidd *v.* Manson, 1882, 9 R. 790.

[6] 13 & 14 Vict. cap. 36, sec. 23.

obtain *judicial* protestation from the Judge,[1] but this has since been repealed;[2] and the necessity for the former protestation has disappeared since the passing of the Court of Session Act of 1868, which allowed the defender to take decree by default if he failed to obey the statutory procedure, and consequently this protestation is no longer in use.

In actions containing reductive conclusions, if the pursuer fails within twelve days after calling to enrol the cause, the defender is entitled to enrol for dismissal of the action or other competent procedure.[3]

(6) Suspensions.—Suspensions formerly required to appear on the Calling Lists; but this has now been abolished, and when a suspension becomes for all purposes an action depending in the Court of Session, the cause may immediately be enrolled by either party in the Motion Roll of the Lord Ordinary to whom it is marked.[4] Protestation is accordingly unnecessary, as the respondent can enrol, if the complainer does not enrol and insist, and obtain decree refusing the suspension.

(7) Appeals.—No protestation is required in appeals. A definite procedure has now been provided,[5] and if this is not observed the appellant is held to have abandoned his appeal, against which abandonment he can only be reponed upon such conditions as to printing, and payment of expenses to the respondent, or otherwise, as to the Court or Lord Ordinary shall seem just.[6] (See *Motion to Abandon*, Part v. Chap. iii.; and also *Review, Removal, and Report*, Part ix., *infra.*)

[1] Act 1672, cap. 40 (record edition), cap. 16 (12mo edition), sec. 10; Shand's Practice, p. 282.

[2] 6 Edw. VII. cap. 38.

[3] A. S., 14th October 1868, sec. 12.

[4] 31 & 32 Vict. cap. 100, sec. 90.

[5] A. S., 10th March 1870, sec. 3; C. A. S., D, iii. 1-5; A. S., 5th January 1909.

[6] A. S., 10th March 1870, sec. 3 (3); C. A. S., D, iii. 3.

CHAPTER V

APPEARANCE

(1) GENERALLY.—Appearance must be entered on the day of calling or on either of the two following days[1] by the defender's agent marking on the margin of the printed Calling List in the Lord Ordinary's office: "*Alt.* [*here he enters the name of defender's counsel*].—To see [*here he enters the name of defender's agent*]," along with the date. The defender's agent may at the same time borrow the process, which he must return, if in session, along with the defences within ten days of the date of calling of the summons.[2] Where the ten days expire during a vacation or recess, the defender may delay returning the process with defences till the first box day thereafter.[3]

Summonses called on the first box day are due to be returned with defences on the second box day.[4] Where there is more than one defender, and each defender has a separate agent, the agent who enters appearance first is entitled immediately to borrow the process, and the appearance is marked by the clerk on a separate paper, to be retained by him for subsequent entry of appearance for any other parties. Prior to 1868 defences were not due before the thirteenth day after the calling of the summons, and if there were two defenders, only the first defender to enter appearance was entitled to borrow the process immediately and to return it on the seventh day. If there were more than two defenders, the first defender to enter appearance had to return the borrowed process on the fourth day, and the other defenders were each entitled to borrow the process for forty-eight hours; and if a defender had not had an opportunity of borrowing the process the Lord Ordinary, on an application by such defender, might allow such defender's agent to borrow the process, and to allow defences to be lodged within a reasonable time thereafter.[5] The period within which defences have now

[1] Court of Session Act, 1868, sec. 22; A. S., 14th October 1868, sec. 11; C. A. S., C, i. 11.

[2] Court of Session Act, 1868, sec. 22; A. S., 11th July 1828, sec. 32; C. A. S., C, i. 12.

[3] A. S., 11th July 1828, sec. 32; C. A. S., C, i. 12.

[4] Court of Session Act, 1868, sec. 93.

[5] A. S., 11th July 1828, sec. 32; C. A. S., C, i. 13.

to be lodged has been reduced to ten days;[1] but there has been no statutory modification of the foregoing provisions consequent upon the altered circumstances, nor has there been any reported decision in which the respective rights of the several defenders to borrow the process have since been defined, as the defenders seem to have been able amicably to arrange among themselves with regard to this matter.

(2) Its Effect.—The effect of entering appearance is (1) that the person appearing cannot state any objection to the regularity of the execution or service as regards himself of the summons or other pleading or writ whereby he is convened;[2] and (2) that if there has been appearance entered for the defender with his authority, and defences have not been lodged and decree in absence has been pronounced, such decree, after extract and upon the lapse of sixty days after the expiry of a charge upon it not brought under review by suspension, shall be entitled to all the privileges of a decree *in foro;* and if it is a decree of declarator, or any other decree in which a charge is not competent, it becomes final after the lapse of twenty years from its date, unless before that time the same shall have been lawfully recalled or brought under review by suspension or reduction.[3]

[1] Court of Session Act, 1868, sec. 22.

[2] Ibid., sec. 21; Corstorphine *v.* Kasten, 1898, 1 F. 287. See, however, Morrison *v.* Vallance's Exrs., 1907, S. C. 999, where executors were allowed to object to the regularity of the service upon a deceased person.

[3] Court of Session Act, 1868, sec. 24.

CHAPTER VI

DECREE IN ABSENCE

(1) GENERALLY.—Where a defender does not enter appearance on the day of calling or on either of the two following days, or if appearance is timeously entered but defences are not lodged on or before the tenth day after the date of calling, the cause may be immediately enrolled in the undefended roll for decree in absence.[1] (See *Rolls of Undefended Causes, supra*, p. 351.) Where defences are given in bearing to be by those called as defenders and the authority of the latter is disputed, the cause is not an undefended cause though the parties defending do not at once produce a mandate,[2] nor is it a decree in absence where a verdict is given by a jury in absence of one of the parties after a motion has been made to delay the trial, and due notice of the trial has been given and the verdict applied and the decree extracted.[3] In a case where there were several defenders and the cause was not immediately enrolled for decree in absence against a non-compearing defender, the Court were of opinion that the pursuer was not entitled at a later stage to obtain such a decree in order to support his case against the compearing defenders.[4] In a case prior to the Court of Session Act, 1868, where the same agent acted for all the defenders and omitted inadvertently to lodge defences for one of the defenders, the Court allowed the latter's defences to be received upon payment of expenses, in respect that the pursuer refused to take decree against the said defender and so prevented him from moving to be reponed.[5]

It is not competent to extract a decree in absence before the expiry of ten days,[6] and until the account of expenses has been taxed.[7]

[1] Court of Session Act, 1868, sec. 22 ; Mackenzie's Trs. *v.* Fletcher, 1873, 1 R. 45. See also Marjoribanks *v.* Borthwick, 1857, 19 D. 474 ; Grant and Sillars *v.* Marshall, 1863, 1 M. 1167.

[2] Fischer & Co. *v.* Andersen, 1896, 23 R. 395.

[3] Gilchrist *v.* Gilchrist, 1844, 7 D. 214.

[4] Morrison *v.* Somerville, 1860, 22 D. 1082.

[5] Mullar *v.* Murray, 1851, 14 D. 212.

[6] Court of Session Act, 1868, sec. 23.

[7] 1 & 2 Geo. IV. cap. 38, sec. 33.

Consistorial actions are an exception to the rule that a decree in absence can be taken, as are also actions of proving the tenor. In actions of reduction and of adjudication for debt there may be a decree in absence, but only after certain procedure has been followed.

See *Consistorial Causes; Proving the Tenor; Reduction; Adjudication, infra,* Part vii.

(2) Recall of a Decree in Absence.—At any time within ten days of the date of a decree in absence the defender may enrol the cause in the Lord Ordinary's Motion Roll; or when such days expire in time of vacation or recess, the defender may at any time within the said ten days lodge his defences with the clerk, and at the next ensuing sitting of the Lord Ordinary officiating on the Bills move him to recall the decree in absence; and if when the cause is called on said roll or moved before the said Lord officiating on the Bills as aforesaid the defender shall produce his defences and pay to the pursuer the sum of £2, 2s., the Lord Ordinary or the Lord Ordinary officiating on the Bills, as the case may be, shall pronounce an interlocutor recalling the decree in absence and allowing the defences to be received, and the cause shall thereupon be treated as if defences had been lodged in due time.[1] The trustees of a co-defender who allowed decree in absence to pass were held entitled to have the decree in absence recalled.[2]

There have been no decisions in cases on the poor's roll since the abolition of reponing by a reclaiming note against a decree in absence and the substitution of a recall upon payment of £2, 2s.,[3] but under the former practice the Court refused, in an early case,[4] to repone a party on the poor's roll without payment of expenses. In a subsequent case the Inner House remitted to the Lord Ordinary to repone upon payment of such expenses as should seem reasonable.[5]

(3) Suspension of a Decree in Absence.—See Maclaren's Bill Chamber Practice, p. 86.

(4) Reduction of a Decree in Absence.—See *Reduction of Decrees, infra,* Part vii.

[1] Court of Session Act, 1868, secs. 23 and 93.
[2] Ross *v.* Ross and A. B., 1909, 2 S. L. T. 117.
[3] Court of Session Act, 1868, sec. 23.
[4] Pratt *v.* Dundas and Bruce, 1824, 3 S. 120 (N. E. 79).
[5] Ord *v.* Ord, 1861, 24 D. 25.

CHAPTER VII

DEFENCES

(1) GENERALLY.—The defences to a summons are in the form of articulate answers to the condescendence annexed to the summons, together with a note of the defender's pleas in law; and, where necessary, there may be appended a statement of the allegations in fact on which the defender founds in defence.[1] They must state specifically for whom they are lodged, otherwise the Court may appoint them to be withdrawn.[2] They must not contain any argumentative matter,[3] nor include the proofs of any averments or answers made, such as medical certificates or extracts therefrom,[4] but, without disclosing what is properly called evidence, must state at least the line of defence and the main facts and points on which the defence is rested, so that the other party may be fully able, previous to the trial or proof, to investigate the case and be prepared for it.[5] Thus a defender cannot at a trial raise a plea of privilege on grounds not stated on record,[6] nor can he competently raise an objection of discrepancy between the title and the specification in an action by a patentee for infringement where no notice has been given on record.[7] In the same way, in order to lead evidence of the truth of the statement complained of in an action of damages for slander, the defender must set forth on record the facts, giving the time and place of their occurrence and the names of witnesses to them which he says will demonstrate the truth of the alleged slanderous statements,[8]

[1] 13 & 14 Vict. cap. 36, sec. 1.

[2] Fernie *v.* Bell, 1894, 2 S. L. T. 311.

[3] A. S., 7th February 1810.

[4] Ure *v.* Pollock, 1832, 10 S. 450.

[5] Neilson *v.* Househill Coal and Iron Co., 1842, 4 D. 1187, per Lord Justice-Clerk Hope, p. 1193.

[6] Smith *v.* Green, 1853, 15 D. 549; 1854, 16 D. 429.

[7] Kerr *v.* Clark & Co., 1868, 7 M. 51. See also Ralston, Goodwin & Co. *v.* M'Lean, 1857, 19 D. 878; Harrison *v.* Anderston Foundry Co., 1874, 2 R. 122.

[8] M'Neill *v.* Rorison, 1847, 10 D. 15, per Lord Moncreiff, pp. 26, 27; M'Rostie *v.* Ironside, 1849, 12 D. 74; Rankin *v.* Simpson, 1859, 21 D. 1057; M'Donald *v.* Begg, 1862, 24 D. 685, per Lord Deas; Hunter *v.* Macnaughton, 1894, 31 S. L. R. 713, per Lord President Robertson.

and where there is a plea of acquiescence there must be an averment of knowledge on the part of the pursuer.[1]

In like manner, where a defender intends to meet the pursuer's case with preliminary pleas, he must lay a foundation in his answers for such pleas.[2] A defence of fraudulent misrepresentation must be averred in a distinct and unambiguous manner.[3] If, however, a defence, even of fraud, emerges upon the cross-examination of any of the pursuer's witnesses and unforeseen by the defender, it is quite competent for the defender to urge such a defence.[4]

Where a defender lodged defences in which he stated that he declined to make any admission until it was shown that he was subject to the jurisdiction of the Scottish Courts, and his only plea was "no jurisdiction," the Inner House was of opinion that the defences should not have been received, as they were in violation of the Act of Parliament, the Acts of Sederunt, and the unbroken practice of the Court. Every ground of defence must, therefore, be stated at the same time.[5]

The defences must not contain irrelevant or scandalous averments. These will be deleted at the order of the Court.[6]

The pleas in law must be distinct legal propositions applicable to the facts of the case. General pleas are not sufficient compliance with the provisions of the Act.[7]

The Court is entitled, *ex proprio motu*, to give effect to a plea not stated,[8] but in that event it will not improbably mulct the successful party in a part or all of his expenses.[9]

(2) Statement of Facts for Defender.—In the ordinary case it is usually sufficient for the defender to meet the pursuer's averments with a simple admission or denial, or an admission of certain of his averments and a denial of the remainder. It is also sometimes advisable to give, in addition, a short explanatory statement, or to make a specific averment or series of averments. It may happen, however, that none of these methods of answering the pursuer's averments will suffice. The pursuer may have given only a brief and incomplete statement of the

[1] Hunter *v.* Broadwood, 1854, 16 D. 441, per Lord President M'Neill, p. 449.
[2] North British Rly. Co. *v.* Brown, Gordon & Co., 1857, 19 D. 840.
[3] Wright *v.* Guild and Wyllie, 1893, 30 S. L. R. 785.
[4] Bile Bean Manufacturing Co., Ltd. *v.* Davidson, 1906, 8 F. 1181.
[5] Thorburn *v.* Dempster, 1900, 2 F. 583.
[6] H. *v.* P., 1905, 8 F. 232; M. *v.* S., 1909, 1 S. L. T. 192; *cp.* Shaw *v.* Craig, 1916, 1 S. L. T. 116.
[7] Young & Co. *v.* Graham, 1860, 23 D. 36; 13 & 14 Vict. cap. 36, sec. 1.
[8] Buchanan *v.* Lumsden, 1837, 9 Jur. 449; Broom *v.* Anderson, 1837, 9 Jur. 450.
[9] Shirra *v.* Robertson, 1873, 11 M. 660; North of Scotland Banking Co. *v.* Fleming, 1882, 10 R. 217; Fairbairn *v.* Sanderson, 1885, 13 R. 81.

point at issue, and it may be advisable that the defender should give a complete narrative with some minuteness, or the pursuer, while relying upon the same facts as the defender, may have put such a gloss upon them as to render necessary a retelling in the defender's own language. There are, however, no hard-and-fast rules on the subject, as the addition of a statement of facts is a matter for the exercise of the discretion of counsel, and will depend upon the circumstances of each individual case.

Where no specific answers are lodged by the pursuer to the defender's statement of facts, the former may be ordained to lodge such answers within a specified time.[1]

(3) Time for Lodging.—Defences are due on or before the tenth day after the date of calling the summons,[2] or, if the tenth day expires in vacation or recess, on the first box day or sederunt day thereafter.[3] Where defences are due to be lodged on a Saturday in session, it is sufficient if they are lodged on the Monday following, except where the Court happens to rise upon a Saturday for vacation or for the Christmas recess.[4] Defences due on a Sunday in session may be lodged on the Monday following.

Sometimes the Court has allowed defences to be lodged after the ten days have elapsed. Thus, in an action prior to the Court of Session Act, 1868, where the same agent acted for all the defenders and inadvertently omitted to lodge defences for one of the defenders, the Court allowed the defences to be received upon payment of expenses, on the ground that the pursuer refused to take decree against the said defender and so prevented him from moving to be reponed.[5] In an action since the passing of that Act, in which the pursuer had enrolled the cause in the Undefended Roll for decree, the defender appeared at the bar and asked leave to lodge defences, and his prayer was granted.[6]

In *consistorial* causes defences may, as a general rule, be lodged any time before decree.[7] They may even be allowed to be lodged after decree. Thus, in a case where the husband lodged no defences but appeared at the proof and cross-examined the pursuer's witnesses, and personally opposed the pursuer's motion for avizandum with the proof,

[1] A. *v.* B., 1899, 36 S. L. R. 533.
[2] Court of Session Act, 1868, sec. 22.
[3] Ibid., sec. 93.
[4] A. S., 11th July 1828, sec. 114; C. A. S., A, iii. 19.
[5] Mullar *v.* Murray, 1851, 14 D. 212; A. S., 11th July 1828, sec. 45.
[6] London and Midland Bank *v.* Forrest and Smith, 1898, 6 S. L. T. 27.
[7] Paul *v.* Paul, 1896, 4 S. L. T. 124, 171.

craving leave to give in defences, the Lord Ordinary refused the prayer and decerned against him, but on a reclaiming note the Inner House allowed defences to be received, and advised the case on the proof and defences, adhering to the interlocutor of the Lord Ordinary.[1] In a case in similar circumstances, but where the wife was defender, the Inner House allowed her defences to be received.[2] Where, in an action of divorce for adultery, the co-defender allowed a decree in absence for £250 damages and expenses to pass against him, the trustees, in a trust deed which the co-defender had granted prior to said decree, were allowed to appear and state defences.[3]

(4) Signature of Defences.—Although most written pleadings require to bear the signature of counsel,[4] it seems that there is an exception in the case of defences, which may be signed by the defender himself.[5] They are, however, subject in other respects to the same rules and sanctions as to their contents as are applicable to defences that bear the signature of counsel.[6] There is a short report of a case where it was held that *revised* defences could not be received unless signed by counsel,[7] but whatever peculiarity attached to revised defences previous to the year 1868 no longer exists, as they are no longer part of our procedure, and recent practice sanctions the signature of defences by a defender who conducts his own case. In a very recent case a lady who refused to pay her taxes on the ground that she had no parliamentary vote was allowed to sign her own defences and plead her own cause.[8] It may often be advisable to have defences which contain charges of fraud or other averments of a serious nature signed by the defender himself. In a case, not of this nature, however, the Court insisted upon the defender putting in a statement signed by himself.[9]

(5) Productions.—With the defences should be lodged any productions upon which the defender relies;[10] for if not lodged at or before the closing of the record, the Court or Lord Ordinary may attach con-

[1] Paterson *v.* Paterson, 1848, 20 Jur. 459.
[2] Cathcart *v.* Cathcart, 1899, 1 F. 781.
[3] Ross *v.* Ross and A. B., 1909, 2 S. L. T. 117.
[4] A. S., 6th February 1692; A. S., 19th December 1710; A. S., 15th June 1738; A. S., 5th March 1789; A. S., 11th July 1828, sec. 112; C. A. S., A, iii. 14 and 15.
[5] Davidson *v.* Paul, 1848, 10 D. 1457.
[6] Ibid., per Lord President Boyle, p. 1459.
[7] Jaffray *v.* Jaffray, 1863, 2 M. 355.
[8] Lord Advocate *v.* Allan, 1913, before Lord Cullen (unreported).
[9] Fergusson *v.* Steavenson, 1830, 8 S. 390.
[10] Court of Session Act, 1825 (6 Geo. IV. cap. 120), sec. 3.

ditions, as to expenses or otherwise, to the receiving of such productions after the record is closed.[1]

(6) Defences with Alternative Pleas.—There is no reason why a defender should not urge pleas which are inconsistent with each other[2] so long as they are taken alternatively, and so long as the facts upon which the pleas are founded are stated alternatively. Thus, in an action of damages for slander a defender may deny the slander and also plead *veritas*;[3] or he may deny that a debt is due and resting-owing and at the same time plead prescription.[4] He may not, however, deny a purchase, and when it is proved against him found upon a presumption that it was paid for, in respect that the purchase took place in open market, if there is no alternative averment that the purchase must be presumed to have been paid for.[5] If, however, one branch of his averment is relevant and the alternative branch is irrelevant, the whole defence may be held to be irrelevant,[6] as the weaker alternative is always the test of the case.[7]

Where inconsistent averments are not stated alternatively the action will be dismissed.[8]

(7) Averments of Pursuer not Denied.—By Act of Sederunt, 7th February 1810, it was enacted that when "a fact is averred by the one and not expressly denied by the other party, he shall be held as confessed, in terms of the Act of Sederunt, 1st February 1715, sec. 6, and the fact as definitely proved against him." There is some doubt whether these Acts of Sederunt are still in force, but by the 105th section of the Act of Sederunt, 11th July 1828, which is still in force, it is enacted that "when a statement in point of fact, within the opposite party's knowledge, is averred on the one side, and not denied on the other, he shall be held as confessed."

The principle contained in the above Acts of Sederunt has been given effect to in several cases.[9] Thus, where the defender in answer stated "it is believed that the account libelled is correct," he was held as confessed, Lord Justice-Clerk Inglis stating: "However limited an answer may be, if it be not accompanied by a denial or a refusal of

[1] Court of Session Act, 1868, sec. 99.

[2] Buchan *v.* Boyd, 1828, 6 S. 1025; London and Caledonian Marine Insurance Co. *v.* London and Edinburgh Shipping Co., 1867, 5 M. 982.

[3] Mason *v.* Tait, 1851, 13 D. 1347.

[4] Alcock *v.* Easson, 1842, 5 D. 356; Campbell *v.* Grierson, 1848, 10 D. 361.

[5] Kidd *v.* Brown, 1828, 6 S. 825.

[6] Finnie *v.* Logie, 1859, 21 D. 825, per Lord President M'Neill, p. 829.

[7] Hope *v.* Hope's Trs., 1898, 1 F. (H. L.) 1, per Lord Watson, p. 3.

[8] M'Sourley *v.* Mags. of Paisley, 1902, 10 S. L. T. 86.

[9] Dunn *v.* Livingston, 1828, 7 S. 218; Drysdale *v.* Wood, 1832, 10 S. 198.

admission, we must take the pursuer's statement to be admitted."[1] In another case where the pursuer averred that he had been employed by a defender to erect hustings and the defender answered that he did not admit that he employed the pursuer, it was held that he admitted that the hustings had been erected on the defender's employment;[2] and where an averment was made by the pursuer that he had remained in the defenders' employment at their special request, and the answer of the defenders evaded the pursuer's averment, the defenders were held as confessed.[3] On the same principle, where the defender makes averments which are not specifically denied, the pursuer will be held as confessed.

(8) Admissions and Qualified Admissions.—As a general rule admissions are only held binding in the action in which they are made, unless the pleadings are signed by the party himself.[4] In several cases the fact that admissions in a prior cause had been made was allowed to be put in evidence,[5] but not where a different interest was at stake in a different cause.[6] In one case it was held incompetent to put in evidence the record in a previous case between the parties, with reference to the same matter, in so far as it was tendered as evidence of the admissions and statements then made by one of the parties regarding the nature of the right in issue.[7]

An admission which is qualified by an explanation must be taken along with the qualification, unless the explanation itself can be disproved.[8] Where, however, the qualification consists of an explanation which is not relevantly averred, the original averment is taken as being admitted without qualification.[9]

An admission must be clear and unmistakable, and is not to be

[1] Scottish North-Eastern Rly. Co. *v.* Napier, 1859, 21 D. 700.

[2] Ellis *v.* Fraser, 1840, 3 D. 264, per Lord Gillies, p. 271.

[3] Pegler *v.* Northern Agricultural Implement Co., 1877, 4 R. 435, per Lord President Inglis, p. 438, and Lord Mure, p. 440.

[4] Marianski *v.* Cairns, 1852, 1 Macq. 212; Aitchison *v.* Aitchison, 1877, 4 R. 899, per Lord Ormidale, p. 921. See also Wauchope *v.* North British Rly. Co., 1860, 23 D. 191, at p. 209.

[5] Andersons *v.* Jeffrey, 1826, 4 Murray, 97, at p. 100; Mackenzie *v.* Dundas, 1835, 14 S. 144; Burns *v.* Burns, 1841, 3 D. 1273; Mollison's Trs. *v.* Crawfurd, 1851, 13 D. 1075; Fraser *v.* Hill, 1854, 16 D. 789.

[6] Wight *v.* Liddell, 1827, 4 Murray, 325, at p. 327.

[7] M'Ghie *v.* M'Kirdy, 1850, 12 D. 442.

[8] Carnegy *v.* Carnegy, 1825, 3 S. 566 (N. E. 389); Grierson *v.* Thomson, 1830, 8 S. 317; Campbell *v.* Arrott, 1835, 13 S. 557; Milne *v.* Donaldson, 1852, 14 D. 849; Campbell *v.* M'Cartney, 1843, 14 D. 1086; Picken *v.* Arundale & Co., 1872, 10 M. 987; Gelstons *v.* Christie, 1875, 2 R. 982; Chrystal *v.* Chrystal, 1900, 2 F. 373.

[9] Robertson & Co. *v.* Bird, 1897, 24 R. 1076. See Coghill *v.* Coghill, 1896, 4 S. L. T. 215.

assumed by implication. Thus, where the defenders denied that they had received certain goods, it was held that this was not an implied admission that the defenders did not deliver them to the consignee;[1] and where a representative of a deceased acceptor of a bill of exchange admitted that he had made a payment to the holder within the prescriptive period, and at the same time denied all knowledge of the bill, or of the debt for which it was granted, and pleaded prescription, it was held that he had not admitted the debt.[2]

Where the pursuer founds upon a document and the defender answers, "Reference is made to said document for its terms," this is not an admission of the existence of the document.[3]

Where a defender denies an averment subject to his statement of facts, there is little chance of his falling into error; but where he makes admissions subject to his statement of facts or denies a statement so far as inconsistent with his statement of facts, he may be held to have made admissions, quite unconsciously, destructive of his case.[4] Such a method of pleading must, therefore, be adopted with great care.

(9) Joint Defences.—Where two or more defenders are called in the same action, and have the same defence, they may either lodge a joint defence or one of the defenders may lodge a detailed defence, and the others may lodge separate defences in which they adopt and repeat the statements made by the first defender. When the latter course is adopted the form which the later defences take is: "This defender has seen and adopts the statement of facts and pleas in law in the defences for *A. B.*, and holds them as repeated, *mutatis mutandis*, on behalf of himself." It is incompetent, however, for a defender to put in defences in which he adopts *ab ante*, and holds as repeated, all such defences as may be stated by the other defenders. There is here no reference to any specific averment; and in a case where the record was closed on such defences the Court ordered the record to be opened up and a specific and relevant statement of his pleas made by such defender.[5] Joint defences may not be lodged for the different defenders of separate actions at the instance of the same pursuer, even where the defence is the same. It is proper, however, in such circumstances to lodge one paper setting forth the defence, and separate *pro forma* defences referring

[1] Cruickshank, Fraser & Co. *v.* Caledonian Rly. Co., 1876, 3 R. 484.
[2] Darnley *v.* Kirkwood, 1845, 7 D. 595.
[3] Pringle *v.* Bremner and Stirling, 1867, 5 M. (H. L.) 55.
[4] Campbell *v.* Campbell, 1863, 1 M. 217; Andersons *v.* Lows, 1863, 2 M. 100, per Lord Deas, p. 107.
[5] Richardson *v.* Gavin's Trs., 1851, 14 D. 275.

to the leading one.[1] The Court is strongly opposed to separate defences containing the same defence being lodged for the several defenders in a case.[2] This is seen by the manner in which the Court deals with the expenses of successful defenders who have lodged separate defences. In an early case it was held that where several defenders have the same ground of defence, but have not combined in a joint defence, the unsuccessful pursuer will only be found liable in the expense of a single defence and of a consultation between the defenders at the beginning of the litigation.[3] This was somewhat modified in a later case,[4] where in somewhat similar circumstances the Court held that two successful defenders were only entitled to one account of expenses, with a modified sum added as watching expenses for the second defender. This latter method of dealing with the expenses of separate defenders was again modified, and it was laid down as a general rule, and the practice now is, that where a pursuer convenes more than one defender and fails in his action, with a liability for expenses, each defender is entitled to his expenses down to the closing of the record; but if it appears from the closed record that the interest of the defenders is identical, the pursuer is only liable in full expenses for a single defence, with watching fees for the other defenders.[5] Accordingly, where several defenders have the same ground of defence they should lodge a joint defence.

(10) Actions of Reduction.—Formerly in actions of reduction where the defender objected to the title of the pursuer, or pleaded on an exclusive title, or stated any other objections against satisfying the production, he was required in the first instance to lodge defences confined to these points;[6] but this has been altered, and it is not now competent for a defender who objects on any ground to satisfy the production to lodge preliminary defences. But if he intends to defend the action, he must put in defences stating his preliminary objections as well as his defences on the merits of the reduction;[7] and where he does not state any objection against satisfying production, he must, along with his defences, produce the writs or documents sought to be reduced so far as the same are in his possession or under his control.[8]

[1] Cowie *v.* Merry, 1828, 7 S. 23.

[2] Bett *v.* Arnott, 1828, 6 S. 1031.

[3] Edinburgh and Glasgow Rly. Co. *v.* Arthur, 1858, 20 D. 677.

[4] Stott *v.* Fender and Crombie, 1878, 16 S. L. R. 5.

[5] Anderson *v.* M'Cracken Bros., 1900, 2 F. 780. See also Bannerman *v.* Bannerman's Tr., 1896, 23 R. 959; Cockburn *v.* The City Club and Others; Cockburn *v.* Austen and Others, 1905, 12 S. L. T. 678.

[6] 13 & 14 Vict. cap. 36, sec. 7.

[7] A. S., 20th March 1907, sec. 4; C. A. S., C, iv. 4 (*b*).

[8] A. S., 20th March 1907, sec. 5; C. A. S., C, iv. 4 (*c*).

(11) Preliminary Defences.—A preliminary or dilatory defence is a defence which does not touch the merits of the case, but is based upon the failure of the pursuer to observe the rules of practice or procedure of the Court before which the cause is brought. Although such a defence requires to be decided before the final decision upon the merits is reached, it is not competent to state it without at the same time stating the defence upon the merits.[1]

A preliminary defence can only be discussed on a closed record.[2] Where such a defence is stated the cause is sent to the Procedure Roll, and the defence is either sustained or repelled. (See *Procedure Roll, supra*, p. 357.) Sometimes, however, a preliminary defence is so bound up with the merits that it is necessary for the Court to have the facts ascertained before deciding upon the preliminary defence and a proof before answer is allowed. (See *Proof Before Answer, infra*, Part vi. Chap. iv. (4).) Where a preliminary defence is stated and the facts are in dispute, the proper course is to have a proof of the averments on which the preliminary defence is founded. Accordingly, where there was a defence that the action had been raised without authority, a record was made up and the Lord Ordinary had a personal interview with the pursuer;[3] where a plea of "no jurisdiction" was stated, based on disputed matters of fact, it was held that only in very exceptional circumstances was the proof on the question of jurisdiction reserved until the proof on the merits was taken;[4] where a defender averred that the pursuer had settled his claim, the question of the validity of the settlement fell to be remitted to probation and determined *primo loco*;[5] where the defender averred that the pursuer had failed to give notice under the Employers' Liability Act, it was held that a proof should be allowed on this prejudicial plea;[6] and where the defenders pleaded that the pursuer in a right-of-way case was not in a financial position to carry on the action out of his own resources, and that he had been put forward by certain persons in order that they might escape liability, it was held that the defenders were entitled to a preliminary proof of their averments.[7]

Preliminary pleas may be amended or added. (See *Motion for Leave*

[1] Thorburn *v.* Dempster, 1900, 2 F. 583; A. S., 20th March 1907, sec. 4; C. A. S., C, iv. 4 (*b*).

[2] Walker and Others *v.* Crawford and Another, 1902, 10 S. L. T. 362.

[3] Smellie *v.* Smellie, 1893, 1 S. L. T. 29 and 143.

[4] M'Leod *v.* Tancred, Arrol & Co., 1890, 17 R. 514.

[5] Docherty *v.* M'Alpine & Sons, 1899, 2 F. 128. See also Hunter *v.* Darngavil Coal Co., 1900, 3 F. 10; M'Lean *v.* Hassard, 1903, 10 S. L. T. 593; Sinclair *v.* Lochgelly Iron and Coal Co., Ltd., 1905, 13 S. L. T. 103.

[6] Duncan *v.* Fife Coal Co., Ltd., 1905, 7 F. 958.

[7] Robertson *v.* Duke of Atholl, 1905, 8 F. 150.

to Amend, infra, Part v. Chap. iv.) Where, however, an action required to be brought within a certain time, and the defender, after the lapse of such time, asked to amend by adding a new preliminary plea, that the pursuer had not given a notice alleged to be requisite as a preliminary step, it was held that the motion was not made *tempestive*, and that to allow it to be made might exclude altogether the pursuer's claim upon an objection which, if stated in time, could have been obviated.[1]

The following are the most important preliminary defences:—

(a) *No Jurisdiction.*—This defence, which is sometimes confounded with that of incompetence, is a defence to the effect that the Court has no power to pronounce an enforceable decree against the defender. Whether or not the Court has such power must be decided *in limine* and before any proof on the merits of the case,[2] unless the question of jurisdiction and the merits are bound up together.[3] In whichever way the Court decides the question of jurisdiction, it has still power to make an award of expenses.[4] (See *Jurisdiction, supra*, p. 33 *et seq.*)

(b) *Objection to the Regularity of the Execution.*—Formerly a defender could appear and state as a preliminary defence an objection to the regularity of his citation, but now no party appearing in any action is entitled to state such an objection.[5] (See *Requisites of Schedule, supra*, p. 321; *Requisites of Execution, supra*, p. 323; *Objections to Execution, supra*, p. 325; *Objection to Citation by Person Entering Appearance, supra*, p. 342.)

(c) *Forum non Conveniens.*—This is a preliminary defence to the effect that although the Court of Session has jurisdiction to try the cause, there is a concurrent jurisdiction in a foreign Court before which it is more convenient that the cause should be tried. (See *Forum non Conveniens, supra*, p. 75.)

(d) *No Title to Sue.*—This defence means that even on the assumption that the defender is liable to have a decree pronounced against him in the circumstances condescended on, the pursuer is not the person who has a title to call upon the Court to pronounce such a decree. Title in this connection is held to include interest, for it may happen that although a pursuer has a right to sue the defender, he may have no interest recognised by law to do so. Where a pursuer has an

[1] Livermore *v.* Duncan, 1865, 3 M. 410.

[2] Muir *v.* Collett, 1862, 24 D. 1119, per Lord Justice-Clerk Inglis, p. 1121; Stewart *v.* North, 1889, 16 R. 927; 17 R. (H. L.) 60; M'Leod *v.* Tancred, Arrol & Co., 1890, 17 R. 514.

[3] Shaw *v.* Dow and Dobie, 1869, 7 M. 449, per Lord President Inglis, p. 454.

[4] Stavert *v.* Stavert, 1882, 9 R. 519; Pike *v.* Pike, 1899, 6 S. L. T. 331; Linder *v.* Linder, 1902, 4 F. 465.

[5] Court of Session Act, 1868, sec. 21.

undoubted title, but the defender has a preferable title, the plea takes the form of "title to exclude."

When the facts upon which these pleas are founded are not disputed, or can be instantly verified, a discussion upon the Procedure Roll is sufficient to dispose of them. They are, however, sometimes so bound up with the merits that it is impossible for the Court to arrive at any conclusion upon them until the facts constituting the merits of the case have been ascertained, in which case a proof before answer will be allowed.

When the pursuer founds upon a certain title, a defender who states the plea of "no title to sue" must specify objections to the title, and where he states specific objections it is incompetent for the defender, under cover of a general plea of "no title to sue," to raise other objections of which no notice has been given.[1]

In a case prior to the Court of Session Act, 1868, where the plea of "no title to sue" was not taken in the closed record and the cause went to proof (not before answer) on the merits, the plea was held to be waived.[2] Under the large powers of amendment now possessed by the Court, however, the defender, if he so desires, will be allowed to amend his record in order to add such a plea, on such terms as to expenses as to the Court or Lord Ordinary shall seem fit.[3] (See *Capacity, Title, and Interest, supra*, p. 161 *et seq.*)

(e) *All Parties not Called.*—The meaning of this defence is that there are other persons who have not been called and whose absence will prejudice the defender who has been called, either in his defence or in his position after the defence has been repelled. The plea must be stated *in limine*, and it is too late to bring it forward after a proof,[4] or after a verdict in a jury trial,[5] or after the judgment of the Lord Ordinary.[6]

It is usually pleaded successfully where an obligation alleged to be joint and several is constituted otherwise than by writing, and all the obligants subject to the jurisdiction of the Scottish Courts have not been called.[7] Where, however, the obligation is constituted by writing,[8] or where the subject of the action is a joint delinquency,[9] any one of the

[1] North British Rly. Co. *v.* Brown, Gordon & Co., 1857, 19 D. 840.

[2] Lade *v.* Largs Baking Co., 1863, 2 M. 17.

[3] Court of Session Act, 1868, sec. 29; A. S., 20th March 1907, sec. 2; C. A. S., B, i. 7.

[4] Pollock *v.* Pollock, 1849, 12 D. 143.

[5] Mags. of Edinburgh *v.* Lawrie, 27th January 1821, F. C.

[6] Tod's Trs. *v.* Graham, 1869, 8 M. 264.

[7] Neilson *v.* Wilson, 1890, 17 R. 608. See also Ross *v.* Baird, 1848, 10 D. 1493; Goldie *v.* Christie and Petrie, 1868, 6 M. 541.

[8] Neilson *v.* Wilson, 1890, 17 R. 608.

[9] Graham *v.* North British Bank, 1850, 12 D. 907; Leslie's Representatives *v.*

parties may be sued alone. Again, where the party who has not been called is not subject to the jurisdiction of the Scottish Courts, the plea will not be sustained.[1] The plea is also sustained where the party omitted is a joint owner,[2] and where a *curator bonis* to minors is called alone, the minors being interested in the defence.[3] In a case where the constituents of a poorhouse combination asked declarator that the board could, at will, dismiss their medical officer and did not make the doctor a party,[4] and where one township of crofters sued another township regarding a question which involved rights in which the landlord had an interest and did not call the latter,[5] the plea was sustained.

The plea has been *repelled* in the following cases:—Where all the proprietors of a coach named in the excise licence were called and there were other proprietors not called;[6] where an action for meliorations was directed by a tenant against the executor of the deceased landlord alone and the landlord alive at the expiry of the lease was omitted;[7] where there had been a body of trustees who were all dead and the action was directed against the representatives of the last surviving trustee alone;[8] where the action was brought against a cautioner, and his principal and co-cautioner were not called owing to the pursuer not being able to trace them, and the defender, who was in a position to know their addresses, had not furnished them, though requested by the pursuer to do so;[9] where there were three co-obligants under a cautionary obligation binding *pro rata* and only two were called;[10] where a vassal sued his superior for damages for wrongfully letting the minerals in the pursuer's feu to a mineral tenant who worked the same, and the mineral tenant was not called;[11] where an information was laid by the Lord Advocate against the individual partners of a

Lumsden, 1851, 14 D. 213; M'Ilquham & Co. *v.* Hope Johnstone, 1852, 14 D. 322; The Western Bank of Scotland *v.* Douglas and Others, 1860, 22 D. 447; Inglis *v.* Douglas, 1860, 22 D. 505; Croskery *v.* Gilmour's Trs., 1890, 17 R. 697; Beatt *v.* Ogg's Trs., 1897, 4 S. L. T. 266; Mackay *v.* Mackay, 1897, 4 S. L. T. 337; Sim *v.* Muir's Trs., 1906, 8 F. 1091; Allen *v.* M'Combie's Trs., 1909, S. C. 710.

[1] Gibson *v.* Smith, 1849, 11 D. 1024; Muir *v.* Collett, 1862, 24 D. 1119.

[2] North British Rly. Co. *v.* North-Eastern Rly. Co., 1896, 24 R. (H. L.) 19.

[3] King's Trs. *v.* M'Lay and Others, 1901, 8 S. L. T. 413.

[4] Kilwinning Parish Council *v.* Cunninghame Combination Poorhouse Board of Management, 1909, S. C. 829.

[5] Mackinnon *v.* Macdonald, 1905, 7 F. 589.

[6] Binny *v.* Machray, 1848, 10 D. 1508.

[7] Cumine *v.* Bayley, 1856, 19 D. 97.

[8] Pearson *v.* Houston's Trs., 1868, 6 M. 286.

[9] M'Ewan *v.* Donald, 1852, 14 D. 809.

[10] M'Arthur *v.* Scott, 1836, 15 S. 270.

[11] Thomson *v.* Wilson's Trs., 1895, 22 R. 866; Highgate & Co. *v.* Mags. of Paisley, 1896, 23 R. 992.

firm for a contravention of the Stamp Acts and the firm was not called;[1] and where an action for aliment was raised by a father against one of his four children, there being no averment that the others were able to pay.[2]

In a case where a company refused to register the transfer of shares as the transferor told them not to do so, and the transferee raised an action against the company but did not call the transferor, the Court repelled the plea, but ordered intimation of the action to the transferor, with a copy of the interlocutor certifying that if he failed within eight days to appear and show cause to the contrary, decree against the company would be pronounced;[3] and where two creditors in a sequestration appealed against a deliverance of the trustee allowing claims of two sisters of the bankrupt, and the trustee alone was called as respondent, intimation was ordered on the two sisters, and they were required to answer within eight days.[4]

Where the pursuer declines to call the parties omitted, the Court will dismiss the action.[5]

(f) *Lis Alibi Pendens.*—The defence consists in the averment that the same question is depending in a prior suit before another Court of competent jurisdiction. Thus, where a deliverance was pronounced by a presbytery and certain heritors took an appeal to the Sheriff, and another heritor brought a suspension of the deliverance in the Bill Chamber, the suspension was refused, as the question was in dependence before a competent tribunal;[6] and where the holder of a bill raised an action in the Small Debt Court, and while the case was at avizandum the acceptor of the bill raised a suspension of a threatened charge in the Bill Chamber, it was held that had the Court known that such an action was proceeding in the Small Debt Court, the plea of *lis alibi pendens* would have been sustained.[7]

Where a defender prorogates jurisdiction in regard to the matter in dispute, he cannot plead *lis alibi pendens* in respect of a prior action, as this would mean that he consented to the raising of the subsequent action while at the same time he reserved pleas which would make the latter action incompetent.[8]

(i.) *Dependence of Prior Action.*—The prior action must truly be in

[1] Lord Advocate *v.* Thomson, 1897, 24 R. 543.
[2] Hamilton *v.* Hamilton, 1877, 4 R. 688.
[3] Shaw *v.* Caledonian Rly. Co., 1888, 15 R. 504.
[4] M'Farlan and Another, 1895, 3 S. L. T. 129.
[5] Earl of Galloway *v.* Mags. of Wigtown, 1870, 8 M. 959.
[6] Mags. of Arbroath *v.* Presbytery of Arbroath, 1883, 10 R. 767.
[7] Clark and Others *v.* Davidson, 1893, 1 S. L. T. 141.
[8] Longmuir *v.* Longmuir, 1850, 12 D. 926.

dependence. An action is in dependence when the summons is executed,[1] and does not cease to be in dependence when an interlocutor has been pronounced dismissing the summons and finding the pursuer liable in expenses while questions as to the amount of expenses remain to be disposed of by the Court.[2] Where, however, the plea upon which the prior action has been dismissed is a plea of no jurisdiction, and the expenses have not been finally disposed of, the defender in the later action cannot found upon the prior case, as it has not been brought before a Court of competent jurisdiction.[3]

Where the prior action is asleep it is still in dependence.[4] In a case where an action of accounting had fallen asleep, and a second action was raised, it was held that the plea of *lis alibi pendens* taken by the defender in the second action did not apply so far as the second action concluded for an accounting subsequent to the citation in the first action.[5]

Where there is an abandonment of the first action, it is only necessary, in order to obviate the plea of *lis alibi pendens* in the second action, that the abandonment should take place before the plea is discussed.[6] In the ordinary case, where there has been litigation in Court, abandonment must be made by minute to which authority has been interponed[7] and not by letter,[8] although abandonment by letter seems sufficient if the summons, though executed, has not been called, and there has been abandonment either in the summons[9] or in the condescendence of the second action;[10] and in one case it was given effect to where no step had been taken in the process for ten years.[11] (See *Motion for Leave to Abandon, infra,* Part v. Chap. iii.)

In some early cases an attempt was made to advocate a prior action from the Sheriff Court *ob contingentiam* in order to obviate the plea of

[1] Aitken *v.* Dick, 1863, 1 M. 1038.

[2] Ibid.; Kennedy *v.* Macdonald, 1876, 3 R. 813; Porteous *v.* Caledonian Rly. Co., 1891, 29 S. L. R. 21.

[3] Watt *v.* Coghlan, 1902, 10 S. L. T. 89.

[4] Denovan *v.* Cairns, 1845, 7 D. 378; Fraser *v.* Emslie, 1845, 17 Jur. 143.

[5] Wallace *v.* Henderson, 1875, 2 R. 999.

[6] Taylor *v.* Glasgow, Paisley, and Ardrossan Canal Co., 1852, 15 D. 14; Earl of Hopetoun *v.* Scots Mining Co., 1859, 21 D. 218; M'Aulay *v.* Cowe, 1873, 1 R. 307. See, however, Porteous *v.* Caledonian Rly. Co., 1891, 29 S. L. R. 21, per Lord Kincairney.

[7] Sinclair *v.* Campbell, 1832, 4 Jur. 520; Cormack *v.* Waters, 1846, 8 D. 889; Campbell's Trs. *v.* Campbell, 1863, 1 M. 1016, per Lord Deas, p. 1019.

[8] Nelson *v.* Gordon, 1874, 1 R. 1093.

[9] Laidlaw *v.* Smith, 1834, 12 S. 538.

[10] M'Aulay *v.* Cowe, 1873, 1 R. 307.

[11] Gracie *v.* Kerr, 1846, 19 Jur. 60.

lis alibi pendens in the subsequent action in the Court of Session, but the attempt was not successful.[1] In a later case the unsuccessful pursuers in a Sheriff Court action appealed to the Court of Session, and while the appeal was pending raised in the latter Court a declarator having the same object, and grounded upon the same *media concludendi* as the earlier action, and the Court sustained the plea of *lis alibi pendens*.[2]

(ii.) *Same Question.*—The same question must be raised in the prior action, otherwise the plea of *lis alibi pendens* in the second action will not be sustained. Thus where an ordinary action is depending at the instance of the holder of a bill against the acceptor for payment, a plea of *lis alibi pendens* will be sustained where the holder extracts the registered protest and charges the acceptor thereon;[3] and where two parties with different interests applied to the Sheriff for interdict against third parties, and the Sheriff dismissed the action, and, pending an advocation, the same parties on the same grounds presented a bill of suspension praying for interdict, the plea was sustained.[4] It is possible, however, that the complainer might be allowed to present a suspension in the Bill Chamber if the respondent was about to do the thing complained of before the advocation could come up for discussion.[5]

In the same way, where the same question is not raised, the plea will be repelled. Thus where a general winding up of the affairs of a company trading in Scotland and England was proceeding in England, the plea of *lis alibi pendens* was not sustained where an action was raised in the Court of Session by certain Scottish partners, who had paid some of the company's debts, for relief against the other partners;[6] and where there was a depending action raised by a child against his father's representatives for exhibition of all deeds in favour of defenders and for payment of all sums due to pursuer thereunder, it was held not to be a *lis alibi pendens* to exclude an action in the Court of Session for payment of a sum contained in a bond of provision in favour of the pursuer;[7] and where a declarator was raised that a road was not within

[1] Brown *v.* Gilfillans, 1825, 4 S. 152 (N. E. 153); Miller *v.* Brown, 1827, 5 S. 825 (N. E. 765); Greig *v.* Johnston, 1835, 13 S. 635. See, however, Aitchison *v.* Earl of Mansfield, 1830, 8 S. 562.

[2] Morison and Others *v.* Ross, 1882, 20 S. L. R. 142.

[3] Denovan *v.* Cairns, 1845, 7 D. 378.

[4] Jolly *v.* Brown, 1828, 6 S. 497.

[5] Cathcart *v.* Sloss, 1864, 3 M. 76.

[6] Richardson *v.* Gavin's Trs., 1853, 15 D. 434. See also Ranken *v.* Stewart, 1840, 2 D. 717; Innerarity *v.* Gilmore, 1840, 2 D. 813.

[7] Thomson *v.* Thomson, 1829, 2 Jur. 117.

the limits of a royal burgh, and a subsequent application was made by the same person to the Justices of the Peace to alter the road, the plea was repelled.[1] Again, where a trustee raised a multiplepoinding for distribution of an estate, and a legatee raised an action against the pursuer in the prior action independently of his character as trustee, the plea was repelled.[2] In an action where a defender pleaded *lis alibi pendens* in respect of an action at the instance of the pursuer's deceased father which had fallen asleep, the plea would have been immediately repelled but for certain peculiarities in the facts.[3]

(iii.) *Consistorial Causes.*—A wife may simultaneously pursue her husband in separate actions of divorce and separation and aliment founded on the same grounds.[4]

(iv.) *Simultaneous Actions of Multiplepoinding.*—Where two multiplepoindings were signeted and called of similar dates, the prior cause is the one whose service has been first completed, and the other is dismissed.[5]

(v.) *Counter Actions.*—Where a pursuer raises an action the defender is not bound to await the pleasure of the pursuer as to the prosecution of the action, but is entitled to raise an action of his own to have his position made clear. There must, however, be some slight difference between the actions, otherwise the plea of *lis alibi pendens* will be sustained. Thus if an ordinary petitory action is brought for the recovery of a sum of money, and a counter action is brought to declare that no sum is due, the plea will be sustained. Where, however, an action of declarator that an entail was valid was replied to by an action of declarator that the entail was invalid and for reduction of the title made up under the entail in question and for delivery of titles, the plea was repelled;[6] and the same result was arrived at where an action of declarator that certain bids at a public roup were illegal, and that the pursuer was entitled to delivery of an article sold at a certain reduced price, was countered by an action for payment of the price of the article as sold by public roup.[7] Again, where a landlord, to whom was due a year's rent but who was due indemnification to his tenant, presented a petition to the Sheriff to fix the amount of indemnification to be deducted from the year's rent, and the tenant raised an action in the

[1] Mags. of Kilrenny *v.* Johnstone, 1828, 6 S. 624.
[2] Longmuir *v.* Longmuir, 1850, 12 D. 926.
[3] Fraser *v.* Emslie, 1845, 17 Jur. 143.
[4] Stewart *v.* Stewart, 1906, 8 F. 769.
[5] M. P. Kirkwood and Others *v.* Lowe and Others, 1893, 1 S. L. T. 29.
[6] Howden *v.* Viscountess Hawarden, 1864, 2 M. 637 ; Harland Engineering Co. *v.* Stark's Trs., 1913, 2 S. L. T. 448.
[7] Wishart *v.* Howatson, 1897, 5 S. L. T. 84.

Court of Session for indemnification, which he libelled at four years' rent, it was held that the former was not a *lis alibi* to exclude the latter.[1]

(vi.) *Prior Action in a Foreign Court.*—"Proceedings in a foreign Court do not constitute *lis alibi pendens* in the proper sense of the plea,"[2] as there is no incompetency in a creditor bringing several suits in several countries for the same debt, provided there is jurisdiction in all, although there is always an equitable power and duty of control in each tribunal to see that there is not on the whole an improper and oppressive accumulation of litigation or diligence.[3] Several early cases were allowed to proceed in Scotland, notwithstanding that similar actions were pending in foreign Courts,[4] and actions have been allowed in Scotland to the effect of sustaining diligence on the dependence while prior actions were proceeding in England to decide the merits of the cases.[5] In the exercise of their equitable power, however, the Scottish Courts have sometimes restricted the arrestments.[6] In a case where an accounting was proceeding in the Court of Chancery in England, a similar Scottish action was sisted *hoc statu*;[7] and where a prior inquiry was proceeding in an English Court into the question of a man's domicile, a similar Scottish action was dismissed.[8] Where there is no actual pending cause in England, and an action is dismissed in the Scottish Courts on the ground of *forum non conveniens*, the Court will not allow the action to be sisted to enable the pursuer to preserve arrestments on the dependence until he raises an action in England.[9]

Since the Judgments Extension Act of 1868[10] there seems every reason why a distinction should be drawn between cases where the prior suits are depending in England or Ireland, and where they are depending in other countries. A judgment obtained in England or Ireland may now be made operative in Scotland, and accordingly the reason for allowing an action in Scotland to proceed in order to preserve diligence no longer exists. There is no such provision, however, with regard to other countries. (See *Forum non Conveniens, supra*, p. 75.)

(g) *Incompetency.*—Strictly speaking, this defence is an objection

[1] Butchard *v.* Walker and West, 1828, 7 S. 203.

[2] Martin *v.* Stopford-Blair's Exrs., 1879, 7 R. 329, per Lord President Inglis, p. 331.

[3] Cochrane *v.* Paul, 1857, 20 D. 178, per Lord Neaves (Ordinary), p. 179.

[4] May *v.* Wharton, 1799, Mor. 8293; Mure *v.* Sharp, 10th July 1811, F. C.; Ranken *v.* Stewart, 1840, 2 D. 717.

[5] Hawkins *v.* Wedderburn, 1842, 4 D. 924; Fordyce *v.* Bridges, 1842, 4 D. 1334.

[6] Seton *v.* Hawkins, 1842, 5 D. 396.

[7] Macmaster *v.* Stewart, 1834, 12 S. 731.

[8] Ferguson *v.* Buchanan, 1890, 18 R. 119.

[9] Atkinson and Wood *v.* Mackintosh, 1905, 7 F. 598.

[10] 31 & 32 Vict. cap. 54.

either to the form of the summons in general or in a particular set of circumstances, as distinguished from irrelevancy, which is an objection to the condescendence. In some cases, however, incompetency and irrelevancy "run very much into one another."[1] It must also be distinguished from the defence of "no jurisdiction," the latter of which, in the older practice, was included under the defence of *forum non competens*—a defence which has now given place to the more correct defence of *forum non conveniens*.

Accordingly, it is incompetent to raise in the Court of Session an action of multiplepoinding where there is no double distress,[2] or no fund *in medio*;[3] or to raise an action for £50 or less;[4] or a special case without a proper contradictor;[5] or an action of declarator without conclusions of an executorial kind;[6] or for independent pursuers to sue in the same action on separate and independent grounds of debt;[7] or for a wife to include in an action of divorce conclusions for payment of her legal rights;[8] or for an action to conclude for a lump sum against different defenders for different wrongs;[9] or for a pursuer to sue more than one defender in the same action with separate conclusions against each defender based on separate and independent grounds of debt.[10]

An incompetent action should be thrown out and a new action brought.[11]

If an objection to the competency does not infer an absolute nullity, but is merely technical, it must be pleaded *in limine*.[12]

[1] Coutts *v.* Coutts, 1866, 4 M. 802, per Lord President M'Neill, p. 803.

[2] Moncrieff *v.* Bethune, 1844, 6 D. 1100; Great North of Scotland Rly. Co. *v.* Gauld, 1863, 1 M. 1053; Campbell *v.* Grant, 1870, 8 M. 988; Dalgleish and Forrest *v.* Miller, 1870, 8 S. L. R. 166; Clark *v.* Campbell, 1873, 1 R. 281; Connell's Tr. *v.* Chalk, 1878, 5 R. 735; Robb's Trs. *v.* Robb, 1880, 7 R. 1049; Mackenzie's Trs. *v.* Sutherland, 1895, 22 R. 233; Commercial Bank of Scotland *v.* Muir, 1897, 25 R. 219; Johnston *v.* Richardson, 1905, 13 S. L. T. 537; Glen's Trs. *v.* Miller, 1911, S. C. 1178.

[3] Richardson *v.* Wilson, 1905, 12 S. L. T. 775.

[4] Sheriff Courts (Scotland) Act, 1907, sec. 7.

[5] Roxburgh County Council *v.* Melrose District Council, 1897, 24 R. 657; Baillie's Trs. *v.* Whiting, 1910, S. C. 887; Smith *v.* M'Coll's Trs., 1910, S. C. 1121, per Lord Dunedin, p. 1128.

[6] Stewart & Co. *v.* Sillars, 1906, 13 S. L. T. 800.

[7] Killin *v.* Weir, 1905, 7 F. 526; Paxton *v.* Brown, 1908, S. C. 406. See also Harkes *v.* Mowat, 1862, 24 D. 701; Gibson *v.* Macqueen, 1866, 5 M. 113; Smyth *v.* Muir, 1891, 19 R. 81; Mitchell *v.* Grierson, 1894, 21 R. 367; Fischer *v.* Andersen, 1896, 23 R. 395.

[8] Ellison *v.* Ellison, 1901, 4 F. 257.

[9] Barr *v.* Neilsons, 1868, 6 M. 651; Taylor *v.* M'Dougall & Sons, 1885, 12 R. 1304; Sinclair *v.* Caithness Flagstone Co., Ltd., 1898, 25 R. 703.

[10] Western Bank Liquidators *v.* Douglas, 1860, 22 D. 447, per Lord Justice-Clerk Inglis, pp. 496, 497.

[11] M'Naught *v.* Milligan, 1885, 13 R. 366, per Lord President Inglis, p. 368.

[12] Tod's Trs. *v.* Graham, 1869, 8 M. 264; Douglas *v.* Tait, 1884, 12 R. 10.

It appears as if it were not *pars judicis* to dismiss an action as incompetent where the defender has not taken such an objection.[1]

(h) *Irrelevancy.*—(i.) *Generally.*—By this defence is meant that, even on the assumption that all his averments are true, the pursuer is not entitled to the decree which he asks; or, in other words, that the pursuer's averments do not support the conclusions of his summons. Thus, if in an ordinary action of damages for slander the pursuer does not say that the slander is false,[2] or, where the occasion of the slander is privileged, does not aver facts and circumstances from which malice may be inferred,[3] the action is irrelevant. Again, if in an action of damages arising out of an accident occasioned by a defect in heritable property the pursuer does not aver that the defender had a duty to inspect and repair the same, or that he knew of the defect and did not put it right, the action will be dismissed as irrelevant.[4] In the same way, if a person is run over by a vehicle belonging to the defender, and the pursuer does not aver that the vehicle was being driven by the defender or someone for whom he is responsible,[5] and fault on the part of the defender or such other person is not specifically averred, the action is held to be irrelevant.[6]

In judging of the relevancy of the pursuer's case, not only is the pursuer's condescendence taken into consideration, but any admission that the pursuer may have made in answer to the defender's statements in his defences.[7]

(ii.) *Want of Specification.*—This defence is usually pleaded along with irrelevancy, and the plea usually runs:—"The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons." In many cases the defender is entitled to have the grounds of action specifically detailed, and if this is not done the pursuer will

[1] Connell *v.* Ferguson, 1857, 19 D. 482.

[2] Campbell *v.* Ferguson, 1882, 9 R. 467; Gray *v.* Scottish Society for the Prevention of Cruelty to Animals, 1890, 17 R. 1185, at p. 1196; Meikle *v.* Wright, 1893, 20 R. 928; Mackenzie *v.* Anderson, 1900, 7 S. L. T. 469.

[3] Fenton *v.* Currie, 1843, 5 D. 705; Ritchie & Son *v.* Barton, 1883, 10 R. 813; Scott *v.* Turnbull, 1884, 11 R. 1131, at p. 1135; Gordon *v.* British and Foreign Metaline Co., 1886, 14 R. 75; Farquhar *v.* Neish, 1890, 17 R. 716, at p. 718; Reid *v.* Moore, 1893, 20 R. 712, at pp. 717, 718; Ingram *v.* Russell, 1893, 20 R. 771, at pp. 776, 777.

[4] M'Martin *v.* Hannay, 1872, 10 M. 411; Paterson *v.* Kidd's Trs., 1896, 24 R. 99.

[5] Shiells *v.* Edinburgh, etc., Rly. Co., 1856, 18 D. 1199; Anderson *v.* Glasgow Tramway and Omnibus Co., Ltd., 1893, 21 R. 318.

[6] Shaws *v.* Croall & Sons, 1885, 12 R. 1186; Smith *v.* Wallace & Co., 1898, 25 R. 761. See also Clerk *v.* Petrie, 1879, 6 R. 1076.

[7] Pringle *v.* Bremner and Stirling, 1867, 5 M. (H. L.) 55.

be given an opportunity to amend on such conditions as to expenses as to the Court or Lord Ordinary shall seem proper. If the pursuer refuses to amend, the action will be dismissed. Thus, in actions on the ground of fraud, the averments of fraud must be minute and specific.[1] In actions of filiation, where the defender denies paternity, he is entitled to know when and where the alleged acts of connection took place.[2] The exact words of a warranty must be given,[3] and the special quality warranted,[4] and the particular purpose for which goods are sold.[5] In actions of slander the very words must be given, and the place where and the persons before whom they were uttered,[6] and it will not do to enumerate several persons and aver that the slander was uttered in presence of one or more of them.[7] If the slander requires to be innuendoed, the innuendo must be specifically set forth on record, and not merely in the issue;[8] and if the words complained of are capable of either a defamatory or an innocent meaning, the pursuer must set forth facts and circumstances which will give to the apparently innocent words a defamatory meaning.[9] (See *Summons; Condescendence, supra*, p. 311.)

(iii.) *Procedure.*—When there is a plea of irrelevancy and want of specification, the cause is usually sent to the Procedure Roll, where such plea will either be disposed of or reserved. If the averments are clearly irrelevant or wanting in specification, or both, the Court will either dismiss the case[10] or refuse to allow such averments as are irrelevant to be proved,[11] or give the pursuer an opportunity of amending his record.[12] If the Court is of opinion that the pursuer's averments are relevant and specifically stated, the defender's plea against the relevancy and sufficiency of the averments will be repelled. Sometimes,

[1] Bousted *v.* Gardner, 1879, 7 R. 139, per Lord Justice-Clerk Moncreiff, p. 145, and Lord Young, p. 147; Wright *v.* Guild and Wyllie, 1893, 30 S. L. R. 785; Thomson & Co. *v.* Pattison, Elder & Co., 1895, 22 R. 432, per Lord Low, p. 435, and Lords Dunedin and Kinnear.

[2] Walker *v.* Walker, 1869, 41 Jur. 502.

[3] Robeson *v.* Waugh, 1874, 2 R. 63; Mackie *v.* Riddell, 1874, 2 R. 115.

[4] Rose *v.* Johnston, 1878, 5 R. 600.

[5] Hamilton *v.* Robertson, 1878, 5 R. 839; Dunlop *v.* Crawford, 1886, 13 R. 973.

[6] Walker *v.* Cumming, 1868, 6 M. 318; Broomfield *v.* Greig, 1868, 6 M. 992.

[7] Bisset *v.* Ecclesfield, 1864, 2 M. 1096.

[8] Reid *v.* Moore, 1893, 20 R. 712; Murdison *v.* Scottish Football Union, 1896, 23 R. 449, at p. 463.

[9] Kennedy *v.* Baillie, 1855, 18 D. 138; Brydone *v.* Brechin, 1881, 8 R. 697.

[10] Mone *v.* Anderson, 1842, 4 D. 786; Chiene *v.* Archibald, 1868, 6 S. L. R. 62; Gray *v.* Scottish Society for the Prevention of Cruelty to Animals, 1890, 17 R. 1185; Evans *v.* Stein & Co., 1904, 7 F. 65, per Lord Kinnear, p. 72.

[11] Inglis *v.* National Bank of Scotland, 1909, S. C. 1038.

[12] Robertson *v.* Cockburn, 1875, 3 R. 21.

however, the relevancy of the case is so doubtful, or so bound up with the merits, that it is necessary to have the facts ascertained before deciding upon the relevancy, and accordingly a proof before answer is allowed, which entirely reserves the question of relevancy.[1] (See also *Procedure Roll, supra,* p. 357.)

(i) *Exclusion of Jurisdiction by a Clause of Reference.*—This is a preliminary plea,[2] but it will only be sustained where the clause of reference is legally binding, as in a reference to arbiters to the extent which parties have expressly specified.[3] Where the plea is sustained and the reference exhausts the cause, the action is dismissed.[4] Where the reference is upheld, but does not exhaust the cause, the action is sisted.[5] (See *Jurisdiction Excluded, supra,* p. 154.)

(j) *Declinature.*—Declinature of a Judge has been classified as a species of dilatory defence.[6] It has been pointed out, however, that "a declinature is not a defence of any kind, but, on the contrary, an express refusing to make defences; for it is an intimation by the defender to the Court, or a protestation entered there, that he does not acknowledge its jurisdiction, nor think himself bound to appear before it."[7] Whichever view may be adopted, it may be not inappropriate to consider the question of declinature at this stage. Judges do not judge in a question as to their own declinature.[8] Where, however, there will be no quorum if the Judges declined retired, the objection will be repelled whether in a case of relationship[9] or interest.[10]

[1] Robertson *v.* Murphy, 1867, 6 M. 114; Macvean *v.* Maclean, 1873, 11 M. 506; Gilillan *v.* Lanark County Council, 1902, 9 S. L. T. 432; 10 S. L. T. 274; Jack *v.* Rivet, Bolt, and Nut Co., Ltd., 1904, 6 F. 572; Vallery *v.* M'Alpine & Sons, 1905, 7 F. 640; Bell *v.* Adam & Co., 1907, 44 S. L. R. 775, per Lord Johnston (Ordinary); Cass *v.* Edinburgh and District Tramways Co., 1908, S. C. 841.

[2] Laidlaw *v.* Dunlop, 1831, 9 S. 579.

[3] Calder *v.* Mackay, 1860, 22 D. 741, per Lord Justice-Clerk Inglis, p. 744; M'Cord *v.* Adams, 1861, 24 D. 75; Tough *v.* Dumbarton Waterworks Commissioners, 1872, 11 M. 236; Kirkwood *v.* Morrison, 1877, 5 R. 79; Howden & Co. *v.* Dobie & Co., 1882, 9 R. 758; Savile Street Foundry Co. *v.* Rothesay Tramways Co., 1883, 10 R. 821; Beattie *v.* Macgregor, 1883, 10 R. 1094; Gilmour *v.* Drysdale, 1905, 13 S. L. T. 505; Miller & Son *v.* Oliver and Boyd, 1906, 8 F. 390; Semple *v.* Macnair and Crawford, 1907, 15 S. L. T. 448; Lanarkshire Tramways Co. *v.* Burgh of Motherwell, 1908, 16 S. L. T. 63; Brown *v.* Simpson, 1910, 1 S. L. T. 183.

[4] North British Rly. Co. *v.* Newburgh and North Fife Rly. Co., 1911, S. C. 710.

[5] Macdonald *v.* Macdonald, 1829, 7 S. 765; W. & A. Robertson *v.* Gerrard, 1908, 16 S. L. T. 100.

[6] Stair, i. 39. 14.

[7] Erskine's Inst. iv. 1. 67.

[8] Blair *v.* Sampson, 26th January 1814, F. C. (1814-15, App. 501).

[9] Douglas, Heron & Co., 22nd July 1774, Tait's Acts of Sederunt, p. 644.

[10] Heritors of Canongate, 22nd January 1789, Tait's Acts of Sederunt, p. 644;

(i.) *Interest.*—(a) *General Rule.*—"The general and salutary rule is that no man can be a Judge in his own cause, and that rule, within certain limits, is rigorously applied. The reason of it is obvious, viz. to ensure not merely that the administration of justice shall be free from bias, but that it shall be beyond suspicion. It is subject, however, to qualifications and exceptions. The result of the authorities which were cited to us may be stated as follows:—

"1. As a general rule a pecuniary interest, if direct and individual, will disqualify, however small it may be.

"2. An interest, although not pecuniary, may also disqualify, but the interest in that case must be substantial.

"3. Where the interest which is said to disqualify is not pecuniary and is neither substantial nor calculated to cause bias in the mind of the Judge, it will be disregarded, especially if to disqualify the Judge would be productive of grave public inconvenience."[1]

(b) *Interest Otherwise than Pecuniary.*—This interest must be substantial. Accordingly, where a magistrate was *ex officio* one of the trustees of a public library and the person charged before him was accused of maliciously destroying a cushion in the library;[2] where a man was charged for illegally removing sand which the magistrates of a burgh claimed for the burgh, and one of the magistrates tried the case;[3] where three members of the Sanitary Committee of a Town Council authorised a prosecution of an offence under the Public Health Act and then sat on the bench to try the culprit;[4] where the Judge was one of the Commissioners of Supply who were defenders;[5] where the Lord President of the Court of Session, who was Chancellor of the University of Edinburgh, declined in a cause relating to the validity of testaments in which trustees were directed to found certain scholarships and bursaries in the University;[6] and where two of the Judges were objected to as being members of the board of trustees in an action in which the stampmaster of the board was a party,[7] it was held that there was no disqualification. Again, a Justice of the Peace,

Hercules Insurance Co. *v.* Hunter, 1837, 15 S. 800, at p. 805; Gray *v.* Fowlie, 1847, 9 D. 811, at p. 823.

[1] Wildridge *v.* Anderson, 1897, 25 R. (J.) 27, per Lord Moncreiff, at p. 34.

[2] Wildridge *v.* Anderson, 1897, 25 R. (J.) 27.

[3] Downie *v.* Fisherrow Harbour Commissioners, 1903, 5 F. (J.) 101.

[4] Rae *v.* Hamilton, 1904, 6 F. (J.) 42.

[5] Lord Advocate *v.* Edinburgh Commissioners of Supply, 1861, 23 D. 933, at p. 944.

[6] Sibbald's Trs. *v.* Greig, 1871, 9 M. 399, at p. 403.

[7] Blair *v.* Sampson, 26th January 1814, F. C. Appendix, High Court of Justiciary, 501.

who was a trustee on a sequestrated estate which included a public-house, was held not to be precluded from sitting on the licensing bench;[1] and a magistrate, who was the proprietor of an inn in a burgh, was not thereby disqualified from acting as a licensing magistrate in an application having reference to other premises in the burgh.[2]

(c) *Pecuniary Interest.*—"The circumstance of a Judge being a proprietor, or holding any shares of the capital stock of any of the chartered banks in Scotland, is not a ground of disqualification against his Lordship judging in a question connected with such bank, or wherein it may have any interest;"[3] and "it shall not be deemed a ground of declinature of jurisdiction that the Judge (whether in the Court of Session or in any of the inferior Courts) is a partner in any joint stock company carrying on as its sole or principal business the business of life and fire or life assurance, where such company is a party to the proceeding in which the Judge is called to exercise his jurisdiction; and it shall not be deemed a ground of declinature of jurisdiction that any such Judge is possessed, merely as a trustee, of any stock or shares in any incorporated company, where such company is a party to the proceeding."[4] Accordingly, any Judge who holds a share in a bank other than a chartered bank, or is a partner in a joint stock company carrying on business other than the business of life and fire or life assurance, is disqualified.

Where six Judges in the Court of Session declined in consequence of being policy-holders in a mutual insurance company, which was the defender in a cause, Lord Justice-Clerk Inglis remarked that such a ground of disqualification was "of the most shadowy kind," and appeared to him to be irrational and absurd;[5] and similar remarks were made in the House of Lords in a case where one of the Judges declined as being a shareholder in a railway company which was a party.[6] Nothing, however, has been done by statute to remedy this evil, and the difficulty is usually got over by both parties waiving any objection by a joint minute.

An ordinary director of a chartered bank is still disqualified as a Judge, but not an extraordinary director.[7]

(d) *Similar Prospective Case in which a Judge may have an Interest.*—

[1] Lundie *v.* Falkirk Mags., 1890, 18 R. 60.

[2] Houston *v.* Ker, 1890, 28 S. L. R. 575.

[3] A. S., 1st February 1820; Spiers *v.* Ardrossan Canal Co., 1823, 2 S. 252 (N. E. 221).

[4] Court of Session Act, 1868, sec. 103.

[5] Borthwick *v.* Scottish Widows' Fund, 1864, 2 M. 595, at p. 613.

[6] London and North-Western Rly. Co. *v.* Lindsay, 1858, 3 Macq. 99, at p. 114.

[7] Bank of Scotland *v.* Ramsay, 1738, 5 Brown's Supp. 206.

It is no disqualification that a similar case may arise in the future in which the Judge will be personally involved.[1]

(e) *Judge previously Counsel in the Case.*—It has been held that the fact that a Judge was counsel in the cause before being raised to the Bench is no ground of declinature,[2] although in an early case the Court refused to call upon a Judge to give his vote who declined in such circumstances.[3] In a recent case appropriate to the Bill Chamber, the Lord Ordinary on the Bills orally reported to the First Division that the case was one connected with a series of litigations in which he had acted throughout as counsel, and that in these circumstances he thought it proper to decline, and the Court sustained the declinature and remitted the cause to another Lord Ordinary;[4] and in similar circumstances, where the Lord President transferred the cause to the Senior Lord Ordinary, and during the dependence of the cause a new Junior Lord Ordinary was appointed, who was under no personal disqualification, it was held that the cause did not pass to the new Junior Lord Ordinary, but remained with the Senior Lord Ordinary until retransferred, and that the question of a retransference was in the discretion of the Lord President.[5]

(ii.) *Relationship.*—(a) *Generally.*—By statute, no Judge can adjudicate in the cause of his father, brother, or son, whether by consanguinity or affinity; nor in the cause of his uncle or nephew by consanguinity.[6] It is no ground of declinature that the defender's wife is the sister of the Judge's wife, as the relation is only *affinitas affinitatis;*[7] nor is it a ground of declinature that one of the parties is married to the Judge's niece,[8] or grandniece,[9] or that the Judge is married to the pursuer's wife's aunt.[10] Where, however, the cause is being carried on by the Judge's niece, there is a good ground of declinature;[11] and in a competi-

[1] Belfrage *v.* Davidson's Trs., 1862, 24 D. 1132.

[2] King *v.* King, 1841, 4 D. 124 (note, p. 127); Hall *v.* Hall, 1891, 18 R. 690.

[3] Innes' Representatives *v.* Duke of Gordon, 1827, 6 S. 279, at pp. 294, 295.

[4] Free Church of Scotland *v.* M'Rae, 1905, 7 F. 686; Court of Session Act, 1821 (1 & 2 Geo. IV. cap. 38), sec. 4.

[5] M'Cardle *v.* M'Cardle's Judicial Factor, 1906, 8 F. 419.

[6] Act 1594, cap. 22 (record edition), cap. 212 (12mo edition); Act 1681, cap. 79 (record edition), cap. 13 (12mo edition); Cuninghame, Petr., 1867, 6 M. 120; Moubray's Trs. *v.* Moubray, 1883, 10 R. 460; Sir A. Moncrieff *v.* Lord Moncreiff, 1904, 6 F. 1021.

[7] Binny *v.* Hope, 1687, Mor. 3420; William Dalgairns, 1776, 5 Brown's Supp. 424; Goldie *v.* Hamilton, 16th February 1816, F. C.

[8] Erskine *v.* Drummonds, 1787, Mor. 2418.

[9] Gordon *v.* Gordon's Trs., 1866, 4 M. 501.

[10] Hepburn *v.* Earl of Lothian, 1680, 3 Brown's Supp. 341.

[11] Calder *v.* Ogilvy, 1712, Mor. 197.

tion of brieves as to the succession to an entailed estate, it was held by a majority of the Division, although not a majority of the whole Court, to be a good ground that the second son of one of the claimants had married the Judge's daughter.[1]

Formerly it was not necessary that the party having relationship to the Judge should appear in the cause for his own interest, and it might be a good ground of declinature although he appeared in a representative capacity. Thus, where a Judge's brother-in-law was a mandatary for one of the parties;[2] where a Judge's brother sued as a commissioner of statutory trustees;[3] where a Judge was a trustee of one of the defenders;[4] where a Judge's son was curator to one of the parties,[5] the disqualification held good. In view, however, of the later cases quoted under the head of Interest (*supra*, p. 392 *et seq.*), it seems clear that if there is no ground of declinature where the Judge of a case is himself one of a representative body which is a party to the cause, it follows that there can be no declinature where the Judge who tries the cause is merely related to the party appearing in a representative capacity. It seems, however, to be a matter of degree, and the decisions in the cases quoted in this paragraph may require to be revised in view of the later decisions.

(b) *No Waiver in Cases of Relationship.*—In cases of relationship where there is ground for declinature, it cannot be waived by consent of parties;[6] and it is doubtful whether it can be done in any case in the Justiciary Court.[7]

(c) *Time for Objection.*—All the interlocutors pronounced by and proceedings before a Judge who is related to one of the parties in a case within the degrees mentioned in the statutes of 1594 and 1681 are a nullity,[8] and effect must be given to the objection although not stated till the case is put out for advising in the Inner House.[9] Where, however, a declinature is proponed on the ground of alleged corruption on the part of the Judge, the plea must be taken *in initio litis*.[10]

(12) Peremptory Defences, or Defences on the Merits.—"There

[1] Shaw Stewart *v.* Corbet, 30th May 1820, F. C.; 1 S. at p. 10 (N. E. at p. 7).
[2] Campbell *v.* Campbell, 1866, 4 M. 867.
[3] Commissioners of Highland Roads *v.* Machray, Croall & Co., 1858, 20 D. 1165.
[4] Alexander *v.* Heritors of Kirkaldy, 1840, 12 Jur. 280, at p. 284.
[5] Clyne's Trs. *v.* Clyne, 1847, 19 Jur. 547.
[6] Shaw Stewart *v.* Corbet, 30th May 1820, F. C. (note, p. 146).
[7] Caledonian Rly. Co. *v.* Ramsay, 1897, 2 Adam, 221; 24 R. (J.) 48.
[8] Douglas, Heron & Co. *v.* Earl of Galloway, 1776, 5 Brown's Supp. 424; M'Lean *v.* Muness' Trs., 1776, 5 Brown's Supp. 455.
[9] Ommanney *v.* Smith, 1851, 13 D. 678.
[10] Duke of Athole *v.* Robertson, 1869, 8 M. 299.

is really no difficulty in determining what ought to be deemed a dilatory defence and what should be held to constitute a peremptory defence. Where the defence presents no answer to the pursuer's case, but consists merely in objecting to some irregularity, or some circumstance which may well consist with the pursuer's being entitled to all the relief or advantage which he seeks to obtain by his suit in some other form or at some other time, such a defence I consider to be dilatory; but where a defence is pleaded which professes to show that the plaintiff has no case which entitles him, at any time or in any form, or in any Court, to the object of his suit, such a defence I consider to be clearly peremptory."[1]

Peremptory defences are dependent upon the facts and circumstances of each case, and cannot be fully discussed apart from these facts and circumstances. There are, however, certain general features of some exceptions or defences which may be dealt with, and may prove of some service.

(a) *Res Judicata.*—This is a plea that the substantial merits of the cause have already been decided by a competent Court in an action between the same parties, or parties having a like interest, and consequently should not be again adjudicated upon. The Court is in use to give effect to this plea on the grounds—(*a*) of public policy; and (*b*) that a person should not be subjected to a second action upon the same grounds.[2]

In order that a previous judgment may found a plea of *res judicata* in a subsequent cause the following circumstances must concur:—

(i.) *There must be a Proper Judicial Determination of the Subject in Question.*—Hence a decree in absence,[3] or a decree founded on a compromise,[4] or a decree of dismissal on the ground of incompetency or irrelevancy[5] will not found the plea, nor will the mere opinions of Judges on questions not raised in the previous case, or not concurred in by the majority of the Court.[6] Again, the mere calling of "heirs and representatives" of a person as the sole defenders of an action

[1] Geils *v.* Geils, 1851, 1 Macq. 36, per Lord Chancellor Truro, pp. 39, 40.

[2] Lockyer *v.* Ferryman, 1877, 4 R. (H. L.) 32, per Lord Blackburn, p. 42.

[3] Mackintosh *v.* Smith and Lowe, 1865, 3 M. (H. L.) 6.

[4] White *v.* Lord Morton's Trs., 1866, 4 M. (H. L.) 53; Jenkins *v.* Robertson, 1867, 5 M. (H. L.) 27.

[5] Barclay *v.* Barclay, 1842, 5 D. 394; Gillespie *v.* Russel, 1859, 3 Macq. 757; Duke of Sutherland *v.* Reed, 1890, 18 R. 252; Menzies *v.* Menzies, 1893, 20 R. (H. L.) 108, per Lord Watson, pp. 110, 111; Wallace *v.* Braid, 1900, 2 F. 754. See also Cunningham *v.* Skinner, 1902, 4 F. 1124.

[6] Marquis of Huntly *v.* Nicol, 1896, 23 R. 610; Moubray's Trs. *v.* Moubray, 1896, 23 R. 809.

without naming them is the same as not calling them.[1] In the same way the granting of an *ex parte* application [2] and a judgment by a Court which has no jurisdiction [3] is not *res judicata*.

The affirmation by the House of Lords in an *actio popularis* of part of a judgment which had been withdrawn from its adjudication was held not to constitute *res judicata* in a question with members of the public not parties to the action.[4] Where a trustee rejected a claim as not being properly vouched, and this deliverance was upheld by the Sheriff, it was held that there was no *judicium* as to the merits of the claim.[5] Where a workman claimed compensation under the Workmen's Compensation Act, and failed on the ground of wilful misconduct, he was held to have exercised his option, but, if he had failed on title, he was not barred from raising an action at common law.[6] In an application under the same Act to end or diminish compensation payable to a minor workman, the arbitrator found that the workman had agreed to accept compensation at a certain rate and reduced the amount. The workman thereafter brought an action against his employers for damages for injury at common law and for reduction, on the ground of minority and lesion, of the arbitrator's finding, and the defenders pleaded *res judicata* in respect that the arbitrator's findings in fact were final, but the Court repelled the plea.[7]

A decree by default being a decree *in foro* may become *res judicata*.[8]

(ii.) *The Parties to the Second Cause must be Identical with, or Representative of, the Parties to the First Cause, or their Interests must be the same.*[9]—Under this head it has been held that an *actio popularis* decided against one member of the public is *res judicata* against the rest of the public,[10] and the same defence was upheld where a member of

[1] Pollok *v.* Jones' Heir, 1899, 1 F. 394.

[2] Fulton *v.* Earl of Eglinton and Winton, 1895, 22 R. 823.

[3] Earl of Lauderdale *v.* Scrymgeour Wedderburn, 1910, S. C. (H. L.) 35. See also Pollock *v.* Thomson, 1858, 21 D. 173 ; Hume *v.* Macfarlane, 1908, 16 S. L. T. 123.

[4] Mags. of Edinburgh *v.* Blackie, 1886, 13 R. (H. L.) 78, per Lord Watson, p. 87.

[5] Smith's Tr. *v.* Smith, 1911, S. C. 653, per Lord Skerrington (Ordinary) and Lord President Dunedin.

[6] Burton *v.* Capel Coal Co., Ltd., 1909, S. C. 430.

[7] M'Feetridge *v.* Stewarts and Lloyds, Ltd., 1913, S. C. 773.

[8] Forrest *v.* Dunlop, 1875, 3 R. 15, per Lord Curriehill (Ordinary), p. 16.

[9] Marquis of Huntly *v.* Nicol, 1858, 20 D. 374 ; Earl of Leven *v.* Cartwright, 1861, 23 D. 1038 ; Carmichall *v.* Anstruther, 1866, 4 M. 842 ; Padwick *v.* Stewart, 1874, 1 R. 697 ; M'Caig *v.* Maitland, 1887, 14 R. 295.

[10] Potter *v.* Hamilton, 1870, 8 M. 1064 ; Macfie *v.* Scottish Rights-of-Way and Recreation Society, Ltd., 1884, 11 R. 1094. See also Greig *v.* Mags. of Kirkaldy, 1851, 13 D. 975 ; Jenkins *v.* Robertson, 1867, 5 M. (H. L.) 27, per Lord Colonsay.

the same association, and representing the same interests, as the pursuer in a prior case, sued a similar action.[1] It has also been decided that a judgment in a case where an heir of entail in possession is a party is *res judicata* against subsequent heirs of entail;[2] that a grandfather is representative of his grandson;[3] an apparent heiress of the next heir-apparent;[4] a fiar of a liferenter;[5] a suspender of his cautioner;[6] and an executor of his cautioner.[7] Where a defender was a pursuer in a former action it was held that the first judgment was *res judicata*.[8] It was left an open question whether a judgment that trustees were bound to denude in favour of the children alive at the truster's death would form *res judicata* as against children emerging.[9]

The plea of *res judicata* has been repelled in the following cases:— Where a latent partner had not been sued in a prior action against his firm;[10] a case by a ratepayer where the previous action had been at the instance of Police Commissioners of a burgh within which the property of the ratepayer was situated;[11] proprietors of separate salmon fishings on the same river;[12] creditors individually where the prior action was against the trustee in bankruptcy;[13] an action by a trustee where the prior action was by an individual creditor,[14] or by the bankrupt himself;[15] an action by a trustee's law agent where the prior action was at the instance of the trustee.[16]

In a case where the pursuer had been proved to be of nearer propinquity than the pursuer in a prior action in which the decree was one of absolvitor, it was held that the judgment in the latter case was not *res judicata*.[17]

Unsuccessful actions to establish marriage or legitimacy are not

[1] Gray *v.* M'Hardy, 1862, 24 D. 1043.

[2] Craik *v.* Craik, 1753, 1 Pat. App. 542; Innes *v.* Duke of Gordon, 1831, 9 S. 632; Dickson *v.* Cuninghame, 1831, 5 W. & S. 657; Maule *v.* Maule, 1833, 6 W. & S. 586; Marquis of Huntly *v.* Nicol, 1858, 20 D. 374.

[3] Rutherfurd *v.* Nisbett's Trs., 1832, 11 S. 123.

[4] Gordon *v.* Ogilvie, 1762, 2 Pat. App. 61.

[5] Denovan *v.* Johnstone, 1832, 10 S. 206.

[6] Jeffrey *v.* Brown, 1824, 2 Shaw's App. 349.

[7] Ross *v.* Mackenzie, 1840, 12 Jur. 570.

[8] Megget *v.* Scoular, 1833, 11 S. 661.

[9] Biggar's Tr. *v.* Biggar, 1858, 21 D. 4.

[10] Edinburgh and Leith Shipping Co. *v.* Gillon, 1832, 10 S. 404.

[11] MacArthur *v.* County Council of Argyll, 1898, 25 R. 829.

[12] Duke of Atholl *v.* Glover Incorporation of Perth, 1899, 1 F. 658.

[13] Kirkland *v.* Cadell, 1838, 16 S. 860.

[14] Howden *v.* Rocheid, 1868, 6 M. 300.

[15] Shepperd *v.* Munro, 1829, 7 S. 680.

[16] Laidlaw *v.* Blackwood, 1843, 15 Jur. 484.

[17] Ralston *v.* Rowat, 1833, 6 W. & S. 468.

res judicata as regards descendants attempting to establish the same conclusions.[1]

A decree in a multiplepoinding is *res judicata* against all the parties to the proceedings in which it is pronounced.[2]

In *Teind causes* a final judgment pronounced *in foro* in one locality is *res judicata* in another locality in the same parish where the question in the latter locality has been distinctly presented to the Court and adjudicated upon in the former locality;[3] and a judgment against the common agent in a locality is *res judicata* against all the heritors.[4]

(iii.) *There must be Identity of Subject-Matter.*—It is not sufficient that the same point has previously been determined in former proceedings between the same parties, but it is necessary that the same subject-matter should have been disposed of by the judgment.[5] Thus, where a man raised an action of declarator of marriage on a *de præsenti* acknowledgment, and added at revisal an averment of promise *subsequenti copula* and decree of absolvitor was granted, and he subsequently raised an action of reduction of this decree on the ground of perjury and subornation of perjury and of declarator of marriage *subsequenti copula*, the Court held it to be barred *exceptione rei judicatæ*.[6]

On the other hand, a judgment in mutual actions that one party had a right of pasturing on disputed ground and the other party had only the privilege of walking thereon, did not preclude as *res judicata* a new declarator of a right of property in the ground;[7] and where decree of adjudication of the whole property of a burgh was given in favour of a creditor, it was held not to be *res judicata*, in a ranking and sale, for the magistrates of the burgh to oppose the sale of certain parts of the adjudged property.[8] Again, a decision in 1803 as to the incompetency of certain alterations proposed on a building was held not to

[1] Coutts *v.* Wear, 1914, 2 S. L. T. 86. See also Norris *v.* Gilchrist, 1847, 9 D. 466.

[2] Elder's Trs. *v.* Elder, 1895, 22 R. 505.

[3] Lord Blantyre *v.* Earl of Wemyss, 1838, 16 S. 1009; M'Leay *v.* Sinclair, 1867, 5 M. 976; Elder *v.* Fotheringham, 1869, 7 M. 341; Bonar *v.* Lord Advocate, 1870, 9 M. 58; Cheape *v.* Lord Advocate, 1871, 9 M. 377; Thomson *v.* Lord Advocate, 1872, 10 M. 849; Dundas *v.* Waddell, 1880, 7 R. (H. L.) 19; Maclachlan *v.* Stuart, 1885, 12 R. 1107; Speir *v.* Lord Willoughby de Eresby, 1891, 18 R. 407.

[4] Duke of Buccleuch *v.* Common Agent in Locality of Inveresk, 1868, 7 M. 95; *cp.* Earl of Mansfield *v.* Stewart, 1880, 7 R. 552.

[5] Leith Dock Commissioners *v.* Miles, 1866, 4 M. (H. L.) 14, per Lord Chelmsford, p. 19. See also Robertson *v.* Melville, 1860, 22 D. 893; Mackintosh *v.* Weir, 1875, 2 R. 877.

[6] Lockyer *v.* Ferryman, 1877, 4 R. (H. L.) 32.

[7] Mags. of Dundee *v.* Hunter, 1843, 6 D. 12.

[8] Phin *v.* Mags. of Auchtermuchty, 1827, 5 S. 690 (N. E. 644).

afford a plea of *res judicata*, the building having in 1828 been pulled down, and the question being as to the plan of rebuilding.[1]

(iv.) *There must be Identity of Media Concludendi.*—A *medium concludendi* is a ground of action either in law or in fact.[2]

"The validity of a plea of *res judicata* must necessarily depend upon the pleadings and decision in the previous action and not upon any rights or equities which may have arisen antecedent to the pleadings, or from any extrajudicial communications between the parties. The question always is—what was litigated and what was decided."[3] The manner in which this question should be solved is "to read the whole of the record in each case—summons (or note), averments, and pleas—and grasp the substance of each, and then compare the two."[4]

Where a defender proposed the same counter issues as in a former action by the same pursuer against the same defender, the plea of *res judicata* was sustained;[5] and where the holder of a bill was assoilzied from an action concluding for restitution of the bill on the ground that it was obtained without due value and in collusion with a bankrupt in defraud of his creditors, he was held entitled to plead *res judicata* in an action of reduction on the same grounds and containing the same conclusions.[6]

On the other hand, where there was a general decree not including interest, it was held not to be *res judicata* as regards interest.[7] Where a pursuer asked for interdict and it was refused, an action of damages at his instance against the same defenders on the same facts was held not to be barred by *res judicata*.[8] Where a pursuer was successful in an action of declarator of trust, it was held that he was entitled to sue the trustee for an accounting.[9] Although successive notes of suspension on technical grounds were refused, an action of reduction on the same grounds was held not to be barred by *res judicata*.[10]

A new *medium concludendi* elides the plea of *res judicata*,[11] except

[1] Young *v.* Cuddie, 1831, 9 S. 500.

[2] Earl of Perth *v.* Lady Willoughby de Eresby's Trs., 1877, 5 R. (H. L.) 26.

[3] Edinburgh and District Water Trs. *v.* Clippens Oil Co., Ltd., 1899, 1 F. 899, per Lord Kinnear, p. 909.

[4] Ibid., per Lord President Robertson, p. 907.

[5] National Exchange Co. *v.* Drew and Dick, 1861, 23 D. 1278.

[6] Pattison *v.* Campbell, 1827, 5 S. 208 (N. E. 193).

[7] Graham *v.* Keble, 1820, 2 Bligh, 126; 6 Pat. App. 616.

[8] M'Callum *v.* Forth Iron Co., 1861, 23 D. 729.

[9] Lyon *v.* Reid, 1833, 11 S. 500.

[10] Wood *v.* M'Caul, 1833, 12 S. 50.

[11] Stevens *v.* Stevens, 1882, 9 R. 730; Scott *v.* Macdonald, 1885, 12 R. 1123, per Lord Rutherfurd Clark, p. 1128; Edinburgh and District Water Trs. *v.* Clippens Oil Co., Ltd., 1899, 1 F. 899.

where the new *medium concludendi* is irrelevant,[1] or falls under the head of "competent and omitted."[2]

(b) *Competent and Omitted.*—Where a *defender* has put forward a defence which is unsuccessful, he cannot in a subsequent process challenge the prior judgment on grounds which it was competent to plead in the prior process, but which he omitted to do. In a House of Lords case the plea was thus explained: "I think the *dicta* from institutional writers and the decisions brought before us are conclusive to show that the doctrine of 'competent and omitted' *applies only to defenders* who cannot challenge a judgment regularly pronounced against them, on the ground that there was a defence which it was competent to them, but which they omitted to set up. *With regard to pursuers*, on the other hand, in proceedings of this nature, there may be as many actions of reduction as there are *media concludendi;* a pursuer cannot a second time set up a ground of reduction on which there has been judgment against him. But this is no bar to his bringing a fresh action on a totally different ground of reduction, although both might have been included in the first action."[3] The Court will not, however, permit an undue and excessive accumulation of actions.[4]

Where a defender obtained decree with expenses, and his agent obtained an award of expenses in his own name as agent-disburser, the pursuer presented a note of suspension on the ground that the agent was not a qualified solicitor, but the Court refused the note and upheld the plea of "competent and omitted."[5]

It is not a good defence of competent and omitted that a plea of compensation is not put forward at the time that an award of expenses is made against the party who subsequently pleads compensation.[6]

The undernoted cases may also be referred to.[7]

[1] Earl of Perth *v.* Lady Willoughby de Eresby's Trs., 1877, 5 R. (H. L.) 26.

[2] See next paragraph.

[3] Macdonald *v.* Macdonald, 1842, 1 Bell's App. 819, per Lord Campbell, p. 829. See also Stair, iv. 1. 50; iv. 40. 16; iv. 52. 16; Shand's Practice, p. 652; Gillespie *v.* Russel, 1859, 3 Macq. 757, per Lord Brougham, p. 759; Phosphate Sewage Co., Ltd. *v.* Molleson, 1879, 4 App. Cas. 801, per Lord Blackburn, p. 820; Glasgow Shipowners' Association *v.* Clyde Navigation Trs., 1885, 12 R. 695; Crawford & Co. *v.* Scottish Savings Investment and Building Society, 1885, 12 R. 1033; North British Rly. Co. *v.* Lanarkshire and Dumbartonshire Rly. Co., 1897, 24 R. 564; Glen *v.* Dunlop & Co., 1906, 13 S. L. T. 898.

[4] Bruce *v.* Duncan, 1793, Hume's Dec. 596.

[5] Rennie *v.* James, 1907, 15 S. L. T. 56. See also Ewing *v.* Wallace, 1832, 6 W. & S. 222.

[6] Fowler *v.* Brown, 1915, 2 S. L. T. 297; affd. 1916, 1 S. L. T. 280.

[7] Napier *v.* Carson, 1828, 6 S. 500; Barbour *v.* Grierson, 1828, 6 S. 860; Buchanan *v.* Dunlop, 1829, 8 S. 201; Campbell *v.* Brown, 1831, 9 S. 258; Campbell *v.* Aiken,

(c) *Compensation.*—This defence was introduced by the Act 1592, cap. 61 (record edition), cap. 143 (12mo edition), which provides that any debt *de liquido ad liquidum* may be admitted by way of exception prior to decree, but after decree has been granted cannot be pleaded in a suspension or reduction of the same decree.[1] If pleaded by the debtor in the course of the process and repelled, it may be received either by suspension or by reduction.[2]

Decrees in absence were, in practice, considered as decrees in the sense of the statute, and consequently cut off the plea of compensation where the decrees themselves were not set aside by some legal nullity, or turned into a libel,[3] but this has been doubted since the passing of the Act of Regulations of 1672, cap. 16.[2] Decrees in absence following on a summons against several debtors, however, have been held not to be decrees in the sense of the statute,[4] but an arrestee cannot plead compensation after an extracted decree of furthcoming pronounced in absence of the arrestee.[5]

The reason of the introduction of the Act of 1592 was to prevent unnecessary actions, and accordingly a person pleading compensation must have an active title to sue, and unless he can sue for his debt he cannot plead compensation.[6]

Compensation does not operate *ipso jure*, but must be pleaded and sustained before having any effect.[7] If otherwise well founded the right of compensation, or set-off, is not destroyed by the circumstance that the party pleading it has a cautioner or collateral security for his debt.[8]

In order to plead compensation effectively the *parties* must bear the same jural character to each other in each obligation, and this either by original transaction or by acquired right, and the parties may be indebted to each other either as sole debtors or as co-obligants. In addition the *debts* must be (1) of the same nature; (2) each liquid; and (3) each presently exigible.

(d) *Prescription.*—This is a peremptory plea.[9] Its effect on the

1837, 15 S. 1049; Campbell *v.* Stewart, 1838, 16 S. 632; Robarts *v.* Cuthbert, 1840, 15 Fac. 1488.

[1] Naismith *v.* Bowman, 1710, Mor. 2645; Paterson's Creditors *v.* M'Aulay, 1742, Mor. 2646.

[2] Erskine's Inst. iii. 4. 19.

[3] Wright *v.* Sheill, 1676, Mor. 2640.

[4] Corbet *v.* Hamilton, 1707, Mor. 2642; A. *v.* B., 1747, Mor. 2648.

[5] Cuninghame, Stevenson & Co. *v.* Wilson & Co., 17th January 1809, F. C.

[6] Johnston *v.* Johnston, 1875, 2 R. 986, per Lord President Inglis, p. 997.

[7] Erskine's Inst. iii. 4. 12; Bell's Com. ii. 124; Cowan *v.* Gowans, 1878, 5 R. 581, per Lord President Inglis, p. 584.

[8] Hannay & Sons' Tr. *v.* Armstrong Bros. & Co., 1875, 2 R. 399, per Lord Ormidale, p. 414; 1877, 4 R. (H. L.) 43, per Lord Blackburn, p. 48.

[9] Munro *v.* Tod, 1829, 7 S. 648.

procedure of a cause is explained with great clearness by Lord Justice-Clerk Hope in the case of *Alcock* v. *Easson*.[1] Reference is also made to Millar on Prescription, where the subject is admirably treated.

(e) *Mora*, or delay, is not of itself a defence, unless the delay has been for such a period, and the circumstances are such, that prescription applies.[2] It is, therefore, not a proper separate plea in law,[3] the proper expression of the plea being "the action is barred by *mora*, taciturnity, and acquiescence."[4] The latter must be supported by an averment of facts and circumstances inferring prejudice or acquiescence,[5] and it is a plea to the merits and not a dilatory plea.[6]

(13) The Effect of Defences.—The effect of lodging defences is that litiscontestation then takes place, and any decree pronounced thereafter in the cause is held to be a decree *in foro*.[7] Until the lodging of defences, any decree pronounced is a decree in absence, even though appearance has been entered.[8] Again, although litiscontestation has no effect upon the question whether a civil claim founded on delict or *quasi*-delict transmits against a wrongdoer's representatives,[9] the fact of litiscontestation having taken place is that penal actions, properly so called, which would otherwise not transmit against the wrongdoer's representatives, do transmit against the latter.[10]

[1] 1842, 5 D. 356.

[2] Brisbane's Trs. *v.* Lead, 1828, 7 S. 69; Cooke *v.* Falconer's Representatives, 1850, 13 D. 157; Cook *v.* North British Rly. Co., 1872, 10 M. 513; Mackenzie *v.* Catton's Trs., 1877, 5 R. 313; C. B. *v.* A. B., 1885, 12 R. (H. L.) 36, per Lord Selborne, p. 40.

[3] Bain *v.* Assets Co., Ltd., 1905, 7 F. (H. L.) 104, per Lord Davey, p. 109.

[4] Assets Co., Ltd. *v.* Bain's Trs., 1904, 6 F. 692, per Lord Kinross, p. 705.

[5] Lord Justice-Clerk Inglis in Cowan *v.* Lord Kinnaird, 1865, 4 M. 236, at p. 241; Assets Co., Ltd. *v.* Bain's Trs., 1904, 6 F. 692, per Lord Kinross, p. 705.

[6] Bicket *v.* Morris, 1866, 4 M. (H. L.) 44, per Lord Cranworth, p. 51; Colvin *v.* Johnstone, 1890, 18 R. 115.

[7] Act 1672, cap. 40 (record edition), cap. 16 (12mo edition), article 19; Gow *v.* Henry, 1899, 2 F. 48, per Lord Young, p. 52.

[8] Court of Session Act, 1868, sec. 22.

[9] M'Naughton *v.* Robertson, 17th February 1809, F. C.; Morrison *v.* Cameron, 25th May 1809, F. C.; Davidson *v.* Tulloch, 1860, 3 Macq. 783, per Lord Chancellor Campbell, p. 790; Evans *v.* Stool, 1885, 12 R. 1295; Erskine's Inst. iii. 1. 15.

[10] Stuart *v.* Bute, 1712, Mor. 10351; Graham *v.* Hopeton, 1798, Mor. 5599; Macturk *v.* Greig, 1830, 8 S. 995; Gibson *v.* Barbour's Representatives, 1846, 8 D. 427; Evans *v.* Stool, 1885, 12 R. 1295; Erskine's Inst. iv. 1. 70.

CHAPTER VIII

REVISAL, ADJUSTMENT, AND CLOSING OF THE RECORD

(1) Revisal.—Previous to 1850, the right of revisal on the motion of either party was absolute.[1] By the Court of Session Act of 1850,[2] however, the pursuer might endorse on the defences a consent to the effect that he was willing to close the record upon the summons and defences without any revisal, in which case it was competent for the defender to move the Court for a revisal, and this was a matter entirely within the discretion of the Lord Ordinary. A revisal was usually ordered where the Lord Ordinary was of opinion that the pursuer was trying to evade giving a direct and honest answer to the defences;[3] and when such a revisal was ordered the pursuer was bound to meet the pleadings of the defender.[4]

By the Court of Session Act, 1868, sec. 25, it was enacted that "neither party shall be entitled as a matter of right to ask for a revisal of his pleadings; but it shall be competent for the Lord Ordinary to allow or to order a revisal of the pleadings, after just cause shown."

In one case, where the defenders lodged a separate statement of facts disclosing homologation and adoption, they asked for an order upon the pursuers to answer their statement, and the Lord Ordinary ordered a revisal of the condescendence and defences under the foregoing section. The pursuers, however, in their revised condescendence did not specifically answer the averments on which the defence rested, and when the cause came before the Inner House the Court opened up the record and ordained the pursuer to lodge specific answers to the defenders' revised statement of facts within fourteen days.[5] A general denial of a defender's statement of facts may be quite sufficient,[6] but it is now the practice when a defender lodges a separate statement of

[1] 6 Geo. IV. cap. 120, sec. 9; A. S., 11th July 1828, sec. 105.
[2] 13 & 14 Vict. cap. 36, sec. 3.
[3] Campbell *v.* Campbell, 1863, 1 M. 217, per Lord Ardmillan, p. 220.
[4] Cruickshank *v.* Fairlie, 1863, 1 M. 928.
[5] Reid *v.* Reid's Trs., 1887, 14 R. 770.
[6] Campbell *v.* Campbell, 1863, 1 M. 217.

facts to ordain the pursuer, either on his own or the defender's motion, to answer the same specifically within a specified time.[1]

Where a motion for revisal is granted and the time given for such revisal has elapsed, or where no motion for revisal is made, or where such a motion is refused, the cause is put to the Adjustment Roll in the usual way.[2] (See *Adjustment Rolls, supra*, p. 353 *et seq.*)

(2) ADJUSTMENT.—At adjustment, any conclusion or averment which is clearly incompetent may be ordered to be struck out,[3] and any scandalous and impertinent averments will be deleted.[4]

For further consideration of Adjustment of Record and Issues, see *Adjustment Rolls, supra*, p. 353 *et seq.*

(3) CLOSING.—After the record has been adjusted the Lord Ordinary closes the record. It is not necessary that it be authenticated by counsel as adjusted or closed, whether by minute of assent or otherwise, but such record shall be closed by interlocutor of the Lord Ordinary before whom the process depends.[5] The adjustments made on record must, however, be written on the principal record and initialed by counsel.[6] The interlocutor closing the record is held to be an appointment to print the same, unless the contrary is expressed in the interlocutor;[7] and the record is printed by the pursuer at the joint expense of parties.[8] The number of copies printed, unless it be otherwise ordered by the Lord Ordinary, shall afford thirty copies to the pursuer or pursuers, or, in the case of a multiplepoinding, thirty copies to each claimant, or set of claimants uniting in a claim; and thirty copies to the defender or defenders, where uniting in one defence; and where separate defences are given in, thirty copies to each defender or set of defenders giving in a separate defence; and the expense of printing shall be divided amongst the parties in the same proportion.[8]

In one case, where the question involved in the preliminary defences was the competency of the action, the Lord Ordinary, of consent, dispensed with printing.[9]

As to prints of the closed record, see *Procedure Roll*, (b), *supra*, p. 357.

[1] A. *v.* B., 1899, 36 S. L. R. 533.

[2] Court of Session Act, 1868, sec. 26.

[3] Heriot-Hill *v.* Heriot-Hill, 1906, 14 S. L. T. 182.

[4] Paton *v.* Clydesdale Bank, 1896, 33 S. L. R. 533, per Lord Watson, p. 535; Thomson *v.* Landale, 1897, 5 S. L. T. 204; Heriot-Hill *v.* Heriot-Hill, 1906, 14 S. L. T. 182; M. *v.* S., 1909, 1 S. L. T. 192; Oliver *v.* Borland, 1911, 2 S. L. T. 46; *cp.* Shaw *v.* Craig, 1916, 1 S. L. T. 116.

[5] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 5.

[6] Dalrymple *v.* Turner, 1901, 8 S. L. T. 437.

[7] A. S., 5th February 1861, sec. 7.

[8] Ibid., sec. 8.

[9] Walker and Others *v.* Crawford and Another, 1902, 10 S. L. T. 362.

At closing the record, the Lord Ordinary shall require the parties to state whether they renounce probation; and *if the parties shall renounce probation*, the Lord Ordinary shall, in respect thereof, appoint the cause to be debated in the Debate (now the Procedure) Roll, and it shall forthwith be enrolled in the said roll by the Lord Ordinary's clerk —without prejudice to the Lord Ordinary or the Inner House ordering proof, *ex proprio motu*, at any after-stage of the cause, if they shall deem proof to be necessary for the purpose of enabling the Court to do complete justice between the parties, subject to such conditions as to expenses as shall seem just.[1] If the parties renounce probation, it would seem that neither party will be allowed to open up the record in order to make new averments with a view to a proof except the justice of the case demands it.[2]

If the parties, or any of them, do not renounce probation, the Lord Ordinary shall require them to state what proof they propose; and if parties are agreed that proof is necessary, and as to what proof ought to be allowed, the Lord Ordinary, if himself satisfied of the propriety of the proof proposed, shall appoint the same to be taken.[3]

If the parties are at variance as to whether there shall be proof, or as to what proof ought to be allowed, or if they or any of them shall maintain that one or more of the pleas stated on record should be disposed of before determining on the matter of proof, the Lord Ordinary shall appoint the cause to be enrolled in the Procedure Roll.[4] (See *Procedure Roll*, *supra*, p. 357.)

Where the case is one for decision by experts, the Lord Ordinary, at the closing of the record, may of consent,[5] or on the motion of either party,[6] remit *primo loco* to a man of skill to report upon the question at issue.

Where the action is one for the recovery of a law agent's judicial account of expenses, the Lord Ordinary, at the closing of the record, remits the account, if employment is not denied, to the Auditor of the Court of Session to tax and report.[7] In one case, where law agents

[1] A. S., 10th March 1870, sec. i. (1); C. A. S., C, ii. 4 (*a*).

[2] Carswell & Son *v.* Finlay, 1887, 24 S. L. R. 643.

[3] A. S., 10th March 1870, sec. i. (2); C. A. S., C, ii. 4 (*b*).

[4] Ibid., sec. i. (3); C. A. S., C, ii. 4 (*c*).

[5] M'Donald, etc., 1882, 10 R. 172.

[6] Lord Blantyre *v.* Glasgow, Paisley, and Greenock Rly. Co., 1851, 13 D. 570; Smith Bros. & Co. *v.* Scott, 1875, 2 R. 601, per Lord Justice-Clerk Moncreiff, p. 608; Quin *v.* Gardner & Son, 1888, 15 R. 776, per Lord Shand, p. 780; Dykes *v.* Allanshaw Coal Co., 1894, 1 S. L. T. 530; Broxburn Oil Co., Ltd. *v.* Morrison, 1903, 5 F. 694.

[7] Hamilton *v.* Brown, 1890, 17 R. 505.

raised an action for payment of several accounts and part of the defence was a denial of employment, the Court, before answer, remitted to the Auditor, as Auditor, Accountant, and Commissioner, "to examine the accounts in process and hear parties thereon," and granted diligence against havers for recovering all books and writings, "reserving the pleas of parties *quoad ultra* entire."[1]

Accordingly, the different motions at the closing of the record are (1) to close the record and send the case to the Procedure Roll; (2) to close the record and fix a diet of proof; (3) to close the record and order issues within eight days; (4) to close the record and remit to a man of skill; and (5) to close the record and remit to the Auditor of Court.

If, within four days from the date of the interlocutor closing the record, the agent for the pursuer, or the party appointed to print the record, fails to lodge with the Clerk of the Process two printed copies of the record as finally adjusted and closed, the cause shall be deleted from the Debate or Procedure Roll, and shall be restored to the roll only on a motion made to the Lord Ordinary by any party to the cause lodging the said two printed copies as aforesaid; and if none of the parties move the Lord Ordinary to restore the cause to the roll, and lodge the two printed copies within twenty-one days of the date of the interlocutor closing the record, the Lord Ordinary shall pronounce an interlocutor dismissing the action, and finding neither party entitled to expenses, which interlocutor can only be recalled by a reclaiming note.[2] (See *Procedure Roll*, (b), *supra*, p. 357.)

[1] Campbell *v.* Ewing, 1832, 11 S. 143.

[2] A. S., 2nd November 1872, sec. v.; C. A. S., C, ii. 6.

CHAPTER IX

PRODUCTIONS

(1) With Summons and Defences.—It is still the practice for parties to produce, along with the summons and defences, the deeds or writings on which they respectively found, so far as the same are in their custody or within their power;[1] and a pursuer is bound to produce the deeds on which he founds in his libel so far as they are in his custody or within his power when called upon by the defender so to produce them.[2] Although it is no longer competent to object to the production of a writing after the record is closed, on the ground that it was in the possession or under the control of the party producing it at the closing of the record, the Court may find the party so producing it liable in expenses, or attach other conditions to its reception.[3]

The duplicate inventory of process in each case must be kept written up, from time to time, by the agent of the party lodging the productions at the time of lodging the same. The number of each production in the process must be marked opposite its number in the inventory of production by the agent when he lodges the same.[4]

In a recent action of multiplepoinding raised by testamentary trustees to obtain a decision on certain questions relating to the succession to the testator's estate, one of the claimants moved the Lord Ordinary to ordain the trustees to print the testamentary writings referred to on record, but the Lord Ordinary refused the motion.[5]

(2) Proof.—By Act of Sederunt, 31st May 1902, it was enacted that in all defended causes all documents, plans, maps, models, and other productions which are intended to be used or put in evidence at the proof must be lodged, according to inventory, with the Clerk of Court at his office in the Register House, *on or before the fourth day prior to the day appointed for the proof*, and notice of the lodging thereof

[1] Court of Session Act, 1825 (6 Geo. IV. cap. 120), sec. 3.

[2] Independent West Middlesex Fire and Life Assurance Co. *v.* Cleugh, 1840, 2 D. 1053; Western Bank *v.* Baird, 1863, 2 M. 127.

[3] Court of Session Act, 1868, sec. 99.

[4] A. S., 15th July 1909, sec. v.; C. A. S., A, iii. 10.

[5] King's Trs. *v.* Ramsay, 1911, 2 S. L. T. 376.

shall at the same time be sent to the agent of the opposite party; and no other production shall be used in evidence at the proof, unless by permission of the Judge presiding thereat, on cause shown to his satisfaction, and on such terms, as to expenses or otherwise, as to him shall seem proper.

In a case where documents essential to the defender's case had been searched for under diligence, but could not be discovered for lodging four days before the proof, the Court allowed the documents, which were found on the eve of the proof, to be put in evidence, and, in respect that the defenders did not know, and had no reason to know, of the existence of said documents, made no condition as to expenses.[1]

In a recent case, where a Sheriff's decision turned mainly on a matter which had not been raised in the pursuer's pleadings, and on which no evidence had been led at the proof, but which had appeared for the first time in evidence given by two aged witnesses who were examined on commission after the proof taken in Court had been concluded, the defender appealed to the Court of Session, and the Court allowed the proof to be opened up, and admitted a document which had been discovered after the proof, and which had a material bearing on the point raised by the aged witnesses' testimony.[2] Where, however, the report of an analysis was not lodged in process four days before the proof, but the pursuer adduced a witness who had arrived in Edinburgh from abroad with the report on the Saturday before the proof, which was on a Tuesday, to prove the report, and asked to be allowed to lodge it in process, the Lord Ordinary refused, especially as it had not been communicated to the defenders on the Monday.[3] Where a plan, the property of the Advocates' Library, had not been lodged within the statutory period, but intimation had been given of the intention to use it, the Lord Ordinary allowed its use.[4]

In cross-examining a witness, who was not a party to the cause, in order to test his credibility, it was held competent to put in a document under his own hand which contradicted his evidence, but which had not been lodged within the statutory period.[5] In the same way, under the old practice, which required the production of documents before the closing of the record, a letter referred to for the first time during a proof was allowed to be put in evidence by the defender, though it had

[1] Campbell *v.* Jamieson, 1902, 10 S. L. T. 393.
[2] Coul *v.* Ayr County Council, 1909, S. C. 422.
[3] Schiltz & Co. *v.* Macfarlan & Co., 1903, 10 S. L. T. 579.
[4] Baird's Trs. *v.* Leechman, 1903, 11 S. L. T. 200.
[5] Paterson & Sons *v.* Kit Coffee Co., Ltd., 1908, 16 S. L. T. 180.

been all along in his possession, as it was necessary to meet a point made for the first time in the course of the pursuer's proof.[1]

At the hearing on evidence it is only competent to refer to documents which have been put to witnesses or admitted of consent; any other document included in the inventory must be struck out.[2]

Previous to the passing of the aforementioned Act of Sederunt it was held that as there was no statutory incompetency in the Court allowing a document or title to be put in after the party who founds on it has closed his proof, it was a matter entirely in the discretion of the Court; and where the matter was one of the merest formality, the Court allowed the document to be lodged.[3] Such a matter is still in the discretion of the Court.

(3) Jury Trial.—All plans, maps, models, or other such productions proposed to be used at the trial of a cause, and all writings which are meant to be put in evidence, must be lodged eight days before the trial with the Clerk of Court, at his office in the Register House, if the trial is to be in Edinburgh, and either with the said clerk, or with the Sheriff-Clerk of the county town where the trial is to be held, if the cause is to be tried on the Circuit; and the lodging thereof shall be at the same time intimated in writing to the opposite agent; and no other productions shall be allowed to be used at the trial, unless of consent of parties, or by permission of the Court, on its being made out on oath, to the satisfaction of the Court, that such productions could not be lodged eight days before the trial, nor before the period at which they are actually produced or exhibited to the opposite party, and that notice to the opposite party had been given of the particular item proposed in such case to be produced.[4]

These provisions apply to cases tried of consent of parties by the Lord Ordinary without a jury,[5] or by arbiters sitting as a jury under the Court of Session Act, 1850.[6]

Uncertified excerpts from a register of shareholders and a minute-book of directors, which the opposite party refused to admit, lodged eight days before a jury trial, have been held not sufficient notice that the originals could not be lodged in time, and the originals and excerpts were not admitted.[7] Again, where excerpts from a minute-book were

[1] Irvine *v.* Irvine, 1857, 19 D. 284.

[2] Neill's Tr. *v.* British Linen Co., 1897, 5 S. L. T. 164.

[3] Universal Stock Exchange Co., Ltd., Liquidator of, *v.* Howat, 1891, 19 R. 128.

[4] A. S., 16th February 1841, secs. 18 and 19; C. A. S., F, i. 10; Cameron *v.* Cameron's Trs., 1850, 13 D. 412.

[5] 13 & 14 Vict. cap. 36, sec. 46. [6] Ibid., sec. 50.

[7] Whitehaven and Furness Rly. Co. *v.* Macfadyen, 1849, 11 D. 846. See also Carricks *v.* Saunders, 1850, 12 D. 922.

taken at the sight of a commissioner and lodged in process eight days before the trial, and no notice was given of the intention to produce the minute-book, it was held that the minute-book could not be received in evidence.[1] Where, however, a law agent who refused to produce a volume of scroll deeds under a commission and diligence, but allowed excerpts to be taken therefrom, brought the volume to the trial for collation with the excerpt, the latter was allowed to be put in evidence though the original volume was not lodged eight days before the trial.[2]

(4) Public Registers.—It is not an inflexible rule that documents to be founded on at a proof or trial must be lodged in terms of the foregoing Acts, and the rule does not apply to public registers unless the ends of justice absolutely require it. Extracts are quite sufficient to be lodged; the originals can be produced at the proof or trial by the proper custodier on a proper application being made.[3] The following are the provisions for obtaining a warrant for the production of original documents from public records:—

No party or parties to any action shall, by diligence or otherwise, obtain from the keeper of any public record production of the originals of any register or deed under his custody except as after provided—

(*a*) To obtain production of such originals, application shall be made to the Court or the Lord Ordinary on the Bills during vacation, and that after due notice of such application shall be made in writing to the keeper in charge of the originals.

(*b*) If it shall appear to the Court, or the said Lord Ordinary, that it is necessary for the ends of justice that such application should be granted, authority shall be given to such keeper to exhibit to the Court or the jury before which the cause is to be tried, the original registers or deeds, and that in the hands of an officer to be selected by the said keeper.

(*c*) The expense attending the transmission and exhibition of such original registers or deeds shall be defrayed, in the first instance, by the party or parties on whose application they are exhibited.[4]

When keepers of records, or clerks of inferior Courts, produce such registers, etc., they should produce them with a signed inventory, so as

[1] Great Northern Rly. Co. *v.* Inglis, 1850, 12 D. 1194; 1852 (H. L.), 24 Jur. 434.

[2] Wilson *v.* Glasgow and South-Western Rly. Co., 1851, 14 D. 1.

[3] A. S., 16th February 1841, sec. 20; A. S., 16th July 1859; C. A. S., B, ii. 4; Cochrane *v.* Ferrier, 1859, 21 D. 749; Maclean *v.* Maclean's Trs., 1861, 23 D. 1262.

[4] C. A. S., B, ii. 4.

to avoid the expense of adducing them as witnesses to the fact that the registers, etc., were so produced by them.[1]

(5) Processes from Another Court.—If a process from another Court requires to be lodged in process, a warrant may be granted for the transmission of such process in order to be produced at the proof or trial and thereafter redelivered.[2] (See also *Proof and Jury Trial, infra*, Part vi. Chaps. vi. and viii.)

[1] Morris *v.* Brymer, 1854, 16 D. 869.
[2] C. A. S., B, ii. 5.

CHAPTER X

BORROWING PROCESS AND PROCESS CAPTION

(1) Borrowing Process.—(a) *Generally.*—No one is entitled to borrow processes or papers except those who are legally entitled to act as agents or solicitors in the Court of Session, their clerks and apprentices, and the Clerks of Court or of the Bill Chamber shall not lend papers or processes to any other.[1] In special circumstances, the First Division, in the exercise of its *nobile officium*, allowed certain documents and models produced by the complainers in a note of suspension and interdict to be borrowed for the purpose of transmitting them to the English Courts, where a similar action by the same complainer was being tried, on the undertaking that the productions would be returned to process in time for a hearing.[2] In an early case the Court, on the motion of the Lord Advocate, prohibited the Clerk to the Process from delivering up or lending to either party to the cause certain productions after final judgment had been pronounced.[3]

When borrowed, the process or steps of process must be returned whenever the case is on the roll. In jury trials all processes and productions borrowed must be delivered back to the clerks in the Register House *two* days before the trial if the cause is to be tried in Edinburgh, and *six* days before the trial if the cause is to be tried on the Circuit.[4]

The regulations as to borrowing the summons on entering appearance have already been dealt with under the heading of *Appearance*, *supra*, p. 367.

(b) *Duty of Clerks to the Process.*—The clerks are not allowed to give up writs except on receipt.[5]

The clerks shall (except as after mentioned) receive back no process, or part of a process, without at once either comparing it with the principal inventory and receipt in presence of the agent or his clerk, and scoring the receipt; or, in the case of a partial return,

[1] A. S., 21st December 1833.
[2] United Telephone Co., Ltd. *v.* Maclean, 1882, 9 R. 710.
[3] Officers of State *v.* Earl of Stirling, 1833, 11 S. 625.
[4] A. S., 16th February 1841, sec. 23; C. A. S., F, i. 13.
[5] A. S., 20th November 1711, sec. 7; A. S., 19th December 1778.

marking on the principal inventory the numbers so returned; or otherwise, if the whole numbers borrowed be not then returned, or if the process be bulky so that it cannot, at the time, be conveniently examined, the clerks shall not receive back such process, or part of a process, without a separate slip or note accompanying the same, dated and signed or initialed by the agent or his clerk, specifying the numbers so returned; and it shall be the duty of the clerk, in all cases where he receives back a process, or part of a process, without at once scoring the receipt, or making a marking on the inventory as aforesaid, as the case may be, to examine the same before the close of the following day at latest, and to give notice to the agent of any inaccuracy, if there be such, in the slip or note aforesaid; and if no notice to the agent be delivered or put into the post office in the course of such following day, stating that such slip or note is inaccurate, the accuracy thereof shall be presumed, and the agent shall be equally exonered as if the receipt had been scored, or a marking made as aforesaid.[1]

(c) *Duty of Agent.*—In addition to the principal inventory and separate inventories of productions a full inventory, with corresponding numbers, but in a consecutive form, to be called *duplicate inventory*, shall be provided and kept, in which shall be entered each step of process, including each production. The principal inventory and all separate inventories shall at all times remain with the Clerk to the Process, and be accessible in his hands only; and it shall be the duty of the agent, who is at present bound to lodge a process inventory, to provide and lodge at the same time the above duplicate inventory, which duplicate shall at all times accompany the process, when borrowed and returned, and when sent to avizandum; and it shall be the duty of the agent returning the process to keep such duplicate inventory complete, by adding thereto, on each occasion, the additional pleadings and productions lodged for his client—the agent being in all cases entitled, in respect of such duplicate inventory, to the same copying fees, according to the length, which he would otherwise be entitled to under existing regulations in respect of copying a process inventory or inventory of productions.[2]

It shall be the duty of the agent returning the whole or any part of a process to see that, in all cases, the numbers so returned are previously arranged in their regular order according to the inventory, and the clerk may refuse to receive any process, or part of a process,

[1] A. S., 7th July 1858, sec. ii.; C. A. S., A, iii. 22.
[2] Ibid., sec. i.

the numbers of which are not so arranged. The business of each agent or his clerk shall, in all cases, be attended to in the order in which they enter the office.[1]

These regulations apply to Bill Chamber cases and procedure, and to the Clerk or Clerks to the Bills.[2]

It was observed in an early case that where a part of a process is returned, the clerk ought to expunge the original receipt, and take a new one for those papers which are retained.[3]

(d) *Steps of Process not Borrowable.*—Neither the principal copy of issues, or of counter issues, after authentication,[4] nor the interlocutor sheet,[5] nor the principal inventory or any of the separate inventories[6] can be borrowed.

The principal summons cannot be borrowed except in order to enter appearance, to make adjustments or amendments, or to do diligence.[7] A petition for sequestration may, however, be borrowed for the purpose of registration.[7]

(e) *Unextracted Processes.*—Every unextracted process, on the expiration of one year from the date of the last interlocutor pronounced in the cause, is transmissible to the department of the Lord Clerk Register, and once in each year the Clerks of Court transmit such processes.[8]

No process or part of a process shall be allowed to be borrowed by any person while the process remains in the custody of the Lord Clerk Register and his deputies and assistants; but when any person having interest desires to borrow any process or part of a process in such custody, he shall be entitled to have the process retransmitted to the Clerk of Court to which such process belongs.[9]

Every enrolled law agent or other person in possession of steps of process or productions belonging to unextracted processes is required to return the same to the Lord Clerk Register without payment of any fee therefor, and such steps of process or productions must be accompanied by a short note in the following form:—

On the . . day of . . I, *A. B.* [*name and designation of person making the return*], do hereby return to the department of the Lord Clerk Register numbers [*here specify the numbers marked by the Clerk of Court on the*

[1] A. S., 7th July 1858, sec. iii.; C. A. S., A, iii. 23.
[2] Ibid., sec. iv.
[3] Dunlop *v.* Hay, 1822, 2 S. 11 (N. E. 9).
[4] A. S., 15th July 1909, sec. vi.; C. A. S., A, iii. 21.
[5] A. S., 24th December 1838, sec. 11.
[6] A. S., 7th July 1858, sec. i.
[7] A. S., 11th July 1828, sec. 104; C. A. S., A, iii. 20.
[8] A. S., 22nd January 1876, secs. 2 and 3; C. A. S., A, v. 1 and 2.
[9] Ibid., secs. 6 and 7; C. A. S., A, v. 5 and 6.

papers returned, but without any further description] of the process *A. B.* versus *C. D.* [*name and designation of the pursuer and defender, or the leading pursuer and defender*].

[*Signature of person making return.*]
[*Signature of Register House official.*]

The officer of the department receiving the same, if satisfied with the accuracy of the note, subscribes the same, and the person making the return is discharged without the necessity of scoring any borrowing receipt.[1]

(2) Process Caption.—(a) *Definition.*—A process caption is a summary warrant of incarceration granted on the application of the Clerk to the Process for the purpose of compelling the party in whose name the receipt for a borrowed process stands, or who has carried away a process without consent and permission, to return the same to the custody of the clerk.

(b) *Process in Borrower's Possession on a Receipt.*—Process caption may be issued by the Clerk of the Process at the instance of the party wishing the process,[2] or it may be issued at the instance of the clerk himself.[3] When an agent obtains a process upon his borrowing receipt, it is not usual for the latter to contain the date when the process is to be returned. Accordingly, it is the practice for an agent requiring the process to send an intimation to the borrower requiring him to return the process within forty-eight hours.[4] If this request is not attended to, the agent desiring the process moves the Clerk to the Process to issue caption. The Clerk to the Process then marks on the inventory of process that caption has been craved, and intimates this to the borrower, requesting the return of the documents within forty-eight hours. If this request is unheeded, a complaint is made out by the clerk and presented to the Court in the following terms:—

Complains *A. B.*, one of the Depute-Clerks of Court, upon Messrs. *C. & D.*, W.S.; and Mr. *C.* and Mr. *D.*, the individual partners of said firm; and *E.*, their apprentice [*or* clerk, *as the case may be*], for not returning the process [*or* Nos. of the process] *in causa F.* v. *G.*, for which the said *C. D.* and *E.'s* receipt stands.

(*Sgd.*) *A. B.* , D.C.S.

A warrant is thereupon granted in the following terms:—

Edinburgh [*date*]. The Lord Ordinary grants warrant to macers of Court

[1] A. S., 22nd January 1876, sec. 10; C. A. S., A, v. 9.
[2] A. S., 11th July 1828, sec. 34; C. A. S., C, i. 14.
[3] Watt *v.* Thomson, 1868, 6 M. 1112; 1870, 8 M. (H. L.) 77. A. S., 11th July 1828, sec. 104; C. A. S., A, iii. 24.
[4] Watt *v.* Ligertwood, etc., 1874, 1 R. (H. L.) 21, per Lord Chancellor Cairns, p. 23.

to apprehend and incarcerate the persons of the said *C.*, *D.*, and *E.*, aye and until they return the said process [*or* Nos. of said process], with expenses of caption. [*Signature of Judge.*]

This warrant is executed by a macer of Court, who may apprehend and imprison the agents in whose name the process was borrowed if the papers are not delivered to him. Although it is the practice to direct the complaint against the clerk or apprentice as well as his employer, it is not usual to execute the warrant against the former.

(c) *Process Illegally in Borrower's Possession.*—Where the process has not been lent upon a borrowing receipt, but has been abstracted illegally, or is in the borrower's hands against the wish of the Clerk to the Process, it is not necessary to give any warning whatsoever before applying for the warrant.[1] Whenever a writ has been presented to the Court it is *in manibus curiæ*, and accordingly cannot be taken away by the party presenting it, or by any other party, except on a borrowing receipt.[2]

(d) *Lapse of Time.*—A process caption will not be issued after a long lapse of time from the date of borrowing. Thus, where a receipt for a borrowed process was granted in 1797, it was held to be improper to put a caption in force in the year 1825;[3] and, in the same way, the Court refused to issue a process caption at the instance of a private party against an agent after the lapse of twenty years.[4]

(e) *Damages for Illegal Process Caption.*—If process caption has been illegally raised, the agent who has instructed the caption to be issued is liable in damages,[5] and his client is equally liable.[6] If malice or irregularity is relevantly averred against the Clerk to the Process, or the officer who executes the warrant, an action of damages will lie, but not against the Judge if he acts judicially,[7] or against the officer if his warrant is in order.[8] In one case it was held that, although the process had been returned half an hour before the borrower had been arrested, there were circumstances that made the latter blamable for his own incarceration.[8] In another case it was held that as the defenders had acted *in bonâ fide*, and as the pursuer was guilty of negligence in not intimat-

[1] Watt *v.* Thomson, 1868, 6 M. 1112; 1870, 8 M. (H. L.) 77; 1871, 11 M. 960; 1874, 1 R. (H. L.) 21, per Lord Chancellor Cairns, p. 23, and Lord Chelmsford, p. 25.
[2] Thomsons *v.* Mags. of Montrose, 1825, 3 S. 600 (N. E. 423).
[3] Horne *v.* Steele, 1825, 3 S. 550 (N. E. 380).
[4] M'Leod *v.* Hill, 1826, 5 S. 1.
[5] Hunter *v.* Kerr, 1842, 4 D. 1175.
[6] Pearson *v.* Anderson, 1833, 11 S. 1008, per Lord Justice-Clerk Boyle, p. 1010.
[7] Watt *v.* Thomson, 1868, 6 M. 1112; 1870, 8 M. (H. L.) 77.
[8] Pearson *v.* Anderson, 1833, 11 S. 1008.

ing the return of the process, he was not entitled to recover;[1] and where a party was entrusted with papers in the Sheriff Court to return them to that Court, and deposited them in the Court of Session and pleaded the possession of the Court of Session as a reason why he should not obey the order of the Sheriff Court to return them, he was held not to be entitled to damages for imprisonment under a process caption.[2]

(f) *Process Lost by Borrower.*—Where a process has been lost, or is beyond the power of the borrower to return, the Court will not allow a process caption to be enforced by imprisonment, but will suspend the caption on caution being found by the borrower to recoup any loss that can be legally claimed in the action, and on account of the loss of the process, together with the expenses incurred thereanent.[3] Moreover, the party against whom the warrant has been issued in an inferior Court must first apply to the Judge of the inferior Court for redress before coming to the Court of Session for a suspension.[4] If no caution or consignation is offered, the suspension will be dismissed,[5] except in such a case as where the party borrowing has done so without the authority of the party in whose name the process has been borrowed.[6]

(g) *Caveat.*—The Court will not stay the issuing of a process caption merely upon a *caveat* being lodged and a statement by counsel at the bar.[7]

[1] Menzies *v.* Stevenson & Co., 1839, M'Farlane's Jury Trial Reports, 281.
[2] Scott *v.* Curle, 1840, 2 D. 348; affd. 1841, 2 Robinson's App. 317.
[3] Livingston *v.* Beveridge, 1831, 10 S. 52.
[4] Johnstone *v.* Dunn, 1839, 1 D. 567.
[5] Ibid., per Lord Glenlee, p. 569.
[6] Roy *v.* White, 1834, 13 S. 108; Black *v.* White, 1834, 13 S. 134.
[7] Patrick, etc., Applicants, 1854, 26 Jur. 459.

CHAPTER XI

THE RECORDS

(1) Process Paper.—All summonses, or other initial writs, and every step of process, shall be written on process paper; or, if printed or typewritten, shall be so printed or typed on paper of a texture not less durable than process paper, and of a like size.[1]

(2) Backing.—All steps of process shall be folded and backed up lengthwise with backings of cartridge paper or material of similar durability.[2]

(3) Printing—Type and Marginal Letters.—All papers printed for the use of the Court shall be printed in type not smaller than that known as "English," and shall have alphabetical reference letters printed on the outer margin.[3]

(4) Form of Printing Condescendence and Answers.—In all causes, wherever the condescendence and answers, as revised and finally adjusted for the record, shall be printed, this shall be done so that the answer to each article of the condescendence shall follow, and be subjoined to the article of the condescendence to which it relates.[4]

(5) Distinctive Letter on Separate Prints.—A distinctive letter of the alphabet (A, B, C, etc.) shall be printed in large heavy type on the front page, and on the backing of every print boxed to the Court, so that in each process the letters thus printed shall follow consecutively. Any print without such lettering shall not be received by the boxing clerks.[5]

(6) Interlocutor Sheets.—All interlocutor sheets when lodged shall contain at least two sheets (eight pages) of process paper.[6]

(7) Writs on which Interlocutor has to be Signed.—Every petition, note, principal copy issues, or counter issues, and the like, on which any interlocutor or order falls to be written for signature, shall, if typewritten or printed, have annexed a sheet of process paper on which such interlocutor, order, or verdict may be written and signed.[7]

[1] C. A. S., A, iii. 1. [2] Ibid., 2. [3] Ibid., 3.
[4] Ibid., 4. [5] Ibid., 5. [6] Ibid., 6. [7] Ibid., 7.

(8) Lost Interlocutor Sheets.—Sec. 15 of the Court of Session Act, 1868, is amended to the effect that said section shall apply to lost interlocutor sheets as well as to the writs or pleadings therein enumerated.[1]

(9) Inventories of Process.—Every inventory of process and duplicate inventory of process shall, when lodged, contain at least two sheets (eight pages) of process paper.[2]

(10) Duplicate Inventory of Process.—The duplicate inventory of process in each case shall be kept written up, from time to time, by the agent of the party lodging the steps of process or productions at the time of lodging the same. The number of each production in the process must be marked opposite its number in the inventory of production by the agent when he lodges same.[3]

(11) Productions of More than One Sheet.—Each production, consisting of more than one sheet, must be securely stitched together, and backed up by the agent lodging same.[4]

(12) Time to be Fixed for Giving in Papers.—In all interlocutors ordering or allowing papers from both or either of the parties, a time shall be fixed for giving in the same, with due regard always to the nature and circumstances of the case; which time may be prorogated, provided, before the lapse thereof, special application, by note or otherwise, shall be made for such prorogation; and no prorogation shall, in any instance, be granted, except on cause shown, nor oftener than once.[5]

(13) Interlocutors to be Prefixed to Papers.—Every paper produced in process, in terms of an interlocutor ordering or allowing the same to be given in, shall have prefixed thereto a full copy (including the date) of the interlocutor ordering or allowing such paper. There shall also be prefixed, in like manner, a copy of the interlocutor, if any, prorogating the time originally allowed.[6]

(14) Papers to be Signed by Counsel.—All petitions to the Court of Session, and all defences, answers, notes, minutes, and other papers in causes depending before the said Court, shall be signed by an advocate, who shall be looked upon as the drawer thereof, and shall be answerable for what they contain.[7]

(15) Papers Must be Duly Signed when Lodged.—The clerks shall not receive into process any paper requiring the signature of counsel without such signature.[8]

(16) Papers Not to be Received After Due Date.—Before mark-

[1] C. A. S., A, iii. 8. [2] Ibid., 9. [3] Ibid., 10. [4] Ibid., 11.
[5] Ibid., 12. [6] Ibid., 13. [7] Ibid., 14. [8] Ibid., 15.

ing any paper as lodged, the clerks shall examine the copy interlocutor or interlocutors ordered to be prefixed; and shall not, in any instance, receive and mark any paper after the lapse of the day on which it is receivable. If any paper shall, through error or incorrect or insufficient information, be received and marked by the clerk after the time within which it is receivable, it shall be ordered to be withdrawn from the process.[1]

(17) Reclaiming Note must be Accompanied with the Paper Ordered.—When a note is given in within the reclaiming days, praying to be reponed against an interlocutor of a Lord Ordinary, pronounced on failure duly to lodge a paper ordered or allowed to be given in within a limited time, the Inner House Clerk shall not receive such note, unless accompanied with the paper ordered.[2]

(18) Date of Lodging Papers to be Marked by the Clerks.—The Clerks of Court shall mark the true date of lodgment on every paper given in to process, excepting such as they are hereinbefore prohibited to receive.[3]

(19) Papers Due on Saturday may be Lodged on Monday, except a Saturday Immediately Before a Vacation or Recess, etc.—Where any paper is ordered or allowed to be given in, so that it would be necessary to lodge it on Saturday, it will be sufficient that such paper be lodged on the Monday following, and the clerks are authorised and required to receive and mark such papers accordingly: Provided always, that where the Court happens to rise on Saturday, either at the end of the session or for the Christmas recess, this regulation shall have no effect as to orders falling by the present practice, to be implemented on such Saturday; and provided also, that this regulation shall not be construed to apply to reclaiming notes, or notes for being reponed, or to papers falling to be lodged in the Bill Chamber, and without prejudice to the effect of any peremptory and special order for the lodging of any paper on Saturday, which the Court or Lord Ordinary may see cause to make.[4]

(20) Certain Writs not Borrowable.—The summons, note of suspension, petition, complaint, or other writ by which a process is commenced, together with the executions of service or citation thereon, shall remain constantly in the hands of the Clerk of Process, subject to inspection by any party interested, and shall on no account be lent out, but a copy of such writ, either printed or in manuscript, certified as correct by the agent giving it in, shall be lodged along with the principal, in order to be lent out when required; saving and excepting

[1] C. A. S., A, iii. 16. [2] Ibid., 17. [3] Ibid., 18. [4] Ibid., 19.

always in the special cases following, viz.:—Firstly. In the case of a defender or respondent entering appearance, the writings being, in such case, returnable in terms of sec. 11, Book C, Chap. i., C. A. S. Secondly. Each party may, after the record is closed, borrow his own principal writ for the purposes of writing on it and authenticating such amendments as may have been made; and similarly after any amendment has been allowed by the Court. Thirdly. In the case of a party intending to apply for letters of inhibition or arrestment on the dependence of a process; and Fourthly. In the case of a petition for sequestration required to be borrowed for the purpose of registration.[1]

(21) Authenticated Issues and Counter-Issues not Borrowable.—The principal copy of issues or of counter-issues, after authentication, shall not be borrowable.[2]

(22) Borrowing and Returning Process.—The Clerks of Court shall (except as after mentioned) receive back no process, or part of a process, without at once either comparing it with the principal inventory and receipt in presence of the agent or his clerk, and scoring the receipt; or, in the case of a partial return, marking on the principal inventory the numbers so returned; or otherwise, if the whole numbers borrowed be not then returned, or if the process be bulky so that it cannot at the time be conveniently examined, the clerks shall not receive back such process, or part of a process, without a separate slip or note accompanying the same, dated and signed or initialed by the agent or his clerk, specifying the numbers so returned; and it shall be the duty of the clerk, in all cases where he receives back a process, or part of a process, without at once scoring the receipt, or making a marking on the inventory as aforesaid, as the case may be, to examine the same before the close of the following day at latest, and to give notice to the agent of any inaccuracy, if there be such, in the slip or note aforesaid; and if no notice to the agent be delivered or put into the post office in the course of such following day, stating that such slip or note is inaccurate, the accuracy thereof shall be presumed, and the agent shall be equally exonered as if the receipt had been scored, or a marking made as aforesaid.[3]

(23) Agents to Arrange Process.—The agent returning the whole or any part of a process shall see that, in all cases, the numbers so returned are previously arranged in their regular order according to the inventory; and the clerk may refuse to receive any process, or part of a process, the numbers of which are not so arranged. The business

[1] C. A. S., A, iii. 20. [2] Ibid., 21. [3] Ibid., 22.

of each agent or his clerk shall, in all cases, be attended to in the order in which they enter the office.[1]

(24) Recall of Borrowed Processes.—The clerks in the several offices of Court shall, as soon as may be after the close of every session, examine what receipts remain at that time outstanding in their respective offices, for writings borrowed during the corresponding session of the immediately preceding year, and require the immediate return of such writings to the office, and, if necessary, apply for and enforce the ordinary compulsitor by caption for recovery thereof, without prejudice to the same being lent again on a new receipt if required, and with this exception from the said injunction, that, in the case of writings produced in any process, if such writings have been borrowed by the agent of the party producing the same, the Clerk of Court shall not, unless at the instance of a party to the process, insist for the return of such writings.[2]

(25) Intimation of Lodging Steps of Process.—The agent lodging a step of process other than the initial writ or defences shall give written intimation of such lodging to the agent of the other party, and the clerks shall not mark any such step as received until a certificate of intimation has been indorsed thereon.[3]

(26) Intimation of Motions of Consent of Party not Present nor Represented by Counsel.—Where in any cause a motion is made purporting to be of consent of a party who is not personally present nor represented by counsel at the diet, such motion shall not be granted unless or until intimation of the motion and of the diet shall have been given to such party by registered letter, as well as to his known agent in common form; and the documentary evidence of consent, along with certificates of the above intimations, shall be lodged in process at least *four* days prior to the granting of the motion.[4]

[1] C. A. S., A, iii. 23.
[2] Ibid., 24.
[3] A. S., 17th February 1914, sec. 1.
[4] Ibid., sec. 2; Ferris *v.* Corporation of Glasgow, 1914, 1 S. L. T. 99.

CHAPTER XII

TENDER, EXTRAJUDICIAL OFFER, AND SETTLEMENT

(1) Distinction between Tender and Extrajudicial Offer. — The distinction between a tender and an extrajudicial offer has thus been expressed by a great authority: "A tender in the proper sense of the term is a judicial offer—that is, an offer by a party to pay a part of the sum asked by his adversary after the action is raised. Offers before litiscontestation are not tenders. Tenders are of two kinds. The defender comes into Court and tenders a part of the debt sued for, admitting that part to be due; or disputing that any part of the sum claimed is due, he yet makes a tender for the sake of peace. In the first case the ordinary course is to make the tender on record, admitting the pursuer's claim to a certain extent and tendering the sum admitted. But when the tender is made without any admission, and for the sake of bringing peace, it is imprudent and unusual to make the tender on record; it ought to be made by a separate minute. I should say nothing to interfere with the general rule, though it may not be inflexible, that every such tender should be by a minute lodged in process, for this reason, that the sufficiency of the minute depends upon the precise terms at the time when it is made, and it should therefore form a distinct step of procedure, in order that a perfect record may be kept of the time when it is lodged and of its terms, and it is only consonant to general practice and regular procedure that parties engaged in litigation should speak through the process." [1]

(2) Tender.—(a) *Characteristics of a Tender.*—A tender must be explicit, and free of qualifications and conditions.[2] It is not a qualification or condition that the tender is prefaced by an affirmation of innocence and of the desire to avoid litigation.[3] A tender must be accompanied by an offer of expenses.[4] (See Maclaren on Expenses, p. 81.)

[1] Lord President Inglis in Ramsay's Trs. *v.* Souter, 1864, 2 M. 891, at p. 892.

[2] Bisset *v.* Anderson, 1847, 10 D. 233; Gunn *v.* Marquis of Breadalbane, 1849, 11 D. 1046; Low *v.* Spences, Ltd., 1895, 3 S. L. T. 170.

[3] Henry Thomson & Co. *v.* Dailly, 1896, 4 S. L. T. 172.

[4] Little *v.* Burns, 1881, 9 R. 118; Gunn *v.* Hunter, 1886, 13 R. 573.

(b) *Date from which Tender takes Effect.* — The First Division, recalling the judgment of the Lord Ordinary, has decided that a minute of tender takes effect from the date of its being lodged in process.[1] The effect of this judgment has been taken away by a subsequent Act of Sederunt, which provides that the agent lodging a step of process other than the initial writ or defences shall give written notice of such lodging to the agent of the other party, and the clerks shall not mark any such step as received until a certificate of intimation has been endorsed thereon.[2]

If a tender is made at the adjustment of the record the date of the tender is the date of the closing of the record.[3]

(c) *Time for Acceptance.*—A reasonable time must be allowed for the acceptance of a tender.[4] In one case[5] a tender was made on a Monday and accepted on the following Saturday, and the Court was of opinion that it should have been accepted, if at all, on the Thursday. In another case[6] a tender was made at 5 o'clock of the evening before a trial, and the Court held that sufficient time had not been given before the trial for consideration of the tender. In a third case[7] a tender was made on the 1st July and was accepted on the 27th July, and the Lord Ordinary was of opinion that it should have been accepted on the 5th July. In a recent case[8] a tender was made on 10th February. On the following day the Court rose for the "February week" adjournment, and on 2nd March the pursuer accepted the tender. The Court held that the 22nd February was a reasonable time within which to accept the tender, taking into consideration the "February week" adjournment.

(d) *In Slander Actions.*—A tender in a slander action to be of any avail must be accompanied by the fullest retractation, so as to clear the pursuer of the slander in the same way as a verdict would have done.[9] A statement by the defender that he was not conscious of having used the words libelled, and that he did not believe that he had done so, accompanied by a full retractation and apology if he had really done so,

[1] M'Guiness *v.* Corporation of Glasgow, 1914, 1 S. L. T. 99.
[2] A. S., 17th February 1914, sec. 1.
[3] Bryden *v.* Devlin, 1899, 6 S. L. T. 297. See also Critchley *v.* Campbell, 1884, 11 R. 475; Gunn *v.* Hunter, 1886, 13 R. 573.
[4] Carnegie *v.* Edinburgh and Granton Rly. Co., 1849, 11 D. 576; Shaw *v.* Edinburgh and Glasgow Rly. Co., 1863, 2 M. 142.
[5] M'Laughlin *v.* Glasgow Tramways Co., 1897, 24 R. 992.
[6] Murray *v.* Caledonian Rly. Co., 1899, 7 S. L. T. 238.
[7] Wilson *v.* Rapp; M'Lachlan *v.* Rapp, 1909, 2 S. L. T. 295.
[8] Jack *v.* Black, 1911, S. C. 691.
[9] Faulks *v.* Park, 1854, 17 D. 247.

has been considered sufficient.[1] Where a defender lodged a minute in which he stated that if expressions used by him could be construed as reflecting upon the pursuer, he unreservedly withdrew them and expressed his regret, and the pursuer accepted this apology, the pursuer was found entitled to expenses.[2]

(e) *In Conjoined Actions.* — Where separate actions for salvage services at the instance of two pursuers having conflicting interests had been brought against the same defender and had been conjoined, an opinion was given by the Court that, if the defender desired to put in a tender in the conjoined actions, he should (following the English practice) be obliged to apportion the sum tendered between the pursuers.[3]

(f) *Change of Circumstances.*—A tender may become inoperative through change of circumstances.[4]

(g) *Expenses in Tenders.*—See Maclaren on Expenses, p. 82 *et seq.*

(3) Extrajudicial Offer.—See Maclaren on Expenses, p. 86.

(4) Settlement.—When a case is settled it is usually taken out of Court by a joint minute of the parties, to which the Court is asked to interpone its authority. It may, however, be settled extrajudicially and effectually without the Court's authority being interponed.[5] When a settlement of an action has been effected by joint minute duly authenticated by the parties or their agents, the settlement is binding although the Court may not have interponed authority thereto.[6] When the Court is asked to interpone authority to a joint minute, and neither the opposite party nor his counsel appears, evidence must be produced of intimation of the motion to the other party.[7]

An action may be effectually settled although the parties are at issue as to the meaning of the terms of settlement.[8] In a case where defenders tendered a minute stating that the case had been settled, the pursuer lodged answers denying a settlement, and the Lord Ordinary sisted the case to allow the defenders to raise a declarator of the alleged agreement to settle.[9]

[1] Mitchells *v.* Nicoll, 1890, 17 R. 795 ; Sproll *v.* Walker, 1899, 2 F. 73.

[2] Hunter *v.* Russell, 1901, 3 F. 596 ; Sturrock *v.* Deas & Co., 1913, 1 S. L. T. 60 ; Davidson *v.* Panti, 1915, 1 S. L. T. 273.

[3] Boyle *v.* Olsen ; Lindsey Steam Fishing Co., Ltd. *v.* Actieselskabet Bonheur 1912, S. C. 1235.

[4] Macrae *v.* Edinburgh Street Tramways Co., 1885, 23 S. L. R. 185.

[5] Gow *v.* Henry, 1899, 2 F. 48.

[6] M'Athey *v.* Patriotic Investment Society, Ltd., 1910, S. C. 584.

[7] Ferris *v.* Corporation of Glasgow, 1914, 1 S. L. T. 99 ; A. S., 17th February 1914, sec. 2.

[8] Christie *v.* Fife Coal Co., 1899, 2 F. 192.

[9] North British Rly. Co. *v.* Bernards, Ltd., 1900, 7 S. L. T. 329.

In very special circumstances a town council was allowed to resile from a joint minute, withdrawing their defences upon payment of expenses by the other side.[1]

A settlement is not vitiated by the fact of *non*-disclosure by the agent to his client that he had received a sum in name of expenses, provided the agreed-on sum for expenses is not excessive.[2]

[1] Paterson *v.* Mags. of St. Andrews, 1879, 7 R. 712.
[2] M'Laughlin *v.* Pumpherston Oil Co., Ltd., 1915, S. C. 65.

PART V

MOTIONS INCIDENTAL TO AN ORDINARY ACTION

CHAPTER I

MOTION TO SIST A MANDATARY

(1) Definition of Mandatary.—"If a party, pursuer or defender in an action, be either a foreigner or, though a Scotchman, resident out of the country, without heritable estate in Scotland, he must appear by a mandatary, and when the party is absent at the commencement of the suit, of course the mandatary is responsible for the whole expense incurred during the continuance of the process while the principal continues to be absent. . . . A mandatary is a party who represents the absent pursuer or defender, not to the effect of interposing his personal security *judicatum solvi;* so far as the merits of the case are concerned he is a mere representative, and all the security he affords as to that is that the judgment on the merits shall be binding on the principal whom he represents. As regards the merits, he is a mere representative, but he is personally answerable for all the other conditions of the contract of litiscontestation. He is liable to implement any order the Court may pronounce in regulating the conduct of the process; he is personally liable for fines and for expenses which may be found due in the course of the process, and he is personally liable for the whole expenses of the process."[1]

A mandatary without special authority cannot settle a case.[2]

(2) Effect of Judgments Extension Act, 1868.[3]—As a Scottish decree for expenses can now be enforced in any part of the United Kingdom, the Court will always deem it to be an important consideration, in judging of the question whether or not a mandatary is to be sisted, that the party who is called upon to sist is resident in the United Kingdom, and, unless there are other circumstances in the case requiring that a mandatary should be sisted, will refuse the motion.[4]

[1] Renfrew and Brown *v.* Mags. of Glasgow, 1861, 23 D. 1003, per Lord Justice-Clerk Inglis, p. 1005. See also Overbury *v.* Peek, 1863, 1 M. 1058, per Lord President Inglis and Lord Deas; Gunn & Co. *v.* Couper, 1871, 10 M. 116; Thoms *v.* Bain, 1888, 15 R. 613.

[2] Thoms *v.* Bain, 1888, 15 R. 613.

[3] 31 & 32 Vict. cap. 54.

[4] Lawson's Trs. *v.* British Linen Co., 1874, 1 R. 1065; North British Rly. Co. *v.* White, 1881, 9 R. 97; D'Ernesti *v.* D'Ernesti, 1882, 9 R. 655, per Lord Fraser (Ordinary), p. 656; Dessau *v.* Daish, 1897, 24 R. 976.

(3) Discretion of Court.—The sisting of a mandatary is a matter in the discretion of the Court,[1] but the discretion is much larger in the case of a defender being asked to sist a mandatary.[2]

(4) Persons Acceptable as Mandataries. — The Court will generally accept any person in Scotland who is solvent and of the same station in life as the absent party.[3] He must not, however, be a person who is a party to the cause along with the absent party.[4] Where the mandatary becomes insolvent, though not legally bankrupt, the opposite party is entitled to have a new mandatary sisted in his stead.[5]

A person resident in England has been accepted by the Court as a mandatary.[6]

(5) Mandatary may not Make Conditions.—A mandatary is not entitled to stipulate any conditions, but must accept the mandate simply, leaving the consequences to follow according to law.[7]

(6) Procedure.—An action may be raised in the name of a person and his mandatary, or the mandatary may be sisted at any stage of the process. The Lord Ordinary, in the latter case, first appoints the pursuer or defender, as the case may be, to sist a mandatary by a certain date. A reasonable time will be allowed to obtain a mandatary,[8] and even additional time may be allowed.[9] A minute of sist, signed by the proposed mandatary, and not merely a mandate signed by the mandant,[10] is then lodged within the specified period. It is in the following terms:—"*A. B.*, above designed, hereby sists himself as mandatary for the pursuer [*or* defender] in said action." A mandate signed by the mandant does not require to be lodged along with the minute of sist,[11] except it is demanded by the opposite party.[12] An

[1] Gordon's Trs. *v.* Forbes, 1904, 6 F. 455.

[2] Simla Bank *v.* Home, 1870, 8 M. 781; D'Ernesti *v.* D'Ernesti, 1882, 9 R. 655.

[3] Scott *v.* Gillespie, 1823, 2 S. 165 (N. E. 149); Duncan *v.* Duncan, 1830, 8 S. 641; Stephenson *v.* Dunlop, 1841, 4 D. 248; Railton *v.* Mathews, 1844, 7 D. 105; M'Kinlay *v.* M'Kinlay, 1849, 11 D. 1022; Overbury *v.* Peek, 1863, 1 M. 1058, per Lord Deas; Grant *v.* Macdonald, 1867, 4 S. L. R. 189.

[4] Scott and Stevens' Tr. *v.* Smith, 1851, 13 D. 854. See also Turnbull *v.* Paul, 1829, 8 S. 124.

[5] Harker *v.* Dickson, 1856, 18 D. 793.

[6] Blow *v.* Ecuadorian Association, Ltd., 1903, 5 F. 444.

[7] Pease, Wrays, and Trigg *v.* Smith and Jameson, 1822, 1 S. 452 (N. E. 420); Robertson *v.* Exley, Dimsdale & Co., 1833, 11 S. 320; Anderson *v.* Bank of Scotland, 1836, 14 S. 316.

[8] Black *v.* Malcolm, 1830, 8 S. 599.

[9] Murray *v.* Murray, 1845, 7 D. 1000.

[10] Thomson *v.* Woodthorpe, 1863, 1 M. 635.

[11] Elder *v.* Young, 1854, 16 D. 1003.

[12] Gunn & Co. *v.* Couper, 1871, 10 M. 116.

interlocutor is thereupon pronounced sisting the person named in the minute. If the order to sist a mandatary is not obtempered, and further time is granted, the interlocutor runs:—"The Lord Ordinary of new appoints the pursuer [*or* defender] to sist a mandatary, and that by the day next." If no further time is granted, the interlocutor is as follows:—"The Lord Ordinary, in respect the *pursuer* has failed to obtemper the previous interlocutor, *assoilzies* the defender from the conclusions, and decerns; Finds the defender entitled to expenses," etc.;[1] or "The Lord Ordinary, in respect the *defender* has failed to obtemper the previous interlocutor, decerns against him in terms of the conclusions of the summons; Finds the pursuer entitled to expenses," etc.[2]

Where a verdict was returned in favour of a pursuer but not to the extent of his conclusions, and thereafter a motion was made to ordain the defender to sist a mandatary which was not opposed, and a mandatary was not sisted, the decree was given not in terms of the conclusions but of the verdict.[3]

Where the motion to ordain a party to sist a mandatary is refused, it is always refused *in hoc statu*, as circumstances may arise which will render a sist necessary. Accordingly, the motion may be repeated.[4]

The name of the mandatary should be included along with his constituent in all papers subsequent to the sist. Where in a decree for expenses against a pursuer who was ordained to sist a mandatary the name of the mandatary was not included, the Lord Ordinary of new found the pursuer and the mandatary liable in expenses.[5]

(7) To a Pursuer.—Where a pursuer is abroad at the commencement of his suit, or goes abroad during its dependence, he must sist a mandatary, whether he is a Scotsman or a foreigner.[6] It has been held that a Scottish pursuer, who has no residence in Scotland and has been abroad for more than forty days, must sist a mandatary.[7] This, how-

[1] Gordon *v.* Gordon, 1822, 2 S. 93 (N. E. 86); Train *v.* Little, 1911, S. C. 736.

[2] Robb *v.* Independent West Middlesex Assurance Co., 1843, 5 D. 1025.

[3] Trodden *v.* Sweetman, 1862, 24 D. 1360.

[4] Simla Bank *v.* Home, 1870, 8 M. 781, per Lord Deas; M'Donald's Trs. *v.* Stewart, 1891, 18 R. 491; Aitkenhead *v.* Bunten & Co., 1892, 19 R. 803, per Lord President Robertson, p. 804.

[5] Lock *v.* Muir, 1914, 1 S. L. T. 106.

[6] Pyranine or Pyronon *v.* Ramsay, 14th February 1627, Mor. 2069 and 16960; Pringle *v.* Kennedy, 16th June 1738, Mor. 4643; Potter *v.* Robertson, 25th July 1739, Mor. 4644; Hope *v.* Mutter, 10th June 1797, Mor. 4646; Simla Bank *v.* Home, 1870, 8 M. 781, per Lord Deas, p. 781, and Lord Ardmillan, p. 782; D'Ernesti *v.* D'Ernesti, 1882, 9 R. 655, per Lord Shand, p. 658.

[7] Taylor *v.* Kerr, 1829, 8 S. 151.

ever, does not apply to a domiciled Scotsman who is temporarily abroad, as a sailor[1] or a soldier on foreign service.[2]

It is not necessary to sist a mandatary where the pursuer is a married woman resident in this country who sues for damages to her reputation,[3] or in respect of a matter from which her husband's *jus mariti* is excluded,[4] and her husband is absent abroad; nor in the case of an absent partner of a descriptive firm where the other partner of the firm is in this country.[5] Where one of a quorum of trustees has gone abroad a similar decision was arrived at.[6]

In a recent case where the pursuers, who had gone abroad after the closing of the record, were held to have established a *primâ facie* case of damages against the defender in respect that the latter had pleaded guilty to assault upon them, a motion to sist mandataries was refused.[7]

Where a beneficiary, who was a foreigner, lodged objections to a petition presented by a judicial factor on a trust for his discharge which was granted and *reclaimed* against, the Court held that he was very much in the position of a pursuer and ordained him to sist a mandatary.[8]

The Court will more readily exercise its discretion to refuse to ordain a *claimant in a multiplepoinding* to sist a mandatary.[9] Thus, where the claimant had gone abroad to earn a livelihood after the litigation had been going on for two years;[10] and where a claimant, who was an American, might have been sued in his own country,[11] the motion to sist was refused. In a recent case, however, where there were no special reasons which would make it hard or inequitable to require claimants to sist a mandatary, whereas there would be hardship if the claimants required to be sued abroad, the Lord Ordinary ordered mandataries to be sisted.[12]

[1] Steel *v.* Steel and Buchanan, 1826, 4 S. 527 (N. E. 535). See also Scott *v.* Gillespie, 1823, 2 S. 165 (N. E. 149).

[2] Graham *v.* Graham's Trs., 1901, 4 F. 1; *cp.* Bruce *v.* Smith, 1865, 1 S. L. R. 53.

[3] Gale *v.* Bennet, 1857, 19 D. 665.

[4] Mackay *v.* Allan, 1868, 40 Jur. 221.

[5] Antermony Coal Co. *v.* Wingate & Co., 1866, 4 M. 544.

[6] Rob's Trs. *v.* Hutton, 1866, 4 M. 546. See also Armour and Others *v.* Glasgow Infirmary and James Wright's Trs., 1908, 16 S. L. T. 435—one of four next-of-kin had gone abroad.

[7] M'Lean *v.* M'Garvey; Mrs. M'Lean *v.* M'Garvey, 1908, 16 S. L. T. 174.

[8] Lowson *v.* Lowson, 1902, 4 F. 692.

[9] Stow's Trs. *v.* Silvester and Others, 1900, 8 S. L. T. 253. See also Elmslie *v.* Pauline, 1905, 7 F. 541.

[10] Gordon's Trs. *v.* Forbes, 1904, 6 F. 455.

[11] Town and County Bank, Ltd. *v.* Lilienfield and Others, 1900, 8 S. L. T. 227. See also North British Rly. Coy. *v.* White, 1881, 9 R. 97; Elmslie *v.* Pauline, 1905, 7 F. 541.

[12] Stern and Watt *v.* Bruce Peebles & Co. (in liquidation), 1909, 2 S. L. T. 297.

(8) To a Defender.—As a general rule a defender who is abroad at the date of raising the action,[1] or who leaves this country while the action is in dependence,[2] must sist a mandatary. There is, however, a large latitude in the discretion of the Court with regard to defenders.[3] Thus, where a defender is out of this country temporarily, it has been held that he does not require to sist a mandatary.[4] Again, where an officer who had returned to India on duty had been sued in this country by an Indian creditor for an Indian debt, a motion to sist a mandatary was refused.[5]

Formerly it was necessary to sist a mandatary to an absent defender even though the latter pleaded "no jurisdiction."[6] In one case, indeed, where the plea of "no jurisdiction" was upheld in the House of Lords, a petition by the defender to apply that judgment was not allowed without the petitioner sisting a mandatary.[7] In a subsequent case, however, it was held that the competency of an action must first be disposed of before considering the question of mandatary;[8] and in a later case, where a husband was defender and abroad, a mandatary was not considered necessary as jurisdiction was doubtful and the defender was in embarrassed circumstances.[9] Where a foreign defender sisted a mandatary and pleaded "no jurisdiction" successfully, the Court held that, although it had no jurisdiction on the merits, it had jurisdiction as to expenses, and awarded them to the mandatary.[10]

Where one of two defenders has gone abroad, it is incompetent for the absent defender to sist the compearing defender as his mandatary.[11]

(9) Foreigners, or Absent Persons, who do not Require to Sist a Mandatary.—A person with an estate in Scotland, which is of some

[1] Grant *v.* Pedie, 1825, 4 S. 237 (N. E. 241).

[2] Smith *v.* Countess of Strathmore, 1828, 6 S. 903; Young *v.* Carter, 1907, 14 S. L. T. 829; Dampskibsselskabet "Neptune" *v.* Blasquez, 1908, 15 S. L. T. 1046; Bank of Scotland *v.* Rorie, 1908, 16 S. L. T. 130. See, however, Morton *v.* Dean Smith, 1902, 9 S. L. T. 396; Florence *v.* Smith, 1913, S. C. 393.

[3] Simla Bank *v.* Home, 1870, 8 M. 781; D'Ernesti *v.* D'Ernesti, 1882, 9 R. 655.

[4] M'Donald's Trs. *v.* Stewart, 1891, 18 R. 491; Florence *v.* Smith, 1913, S. C. 393.

[5] Simla Bank *v.* Home, 1870, 8 M. 781.

[6] Ranken *v.* Nolan, 1842, 4 D. 832.

[7] Grant *v.* Pedie, 1825, 4 S. 237 (N. E. 241).

[8] Clark *v.* Campbell, 1873, 1 R. 281.

[9] D'Ernesti *v.* D'Ernesti, 1882, 9 R. 655.

[10] Maclachlan *v.* Rob, 1831, 9 S. 588. See also Mowbray *v.* Leitch and Stewart, 1825, 3 S. 505 (N. E. 352); Lindsay *v.* Lindsay, 1827, 5 S. 310 (N. E. 288).

[11] Barstow *v.* Smith, 1851, 13 D. 854.

value,[1] need not sist a mandatary,[2] except the question at issue is the property in question.[3]

It is not quite clear whether a foreigner may be allowed to litigate in the Court of Session without sisting a mandatary if he gives security in a sufficient sum to attend personally all the diets of Court on reasonable notice;[4] but if he comes to stay in Scotland permanently, appears personally in Court, and undertakes to remain in Scotland until the issue of the action,[5] he need not sist a mandatary, or, if he has sisted a mandatary, the latter will be allowed to withdraw.

It was held not to obviate the necessity by a foreigner of sisting a mandatary that he consigned a sum of money which did not secure the expenses of the action.[6] Where, however, the cause has progressed so far in favour of a foreigner that there is no risk of the expenses not being paid, a mandatary will not be insisted upon.[7]

Where a party is detained abroad at the instance of the opposite party to a cause, it is unnecessary for the former to sist a mandatary. Thus, where a Scotsman carrying on business in London was imprisoned in the Queen's Bench Prison at the instance of a creditor, and took out sequestration in Scotland, as partner of a company carrying on business in London and Scotland, and as an individual, and petitioned for liberation, which was opposed by the incarcerating creditor, it was held that he was not bound to sist a mandatary.[8] Where there is no such consideration, a bankrupt sequestrated in Scotland and applying for his discharge in Scotland while resident in England will require to sist a mandatary.[9]

A person resident abroad who suspends a charge on a bond and disposition in security granted over a heritable property belonging to him in this country does not require to sist a mandatary.[10]

[1] Fairly *v.* Elliot, 1839, 1 D. 399; Caledonian and Dumbartonshire Rly. Co. *v.* Turner, 1849, 12 D. 406; Seaman *v.* Butters, 1911, 2 S. L. T. 198; *cp.* Dempster *v.* Potts, 1835, 14 S. 189.

[2] Smith *v.* Norval, 1828, 6 S. 852.

[3] Sandilands *v.* Sandilands, 1848, 10 D. 1091; Lawson's Trs. *v.* British Linen Co., 1874, 1 R. 1065.

[4] Earl of Hopetoun *v.* Horner, 1842, 4 D. 877; *cp.* Railton *v.* Mathews, 1844, 6 D. 1348.

[5] Faulks *v.* Whitehead, 1854, 16 D. 718; Hall *v.* Newland's Trs., 1859, 22 D. 333; Bracken *v.* Blasquez, 1891, 18 R. 819. See also Clarke *v.* Newmarsh, 1836, 14 S. 488; Shedden *v.* Patrick, 1853, 15 D. 379; Mackay *v.* Allan, 1868, 40 Jur. 221; *cp.* Dickey *v.* British Mexican Rly. Co., 1893, 1 S. L. T. 273.

[6] Brown *v.* Lindley, 1833, 12 S. 18.

[7] Buik *v.* Pattullo, 1855, 17 D. 568.

[8] Robertson *v.* De Salvi, 1857, 19 D. 996.

[9] Overbury *v.* Peek, 1863, 1 M. 1058.

[10] Seaman *v.* Butters, 1911, 2 S. L. T. 198.

A defender who was assoilzied in the Sheriff Court and thereafter went abroad on business but was still within the jurisdiction of a British Court was not required *hoc statu* to sist a mandatary to defend the action on an appeal.[1] (See also *To a Pursuer, supra,* p. 433; *To a Defender, supra,* p. 435.)

(10) Consistorial Causes.—Where a wife is pursuer and is abroad, while the husband is resident in Scotland, or *vice versâ,* it is not necessary for the pursuer to sist a mandatary.[2] Where a husband is defender and goes abroad during the dependence, he will require to sist a mandatary in the ordinary case.[3] In one case, however, where the husband, who was defender, was abroad and pleaded "no jurisdiction," the Court refused to ordain him to sist a mandatary as the jurisdiction was doubtful and he was in embarrassed circumstances.[4]

(11) Poor's Roll.—A pursuer on the poor's roll, who is abroad, must sist a mandatary, but the latter is not liable in expenses if awarded against the pursuer.[5]

(12) Termination of Office.—A mandatary's office is terminated by his tendering a minute of resignation.[6] A mere intimation to the opposite party is not sufficient.[7] He is liable in expenses down to the date of withdrawal.[8] When the constituent dies, the office terminates, and the proper procedure is to order intimation of the process to the representatives of the constituent, and, in the event of their declining to go on, to hold the mandatary liable in expenses down to the date of the constituent's death.[9] The office also terminates with the death of the mandatary,[10] or his insolvency.[11]

(13) Liability of Mandatary.—A mandatary is in no way liable in respect of a decree pronounced against his constituent on the merits, but he is liable, during the period he is a mandatary, to implement any order of Court, for fines and expenses due in the course of the cause, and for the whole expenses of process at the final decision, if against

[1] Florence *v.* Smith, 1913, S. C. 393.

[2] Campbell *v.* Campbell, 1855, 17 D. 514; Low *v.* Low, 1905, 12 S. L. T. 817.

[3] Tingman *v.* Tingman, 1854, 17 D. 122.

[4] D'Ernesti *v.* D'Ernesti, 1882, 9 R. 655.

[5] Carling *v.* Campbell and Chrystal, 1826, 4 S. 548 (N. E. 556); Middlemas *v.* Brown, 1828, 6 S. 511.

[6] Cairns *v.* Anstruther, 1841, 2 Robinson, 29.

[7] Neilson *v.* Wilson, 1822, 1 S. 314 (N. E. 290); Martin *v.* Underwood, 1827, 5 S. 783 (N. E. 730).

[8] Gordon and Gibson Craig *v.* Gordon, 1823, 2 S. 572 (N. E. 493).

[9] Cairns *v.* Anstruther, 1841, 2 Robinson, 29; Marshall *v.* Connon, 1848, 21 Jur. 63.

[10] Barclay and Ewart's Representatives *v.* Barclay, 1850, 12 D. 1253.

[11] Harker *v.* Dickson, 1856, 18 D. 793.

his constituent, no matter at what stage he has been sisted;[1] and he is liable down to the date of his withdrawal although the mandant has returned before decree is pronounced.[2]

Although his constituent becomes bankrupt and a decree of absolvitor is pronounced against his constituent in respect of his failure to find caution for expenses, the liability of a mandatary does not thereby cease;[3] and where a mandatary for a pursuer lodged a minute of withdrawal on the morning of a jury trial, he was held liable for fees to counsel and agents, payments to witnesses and jury, and the expenses of audit.[4]

He has been held not to be liable for an *interim* award of aliment to a wife in a divorce case;[5] nor to be liable in damages if he acts as a mandatary *in bonâ fide*.[6]

In one case where a mandatary for a pursuer died, and absolvitor with expenses was pronounced, the Court gave decree for expenses against the constituent alone, leaving him to operate his relief against the representatives of the mandatary.[7]

In order that a mandatary may be held to be liable as such, it is not necessary that he should sign and lodge a minute of sist, as a person who calls himself a mandatary and carries on a process in that character incurs liability as such.[8]

(14) Nomination of Mandatary by Agent.—An ordinary Commissioner, with power to sue and defend, cannot appoint a mandatary to his absent constituent,[9] although an agent with a full and comprehensive power of attorney may do so.[10] If there is no objection, the Court will accept a mandatary nominated by an agent who has full power to carry on a case and of doing all that is required for that purpose;[11] but if the opposite party insists upon having a mandate produced, signed by the mandant himself, he is entitled to obtain it.[12]

[1] Gordon and Gibson Craig *v.* Gordon, 1823, 2 S. 572 (N. E. 493); Cairns *v.* Anstruther, 1841, 2 Robinson, 29; Renfrew and Brown *v.* Mags. of Glasgow, 1861, 23 D. 1003; Overbury *v.* Peek, 1863, 1 M. 1058; Gunn & Co. *v.* Couper, 1871, 10 M. 116; Thoms *v.* Bain, 1888, 15 R. 613.

[2] Erskine *v.* Walker's Trs., 1883, 10 R. 717.

[3] Cullen *v.* Brown, 1860, 22 D. 1090.

[4] Chapman *v.* Balfour, 1875, 2 R. 291.

[5] Webster *v.* Webster, 1896, 33 S. L. R. 369.

[6] Cameron *v.* Russell, 1821, 1 S. 211 (N. E. 200).

[7] Barclay and Ewart's Representatives *v.* Barclay, 1850, 12 D. 1253.

[8] Cullen *v.* Brown, 1860, 22 D. 1090.

[9] Dempster *v.* Potts, 1836, 14 S. 521.

[10] Knight *v.* Freeto, 1863, 2 M. 386.

[11] Elder *v.* Young, 1854, 16 D. 1003.

[12] Gunn & Co. *v.* Couper, 1871, 10 M. 116.

(15) Diligence.—The necessity for a mandatary to be sisted applies to all kinds of judicial applications, such as a claimant in a multiplepoinding,[1] a petitioner,[2] a suspender,[3] and a claimant in a sequestration,[4] but does not apply to diligence, which proceeds without a mandatary being sisted,[5] especially if the absent charger has heritable estate in Scotland.[6] If, however, the matter be litigated, the charger may be called upon to sist a mandatary.[7] In a recent case the Lord Ordinary refused to ordain the complainer in a suspension of a charge on a bond and disposition in security, who was resident abroad, to sist a mandatary.[8]

(16) Decree as Agent-Disburser. — A party in whose favour expenses have been awarded and who has gone abroad is entitled to take decree in his own name without sisting a mandatary.[9]

[1] North British Rly. Co. *v.* White, 1881, 9 R. 97. In this case there were special circumstances which enabled the Court to dispense with a mandatary.
[2] M'Coll *v.* Campbell, 1822, 1 S. 246 (N. E. 233).
[3] Hamilton *v.* Laing, 1822, 1 S. 421 (N. E. 392).
[4] John Ford, Applicant, 1844, 6 D. 1163.
[5] Ross *v.* Shaw, 1849, 11 D. 984.
[6] Ewing *v.* Hare, 1823, 2 S. 534 (N. E. 467); Lockhart *v.* Ferrier, 1832, 11 S. 236.
[7] Ross *v.* Shaw, 1849, 11 D. 984.
[8] Seaman *v.* Butters, 1911, 2 S. L. T. 198.
[9] Henderson *v.* Gilfillan, 1834, 12 S. 468.

CHAPTER II

MOTION FOR LEAVE TO DISCLAIM

(1) Minute of Disclamation.—Any person whose name has been used as a party to a cause without authority may lodge a minute of disclamation in process in the following terms:—

Minute for *A. B.* [*designation*],

in action of , at the instance of

C. D. [*designation*], Pursuer;

against

E. F. [*designation*], Defender.

G. [*name of counsel*] for the minuter stated to the Court that he gave no instructions or authority for this action being raised in his name [*or*, for his name being included as one of the pursuers in this action; *or*, for appearance being entered in his name in this action; *or*, for defences being lodged in his name in this action], and he therefore disclaimed, and hereby disclaims, the action [*or*, appearance; *or*, the defences].

This minute requires to be sustained by the Court before there is disclamation.

(2) Liability for Expenses.—A person who disclaims timeously is not usually liable in expenses prior to his disclamation.[1] It has been held, however, that where counsel has appeared for a person in any litigation, the latter is in the first instance liable for expenses, with a right to proceed against those who have used his name without authority,[2] but according to an earlier case it would seem that the law agent who acts for the party disclaiming is liable in the first place for the expenses of the opposite side, with a right of relief against those who instructed him.[3]

The person who raises an action without authority is also liable in the expenses of the party disclaiming. Thus, where an action was raised in the name of a committee of nine persons, and three of their number disclaimed, the latter were held entitled to have their names

[1] Menzies *v.* Caldwell, 1834, 12 S. 772.

[2] Thomson *v.* Incorporation of Edinburgh Candlemakers, 1855, 17 D. 774.

[3] Cowan *v.* Farnie, 1836, 14 S. 634.

deleted from the record, with expenses against the remaining pursuers, who had, without authority, used their names;[1] while in a case against a body of trustees, the majority of whom wished to defend and a minority dissented, but defences were lodged for all the trustees, the minority lodged a minute of disclamation, which was sustained, and the Court gave an award of modified expenses against the agent in the trust, in favour of the minority of trustees;[2] and where a party and his agent raised an action in the name of two nominal pursuers, one of whom disclaimed, and no mandate from the other was produced, the action was dismissed, and the party and his agent were found liable, conjunctly and severally, in expenses.[3] In a recent case where a defender, before the closing of the record, lodged a minute of disclamation, and moved the Court to sustain the minute and to find the agents responsible for the lodging of defences in his name liable to him in (1) the expenses of the minute of disclamation; and (2) relief from all expenses for which he might be liable in a question with the pursuer, the Lord Ordinary, in respect that there was a difference on the facts of such small moment that he was not inclined to allow a proof, sustained the minute, and on the question of expenses reserved the disclaimer's right to constitute his claim for said expenses in any competent Court against the person or persons who used his name without authority.[4]

In an early case it was held that expenses were only due against the agent of a party disclaiming where the opposite side proved that the agent was acting without authority.[5] An agent, however, should produce his mandate when asked to do so, and if he fails to do so, or refuses to give information showing that he was *rebus ipsis et factis* authorised to appear, he will be held liable in expenses.[6]

(3) Disclamation ab Initio Litis.—If a minute of disclamation by a pursuer dates back to the raising of an action, the Court has held that there has never been a process before the Court,[5] and that, therefore, another pursuer cannot be sisted.[7]

(4) No Right to Disclaim where Mandate Given.—Where a party gives an agent a mandate to sue in his name, he cannot disclaim

[1] Cambuslang West Church Committee *v.* Bryce, 1897, 25 R. 322.
[2] Fairlie *v.* Fairlie's Trs., 1903, 11 S. L. T. 51.
[3] Ferguson, Davidson & Co. *v.* Paterson and Dobbie, 1898, 1 F. 227.
[4] Cassidy *v.* Bilsland and Others, 1907, 15 S. L. T. 615.
[5] Noble *v.* Mags. of Inverness, 1825, 3 S. 516 (N. E. 358).
[6] Philip *v.* Gordon, 1848, 11 D. 175.
[7] Ferguson, Davidson & Co. *v.* Paterson and Dobbie, 1898, 1 F. 227; Gordon *v.* Purves and Others, 1902, 10 S. L. T. 446.

where the party using his name undertakes to relieve him of all expenses and consequences of the action;[1] nor can he disclaim where he has granted a general mandate to recover a debt, although no special mandate was given to institute proceedings and he was not aware of their being carried on.[2]

A party may disclaim a minute of disclamation.[3]

[1] Pitcairn *v.* Pitcairn's Trs., 1834, 12 S. 769.
[2] Sanderson *v.* Campbells, 1833, 11 S. 623.
[3] Tulloch *v.* Baird, 1859, 21 D. 807.

CHAPTER III

MOTION FOR LEAVE TO ABANDON

(1) GENERALLY.—The abandonment of an action generally arises from the recognition by the pursuer at some stage of its progress that he has no good claim against the defender, or that the action as laid is defective. In the former case his sole desire is to make an end of the litigation; in the latter case his desire is to end the action in order that he may be able to raise a new action against the same defender upon the same grounds. In either case he can only do so upon conditions; and these conditions vary according to the intention of the pursuer and also according to the stage which judicial proceedings have reached.

Abandonment of an action may also be inferred from circumstances.

(2) WHERE ABANDONMENT IS ABSOLUTE.—In such a case the pursuer by a minute of abandonment gives up his action without reservation, and accordingly the proper decree is one of absolvitor, and the only question that remains is one of expenses, which is a matter entirely in the discretion of the Court. In awarding expenses no distinction seems to have been drawn in respect of the different stages which the proceedings have reached. *Full expenses* have been given both before[1] and after[2] the closing of the record; and expenses have been *modified* both before[3] and after[4] the record has been closed.

(3) WHERE ABANDONMENT IS MADE UNDER RESERVATION.—(a) *Generally.*—If a pursuer desires to abandon an action which he recognises as defective in order to raise a new action against the same defender on the same grounds, he may, *previous to the closing of the record*, be allowed to do so at *common law* under conditions imposed by the Court; or, *if the record is closed*, he is entitled, as of right, to do so in terms of statute. Abandonment, if thus judicially carried out, entitles a pursuer to obtain an interlocutor of *dismissal*, and such an

[1] Burn Murdoch's Trs. *v.* Thomson's Trs., 1907, 15 S. L. T. 721.

[2] Paul *v.* British Commercial Insurance Co., 1832, 10 S. 618; Maxtone *v.* Muir, 1846, 18 Jur. 452; Speedie *v.* Blyth, 1854, 16 D. 375.

[3] Clarke *v.* M'Nab, 1888, 15 R. 670.

[4] Hay *v.* Dinwiddie, 1851, 1 Stuart, 55; Hare *v.* Stein, 1882, 9 R. 910; M'Harrie *v.* Innes and Anderson, 1893, 1 S. L. T. 241.

interlocutor leaves it open to him to bring a new action;[1] whereas, if an action is not judicially abandoned, the defender can obtain an interlocutor of *absolvitor*, entitling him to urge a plea of *res judicata* in any subsequent action brought against him by the same pursuer on the same grounds; or to state a plea of *lis alibi pendens*, in such a new action, in respect that the prior action has not been properly brought to an end.

Abandonment must be made by a judicial act, as by a minute of abandonment in the first process;[2] or by a statement of abandonment of the first action, in the condescendence of the new summons,[3] or *in gremio* of the new summons itself.[4]

In order to obviate a plea of *lis alibi pendens*, the authority of the Court must be interponed to the minute of abandonment, and there must be not only a judgment dismissing the first action,[5] but the question of expenses must also have been disposed of.[6] (See *Lis Alibi Pendens, supra*, p. 383.)

It is quite within the province of counsel,[7] but not of a law agent,[8] to abandon an action without the instructions of his client.

(b) *Prior to Closing the Record.*—Where a pending action is abandoned by the pursuer previous to the closing of the record, the pursuer is entitled to obtain a decree of dismissal, or one of absolvitor reserving his right to bring a new action, upon conditions laid down by the Court.[9] There is no hard-and-fast rule with regard to expenses. *Full expenses* are sometimes awarded against the pursuer, but an award of expenses is not imperative.[9] Expenses are sometimes modified.[10] In one case, where a pursuer abandoned his action before enrolment, he was held entitled to raise a new action without first paying any expenses, but without prejudice to the defender claiming his expenses in the abandoned action in any competent form.[11]

(c) *After Closing the Record.*—(i.) *Under the Judicature Act.*[12]—By sec. 10 of the Act it is provided that after the record is closed a

[1] Stewart *v.* Greenock Harbour Trs., 1868, 6 M. 954, per Lord Deas, p. 958.
[2] Nelson *v.* Gordon, 1874, 1 R. 1093, at p. 1097.
[3] M'Aulay *v.* Cowe, 1873, 1 R. 307.
[4] Laidlaw *v.* Smith, 1834, 12 S. 538.
[5] Sinclair *v.* Campbell, 1832, 4 Jur. 520; Cormack *v.* Waters, 1846, 8 D. 889; Muir *v.* Barr, 1849, 11 D. 487.
[6] Aitken *v.* Dick, 1863, 1 M. 1038.
[7] Duncan *v.* Salmond, 1873, 1 R. 329.
[8] Urquhart *v.* Grigor, 1857, 19 D. 853, per Lord Justice-Clerk Hope, p. 855.
[9] Caledonian Iron and Foundry Co. *v.* Clyne, 1831, 10 S. 133.
[10] Nelson *v.* Gordon, 1874, 1 R. 1093.
[11] Laidlaw *v.* Smith, 1834, 12 S. 538.
[12] Court of Session Act, 1825 (6 Geo. IV. cap. 120).

pursuer may abandon his cause on paying full expenses to the defender, and may bring a new action if otherwise competent. This applies only to the case of a pursuer abandoning his cause before an interlocutor has been pronounced assoilzieing the defender in whole or in part, or leading by necessary inference to such absolvitor, after which it is not competent for him to do so, in regard to that part of the cause decided by said interlocutor either expressly or by necessary inference; reserving, however, to him any remedy by a new action which may be competent to him under subsisting regulations.[1]

The record must be closed before a pursuer can abandon under the Judicature Act.[2]

Where a pursuer abandoned in terms of the Judicature Act, and the Court assoilzied the defender with full expenses, it was held that the word *assoilzie* was a clerical error, and the pursuer was allowed to raise a new action.[3]

Where there was an interlocutor limiting the mode of proof, and the pursuer took a diligence for the recovery of writings which he did not use, it was held that there had been no interlocutor either of absolvitor or leading by inference to absolvitor, and a minute of abandonment was accordingly sustained.[4]

An action may be abandoned notwithstanding that the Court has delivered its opinion with a view to judgment against the relevancy of a considerable portion of the action, no interlocutor having been pronounced.[5]

Full expenses are expenses, not as between agent and client, but as between party and party, and the Court has no power to modify them.[6] They include the repayment by the pursuer of an award of expenses paid to him in consequence of his success on a preliminary plea.[7] In a multiplepoinding they include the expense of lodging the other party's claim.[8]

Expenses must be paid as a *condition precedent* to abandonment, or consignation may be made of a sum sufficient to cover expenses.[9] If a party abandoning fails to pay expenses after a minute of abandon-

[1] A. S., 11th July, 1828, sec. 115.
[2] Hay *v.* Earl of Morton, 1862, 24 D. 1054.
[3] Shirreff *v.* Brodie, 1836, 14 S. 825.
[4] Kermack *v.* Kermack, 1874, 2 R. 156, at p. 162.
[5] Western Bank *v.* Bairds, 1862, 24 D. 859.
[6] Lockhart *v.* Lockhart, 1845, 7 D. 1045; Mica Insulator Co., Ltd. *v.* Bruce Peebles & Co., Ltd., 1907, S. C. 1293.
[7] Stewart *v.* Stewart, 1906, 8 F. 769.
[8] Agnew *v.* White, 1900, 8 S. L. T. 43.
[9] Lawson *v.* Low, 1845, 7 D. 960.

ment is lodged, he is merely deprived of his privilege of abandonment,[1] except where the case is down for proof or jury trial, in which case the minute of abandonment is held to be sufficient proof of abandonment under the Act of Sederunt of 16th February 1841, sec. 46, and decree of absolvitor is granted.[2]

A pursuer can only abandon under the Judicature Act what may be truly abandoned. Thus, a pursuer was held not entitled to abandon a portion of a case upon which he had taken no issues, in order to enable him to raise another action with regard to the same.[3]

Where an abandonment took place before an order for proof was made, it was held that the defenders were entitled to have their account of expenses taxed as if a proof had been ordered, as no other order was possible.[4]

Abandonment under the Judicature Act applies to actions raised in the Sheriff Court and appealed to the Court of Session for jury trial.[5]

Procedure.—The procedure adopted is as follows:—

The pursuer lodges a minute of abandonment in the following terms:—

A. [*name of counsel*] stated to the Lord Ordinary that the pursuer abandons this cause in terms of the statute.[6]

Thereupon the following interlocutor is pronounced:—

The Lord Ordinary, in respect of the minute of abandonment No. of Process, appoints the defender to lodge an account of expenses, and remits the same when lodged to the Auditor to tax and report.

The account is accordingly lodged and taxed as between party and party, and it is the duty of the pursuer to pay the account as taxed, lodge the receipt in process, and enrol for the final interlocutor, which is in the following terms:—

The Lord Ordinary, in respect the expenses due to the defender have been paid, allows the pursuer to abandon the cause, dismisses the action, and decerns.

[1] Ross *v.* Mackenzie, 1889, 16 R. 871, per Lord President Inglis, p. 872.

[2] Ross *v.* Mackenzie, 1889, 16 R. 871; Donnelly *v.* Morrison and Others, 1895, 2 S. L. T. 582.

[3] Hay *v.* Earl of Morton, 1862, 24 D. 1054; White *v.* Lord Morton's Trs., 1866, 4 M. (H. L.) 53.

[4] Mica Insulator Co., Ltd. *v.* Bruce Peebles & Co., Ltd., 1907, S. C. 1293.

[5] Aitken *v.* Farquhar, 1896, 24 R. 268.

[6] Adamson, Howie & Co. *v.* Guild, 1868, 6 M. 347.

(ii.) *Under the Court of Session Act*, 1868.—Any action may, with leave of the Judge, be abandoned on the conditions contained in the 10th section of the Act 6 Geo. IV. cap. 120, and relative Act of Sederunt, sec. 115 (see preceding section), in the course of a trial at any time before the Judge has commenced to charge the jury, or where there is no jury, at any time before the Judge has made avizandum with the evidence; provided that such abandonment shall not be competent without leave of the Judge, who shall be of opinion that it is just and proper in the circumstances; provided further, that in granting such leave the Judge shall specify the time within which the expenses shall be paid to the defender; and if the expenses shall not be paid within such time, the defender shall be entitled to be assoilzied from the conclusions of the action with expenses.[1] The minute of abandonment is in the same terms as in the preceding paragraph. The interlocutor allowing abandonment is in the following terms:—

The Lord Ordinary grants leave to the pursuer to abandon the action on payment to the defender of the expenses thereof by the day of next; allows an account thereof to be given in, and remits the same when lodged to the Auditor to tax and report.

If the expenses are not paid by the time specified, the defender may enrol to obtain absolvitor, and the interlocutor granting this is in the following terms:—

The Lord Ordinary approves of the Auditor's report on the defenders' account of expenses, No. of Process, and decerns against the pursuer for the sum of £ , the taxed amount thereof; assoilzies the defender from the conclusion of the action, and decerns.

(4) Consistorial Causes.—There is no rule to the effect that where a pursuer in a consistorial cause, who has abandoned his case, fails to pay the taxed amount of expenses within a reasonable time the defender is entitled to absolvitor. Thus, where a husband brought an action against his wife, and, before the record was closed, lodged a minute of abandonment, the defender was awarded expenses. The pursuer refused or delayed to pay these expenses, and the defender asked for absolvitor, but the Lord Ordinary refused the motion and intimated that he was not prepared to grant absolvitor except of consent, or on a consideration of the merits, or on default.[2]

A wife who abandons an action of adherence and aliment raised

[1] 31 & 32 Vict. cap. 100, sec. 39.

[2] Nicolson *v.* Nicolson, 1902, 10 S. L. T. 464.

in bonâ fide is entitled to her expenses.[1] Where she does not ask them her agent is not entitled to do so on his own behalf.[2]

If a wife wishes to abandon an action of divorce[3] or nullity of marriage,[4] in terms of the Judicature Act, she must satisfy its provisions, and accordingly must pay *full* expenses to the defender.

(5) Withdrawal of Minute of Abandonment.—A pursuer has an absolute right to withdraw his minute of abandonment. If he is *in bonâ fide* the pursuer is entitled to go on with the case, subject to such conditions as to expenses as the Lord Ordinary may choose to lay down. If, however, he is not *in bonâ fide*, the defender may enrol and obtain *absolvitor*.[5] The usual condition upon which a pursuer is allowed to withdraw his minute of abandonment and to proceed is that he must pay to the defender all the latter's expenses connected with the proposed abandonment,[6] so far as the said expenses would not be available at the future stages of the case.[7]

In a case where one of two sets of defenders entered into a joint minute with the pursuers in which they craved the Inner House to allow them, after a judgment in their favour, to withdraw their defences, but subsequently tendered a new minute craving leave to withdraw their former joint minute, and insisting in their defence, the Court allowed them to insist.[8]

Withdrawal must be before final decree.[9]

[1] Murray *v.* Murray, 1893, 1 S. L. T. 260.
[2] Elliot *v.* Elliot, 1893, 1 S. L. T. 261.
[3] Stewart *v.* Stewart, 1906, 8 F. 769.
[4] A. *v.* B., 1894, 2 S. L. T. 31.
[5] Lee *v.* Pollock's Trs., 1906, 8 F. 857.
[6] Todd and Higginbotham *v.* Corporation of Glasgow, 1879, 16 S. L. R. 718; Dalgleish *v.* Mitchell, 1886, 23 S. L. R. 552.
[7] Lee *v.* Pollock's Trs., 1907, S. C. 211.
[8] Paterson *v.* Mags. of St. Andrews, 1880, 7 R. 712.
[9] Duncan's Factor *v.* Duncan, 1874, 1 R. 964. See also Gallie *v.* Wylie, 1845, 7 D. 301.

CHAPTER IV

MOTION FOR LEAVE TO AMEND

(1) Undefended Actions.—An amendment is allowed, with the consent of the Lord Ordinary or the Court, upon any summons or other pleading which is undefended. Such amendment is made in writing, either upon the summons or pleading, or in a separate paper, and authenticated by the signature of counsel. The Lord Ordinary or Court may order the amended summons or other pleading to be served upon the absent defender or defenders, with liberty to him or to them to enter appearance within such time as shall seem proper. The expenses occasioned by such amendment cannot be charged against the defender or defenders; nor has such amendment the effect of validating diligence used on the dependence of the action so as to prejudice the rights of creditors of the defender interested in defeating such diligence.[1] The defender, however, or anyone deriving right through him by a title or in right of a debt contracted by him subsequent to the using of such diligence, cannot plead such an objection.[2]

The pursuer of an undefended action may also *restrict* the conclusions of his summons in terms of a minute of restriction written on the summons by his agent.[3]

(2) Defended Actions.—(a) *Distinction between Amendment and Adjustment.* — Amendments are to be distinguished from what is technically known as "adjustments." Adjustments are the large extensions, amplifications, and revisions which upon the Adjustment Roll the parties to a cause have a right to make of their condescendence, answers, and pleas in law respectively under the forms of procedure which have immemorially prevailed in the Court of Session. They may be made by either party without any formal minute of amendment, the alterations upon the principal summons alone being

[1] Court of Session Act, 1868, sec. 20; Fischer & Co. *v.* Andersen, 1896, 23 R. 395.

[2] Court of Session Act, 1868, sec. 20.

[3] Ibid., sec. 23.

initialed by counsel, and accordingly sec. 29 of the Court of Session Act, 1868, has no application to them.[1]

Amendments, on the other hand, are alterations made by the pursuer upon the instance or conclusions of the summons at any time, or by either party upon the record after the latter is closed.

Sometimes a party will not accept the adjustments of the opposite side on the ground that they are beyond the scope of adjustments, and should be made as amendments on conditions as to expenses.[2] In practice, however, any adjustment which does not radically alter the nature of the action will be allowed to be made.

(b) *Instance.*—Under the Court of Session Act, 1868,[3] it was only in very rare cases, such as cases of clerical error,[4] or of consent,[5] that any amendment was allowed upon the instance of a summons. By the Act of Sederunt, 20th March 1907, however, the power of allowing amendment given to the Court or Lord Ordinary is much increased, and the instance of a summons may now be amended in the following ways and on the following conditions:—

(*a*) Where an action or other proceeding has been commenced in the name of the wrong person as pursuer, or where it has been commenced without a person whose conjunction may be deemed necessary to make a good instance, or where it is doubtful whether it has been commenced in the name of the right person, the Court or Lord Ordinary, if satisfied that it has been so commenced through *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, may allow any other person to be sisted as pursuer in substitution for, or in addition to, the original party.[6]

(*b*) The character in which a party sues or is sued may be amended, at the instance of either party, from a representative character to suing or being sued in his own right, and *vice versâ*.[7]

(*c*) An insufficient or incorrect name or description of a party may be corrected at the instance of either party, and thereupon the action shall proceed in all respects as if the name or description had been

[1] Cairns *v.* Lee, 1892, 20 R. 16; Dalrymple *v.* Turner, 1901, 8 S. L. T. 437.

[2] Henderson *v.* Dawson, 1894, 2 S. L. T. 137.

[3] 31 & 32 Vict. cap. 100, sec. 29.

[4] Riach *v.* Wallace, 1899, 1 F. 718; Watt *v.* Smith's Trs., 1901, 9 S. L. T. 215.

[5] Andersen *v.* Harboe, 1871, 10 M. 217; Hislop *v.* MacRitchie's Trs., 1881, 8 R. (H. L.) 95.

[6] A. S., 20th March 1907, sec. 2 (*a*); C. A. S., B, i. 1; The Doughty Shipping Co., Ltd. *v.* North British Rly. Co., 1909, 1 S. L. T. 267.

[7] A. S., 20th March 1907, sec. 2 (*b*) and (*c*); C. A. S., B, i. 2 and 3; Klein *v.* Lindsay, 1909, 1 S. L. T. 89; The Doughty Shipping Co., Ltd. *v.* North British Rly. Co., 1909, 1 S. L. T. 267.

originally such as it appears after the amendment had been made. If no objection is taken to the original name or description the action may proceed, and in the judgment and all subsequent proceedings founded thereon the party may be named and described in the same manner as in the summons or other writ.[1]

In all these cases the amendment may be made on such terms as to expenses as to the Court or Lord Ordinary shall seem proper.

When all parties who have an interest are not called it is not now necessary for the pursuer to bring a supplementary or additional action as heretobefore, but it is competent for the Court or Lord Ordinary to allow the record to be amended by inserting in the summons or other writ the name of such additional defender, and to have the record as amended served on him, along with a notice in the following terms:—

X. Y. [*designation and address*].

Take notice that, in the action in which *A. B.* is the pursuer, and *C. D.* is the defender, the record in which, as now amended, is herewith enclosed, your name has, by order of Lord , Ordinary, dated , been added as a defender; and the conclusions of the action, originally directed against the said *C. D.*, are now also directed against you. If you desire to defend the said action, you will require to lodge defences within days from the date of service hereof, under certification that, if you fail to do so, the said *A. B.* will be entitled to take decree against you in the Undefended Roll in terms of the conclusions of the said action [*or*, obtain decree in absence against you, *in cases of suspensions and interdicts, etc.*];

and thereafter the action proceeds as if such added defender had originally been made a party to the cause; and in the event of no defences or answers being lodged by such added defender, after being duly served as aforesaid, the pursuer is entitled to take decree against him in the Undefended Roll or otherwise according to the present practice. In the event of defences being lodged, the pursuer prints the record along with such defences, and the action thereafter proceeds in ordinary form; provided always that the pursuer is liable for any expenses occasioned to the original defender by his failure to call such added defender in the first instance, unless cause be shown to the contrary; and the Court or Lord Ordinary must make it a condition of such amendment being allowed that said expenses shall first be paid, unless satisfied that the pursuer had sufficient reason for not calling the said additional defender in the first instance.[2]

It would accordingly appear that where all parties who have an

[1] A. S., 20th March 1907, sec. 2 (*d*); C. A. S., B, i. 4.

[2] A. S., 20th March 1907, sec. 2 (*e*); C. A. S., B, i. 5; Kennedy *v.* Shotts Iron Co., Ltd., 1910, 2 S. L. T. 329.

interest are not called, there is no discretionary power in the Court or Lord Ordinary to allow or disallow an amendment calling additional defenders, if the pursuer can otherwise bring a supplementary or additional action. As to the circumstances in which a supplementary or additional action may be raised, see *Supplementary Action*, *supra*, p. 314.

Where independent pursuers sue in the same action on separate and independent grounds of debt, the summons may be amended.[1]

(c) *Conclusions.*—Under sec. 29 of the Court of Session Act, 1868, as unamended, the Court or Lord Ordinary was given a certain limited power to allow amendments to be made in the conclusions of an action. Thus, leave was granted to add the words "or severally" to joint and several conclusions;[2] a general conclusion was allowed to be amended by introducing specific conclusions;[3] the person to whom payment was sought to be made was allowed to be altered;[4] the omission of a document of debt was allowed to be remedied;[5] a clerical error in the conclusions was allowed to be amended;[6] an alternative conclusion for damages at common law was allowed to be added to a conclusion for damages under the Employers' Liability Act;[7] and an alternative conclusion for payment of the sum for which a bill was granted was allowed to be added to a conclusion for payment of the sum contained in a bill of exchange.[8]

Whilst this was so, the power of the Court or Lord Ordinary was limited in many ways. Thus, where an action was laid on a draft agreement coupled with *rei interventus* the Court refused to limit the conclusions in order to found on a verbal agreement;[9] where an action concluded for declarator that defenders were bound to execute on their land at their own expense certain works for the drainage of the pursuer's land, a proposed amendment, that the expense should be borne jointly or by the pursuers, was held to be incompetent;[10] where there was one conclusion against separate defenders, the Court refused to substitute separate conclusions against the separate defenders;[11] where the action was a declarator of common ownership, the Court refused to

[1] Paxton *v.* Brown, 1908, S. C. 406.
[2] Cook *v.* Barnton Hotel Co., 1900, 2 F. 1011.
[3] Robertson *v.* Cockburn, 1875, 3 R. 21.
[4] Carruthers *v.* Cairns, 1890, 17 R. 769; Brown's Trs. *v.* Hay, 1897, 24 R. 1108.
[5] Bank of Scotland *v.* Fergusson, 1898, 1 F. 96; Sanderson *v.* Bryden, 1898, 5 S. L. T. 383.
[6] Davidson *v.* Renton, 1902, 10 S. L. T. 479.
[7] O'Donnell *v.* Russell, 1906, 14 S. L. T. 437.
[8] Hope *v.* Derwent Rolling Mills Co., Ltd., 1905, 7 F. 837.
[9] Gibson's Trs. *v.* Fraser, 1877, 4 R. 1001.
[10] Hope *v.* Heriot's Hospital Governors, 1878, 15 S. L. R. 400.
[11] Taylor *v.* M'Dougall & Sons, 1885, 12 R. 1304.

amend it by substituting a declarator of sole ownership;[1] where an action contained a number of separate money claims, an alternative conclusion for a sum of money calculated on a different basis was held to be incompetent;[2] where an action concluded for a declarator of property of goods, it was held incompetent to add an alternative conclusion of a declarator of lien;[3] where an action was for declarator of the right of an individual, it was held incompetent to change it into a right in the public;[4] and where an action was founded on contract, the Court refused to substitute an amendment to the effect that it was simply a unilateral obligation.[5]

Again, by the 29th section of the Court of Session Act, 1868, as unamended, it was not competent by amendment of the record or issues "to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment." Accordingly, a conclusion for interest was not allowed to be added;[6] and a conclusion for such damages as should arise after the date of the record was not allowed to be amended to include such damages as had arisen prior to such date.[7]

The Act of Sederunt, 20th March 1907, however, amends sec. 29 of the Court of Session Act, 1868, and enacts that "it shall be competent for the pursuer, at any time before final judgment, to amend the conclusions of the summons or other writ to the effect of increasing the sum for which he sues, or subjecting any other additional funds or property to the adjudication of the Court, on such terms as to expenses as to the Court or Lord Ordinary shall seem proper; and such amendment shall be allowed in all cases where according to the existing practice it would have been competent to raise a supplementary action; but in all other cases shall only be allowed in the discretion of the Court or Lord Ordinary."[8] (See *Supplementary Action*, *supra*, p. 314.)

It also provides that "it shall be competent for the Court or Lord Ordinary to allow any amendment of the summons or other writ which may be necessary for the purpose of determining, in the existing action or proceeding, the real question in controversy between the parties,

[1] Leny *v.* Dunfermline Mags., 1894, 21 R. 749.
[2] Russell, Hope & Co. *v.* Pillans, 1895, 23 R. 256.
[3] Dobell, Beckett & Co. *v.* Neilson, 1904, 11 S. L. T. 676.
[4] Loudon *v.* Ayr Tailors, 1891, 18 R. 549.
[5] Malcolm *v.* Campbell, 1891, 29 S. L. R. 235.
[6] Shotts Iron Co. *v.* Turnbull, Salvesen & Co., 1870, 8 M. 383.
[7] Laming & Co. *v.* Seater, 1889, 16 R. 828.
[8] A. S., 20th March, 1907, sec. 2 (*f*); C. A. S., B, i. 6; Duncanson *v.* Anderson, 1907, 15 S. L. T. 684; M'Donald *v.* Caledonian Rly. Co., 1909, 2 S. L. T. 20.

notwithstanding that, in consequence of such amendment, a larger or different remedy than that originally concluded for is thereby sought; but such amendment shall only be allowed on such terms as to expenses as to the Court or Lord Ordinary shall seem proper."[1] A conclusion for damages has been allowed to be added as an alternative to a conclusion for specific implement.[2]

The Act of Sederunt does not apply to Sheriff Court cases appealed to the Court of Session.[3] Notwithstanding this, amendments of records on appeal to the Court of Session from the Sheriff Court have been allowed and additional proof thereon taken by a Judge of Division.[4] Such proof is considered to be proof in the Sheriff Court.[5]

(d) *Condescendence, Answers, and Pleas in Law.*—By sec. 29 of the Court of Session Act, 1868, it is enacted "The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made."

Accordingly it has been held that a pursuer may introduce by amendment a new ground of action,[6] or a new defence,[7] with the appropriate pleas in law; he may substitute a new account for the one founded upon;[8] or amend the method of assessing the damages sued for;[9] or alter an averment that he is entitled to have the sum concluded for repaid to an averment that he is entitled to the same sum in name of damages;[10] or obtain a new trial upon new issues.[11]

These wide powers of amendment have been still further enlarged

[1] A. S., 20th March 1907, sec. 2 (*g*); C. A. S., B, i. 7; M'Donald *v.* Caledonian Rly. Co., 1909, 2 S. L. T. 20; Summerlee Iron Co., Ltd. *v.* Caledonian Rly. Co., 1911, S. C. 458; *cp.* Paterson *v.* Wallace, 1909, S. C. 20.

[2] Summerlee Iron Co., Ltd. *v.* Caledonian Rly. Co., 1911, S. C. 458.

[3] Paterson *v.* Wallace, 1909, S. C. 20.

[4] Gairdner *v.* Macarthur, 1915, S. C. 589. See also Mitchell *v.* Sellar, 1915, S. C. 360.

[5] Gairdner *v.* Macarthur, 1916, 1 S. L. T. 276.

[6] Arnott *v.* Burt, 1872, 11 M. 62; Morgan, Gellibrand & Co. *v.* Dundee Gem Line S.S. Co., 1890, 18 R. 205; Davidson *v.* Logan, 1908, S. C. 350.

[7] Keith *v.* Outram & Co., 1877, 4 R. 958; Cochrane *v.* Russell, 1891, 28 S. L. R. 697; Guinness, Mahon & Co. *v.* Coats Iron and Steel Co., 1891, 18 R. 441; Clippens Oil Co. *v.* Edinburgh, etc., Water Trustees, 1905, 7 F. 914. See also Davidson *v.* Falconer, 1827, 5 S. 748 (N. E. 699); Laurie *v.* Cleland, 1848, 11 D. 110.

[8] Caledonian Rly. Co. *v.* Chisholm, 1886, 24 S. L. R. 120.

[9] Govan Rope and Sail Co. *v.* Weir & Co., 1897, 24 R. 368.

[10] Rottenburg *v.* Duncan, 1896, 24 R. 35.

[11] Gelot *v.* Stewart, 1870, 8 M. 649.

by Act of Sederunt, 20th March 1907,[1] for the provisions of this Act, allowing for the first time extensive amendments to be made to the instance and conclusions of an action and a larger or different remedy than that originally sought, necessitate the allowance of corresponding amendments to the condescendence, answers, and pleas in law. (See *Instance, supra,* p. 450, and *Conclusions, supra,* p. 452.)

(e) *Amendments still Disallowed.*—Notwithstanding the wide powers of amendment now available under Act of Sederunt, 20th March 1907, there are certain events in which the Court will not allow amendments to be made:—

If a summons or other proceeding is *ab initio* null, it is impossible to amend it. Thus, letters of suspension were dismissed as incompetent and not to be remedied by amendment where the date of the letters was not that of the passing of the bill;[2] and where a minute of disclamation dated back to the raising of the action another pursuer could not be sisted.[3]

If, when a summons is served, there is no jurisdiction over the defender, it cannot be made good by subsequent amendment of the summons and record.[4]

A party will not be allowed to amend his record in order to adduce evidence which might have been led on the original record.[5] The Court will not allow an amendment to give effect to a technical plea which is not necessary to raise the true issue between parties.[6] An amendment will not be allowed to be made to validate an otherwise irrelevant action, if the amendment is made after the expiry of the date when by statute the action requires to be raised;[7] nor can an action be converted, by amendment, from one at common law into one raised alternatively under a statute, where the time allowed by said statute for bringing actions has expired.[8]

If a defender does not take a plea *tempestive* he will not be allowed to state a new ground of defence which, if sustained, will exclude the pursuer's claim, where if the said defence had been stated in time the

[1] C. A. S., B, i. 1-7.

[2] Campbell *v.* Fotheringhame, 1826, 4 S. 766 (N. E. 774).

[3] Ferguson, Davidson & Co. *v.* Paterson and Dobbie, 1898, 1 F. 227; Gordon *v.* Purves, 1902, 10 S. L. T. 446; 1903, 11 S. L. T. 38.

[4] Morley *v.* Jackson, 1888, 16 R. 78, per Lord Shand, p. 83; per Lord Adam, p. 84.

[5] Brown *v.* Hastie & Co., 1904, 6 F. 1001.

[6] Paterson *v.* Wallace, 1909, S. C. 20.

[7] Paul *v.* Inglis & Co., 1824, 2 S. 628 (N. E. 533); Mitchell *v.* Stuart, 1838, 16 S. 409.

[8] Clark *v.* Adams, 1885, 12 R. 1092.

objection could have been remedied.[1] After proof, a plea of reduction *ope exceptionis* should not be allowed to be added.[2]

A party cannot be allowed to amend in order to lead proof, if he has entered into a contract with the opposite side to renounce probation.[3]

(f) *Discretion of Lord Ordinary.*—In dealing with an amendment allowed by a Lord Ordinary under the Court of Session Act, 1868, Lord M'Laren expressed himself thus:—"I think there are strong reasons for considering that the power of amendment given to the Judge or the Court under the Court of Session Act is—I will not say a discretionary power—but a power to be exercised according to the *personal* judgment of the Judge or Court before whom the question may arise. . . . Even if I differed from the Lord Ordinary, which I do not, I should not be prepared to interfere with his judgment in such a matter."[4] The Lord Ordinary has a discretionary power to attach conditions to such amendments as he may authorise, and the conditions are not limited to the mere payment of expenses; and where a party has amended upon conditions imposed by the Lord Ordinary he cannot, after making his amendments, object to the competency of the conditions.[5]

(g) *Amendment of an Amendment.*—An amendment may be made on an amendment.[6]

(h) *Res Noviter.*—In course of a cause either party may state matter of fact *noviter veniens ad notitiam* or emerging since the commencement of the action if, on cause shown, leave is obtained from the Lord Ordinary to do so, the party amending always paying previous to stating such new matter such expenses as may be deemed reasonable by the Lord Ordinary or Court.[7]

It is imperative upon the Lord Ordinary, on permitting such an addition, to find the party amending liable in "such expenses as he may deem reasonable," though these should be modified to one shilling.[8] The motion to amend may be refused.[9]

[1] Livermore *v.* Duncan, 1865, 3 M. 410; *cp.* Clippens Oil Co. *v.* Edinburgh, etc., Water Trustees, 1905, 7 F. 914.

[2] Oswald *v.* Fairs, 1911, S. C. 257.

[3] Picken *v.* Arundale and Co., 1872, 10 M. 987; Carswell & Son *v.* Finlay, 1887, 24 S. L. R. 643.

[4] Brown's Trs. *v.* Hay, 1897, 24 R. 1108.

[5] Duthie Bros. & Co. *v.* Duthie, 1892, 19 R. 905.

[6] Lynch *v.* Stewart, 1871, 9 M. 860, per Lord Cowan, p. 865.

[7] Court of Session Act, 1825 (6 Geo. IV. cap. 120), sec. 10; Johnston *v.* Johnston, 1903, 5 F. 659.

[8] White *v.* Forbes, 1845, 7 D. 886.

[9] Brown *v.* Hastie & Co., 1904, 6 F. 1001.

Amendment on account of *res noviter* may take place in the Inner House.[1]

(i) *Right to Pursuer to Abandon on Amendment by Defender.*—Where a defender adds a new plea by way of amendment, the pursuer is entitled to abandon as at the date of lodging defences and will be awarded expenses from that date.[2]

(j) *Expenses of Amendment Equal to that of New Action.*—Where the expense of an amendment will equal the expense of beginning *de novo*, the Court will refuse to allow an amendment, especially if some parts of the summons are clearly irrelevant.[3]

(k) *Stage at which Amendment Allowed.*—By sec. 29 of the Court of Session Act, 1868, the Court or the Lord Ordinary may *at any time* amend any error or defect in the record or issues of any case, and by sec. 2 (*f*) of the Act of Sederunt, 20th March 1907 (C. A. S., B, i. 6), it is competent for the pursuer, *at any time before final judgment*, to increase the sum for which he sues, or to subject additional funds or property to the adjudication of the Court. Although it is thus competent at any time to grant leave to amend, "the stage at which amendments are proposed is a material element in determining whether they ought to be allowed."[4] Accordingly, leave to amend in the Inner House was refused where judgment had been delivered but the interlocutor was still unsigned,[5] and a motion, after the case had been heard, for an adjournment to consider whether an amendment should be made was not granted.[6] It is quite usual to allow amendments to be made in the Inner House.[7] In three cases[8] in the Inner House leave to amend was refused, but although the time at which the amendments were proposed to be made was alluded to, the real reason of refusal was that the amendments raised questions not intended to be raised by the original summons.

An amendment has been allowed in the Inner House after the case has been put out for advising;[9] and the House of Lords have

[1] Gairdner *v.* Macarthur, 1915, S. C. 589.

[2] Railton *v.* Jacques, 1834, 13 S. 26; Thomson *v.* Hughson & Co., 1861, 23 D. 679.

[3] Henderson *v.* Earl of Minto, 1860, 22 D. 1126.

[4] Gibson's Trs. *v.* Fraser, 1877, 4 R. 1001, per Lord President Inglis, p. 1004.

[5] Mackenzie *v.* Munro, 1869, 7 M. 676.

[6] Menzies *v.* Menzies, 1890, 17 R. 881.

[7] Morgan, Gellibrand & Co. *v.* Dundee Gem Line Steamship Co., 1890, 18 R. 205; Guinness, Mahon & Co. *v.* Coats Iron and Steel Co., 1891, 18 R. 441; Gallagher *v.* Pattison, 1891, 19 R. 79; Thornton *v.* Boyd and Forrest, 1907, S. C. 390; Mitchell *v.* Sellar, 1915, S. C. 360; Gairdner *v.* Macarthur, 1915, S. C. 589.

[8] Forbes *v.* Watt's Trustees, 1870, 9 M. 96; Gibson's Trs. *v.* Fraser, 1877, 4 R. 1001; North Berwick Gas Co. *v.* Robertson & Co., 1884, 22 S. L. R. 93.

[9] Gray *v.* Scottish Society for the Prevention of Cruelty to Animals, 1890, 17 R. 789.

remitted a case, with directions to allow the parties to amend the record,[1] and it has also deleted an erroneous admission.[2]

In a case appointed for jury trial it was held that it was too late to amend after the interlocutor adjusting issues had become final.[3] This judgment has been explained in a subsequent decision, and it is now thought that an amendment is still competent, notwithstanding that issues are finally adjusted.[4]

An amendment has been allowed in the Inner House, notwithstanding that the notes of evidence led at the proof in the Outer House have not been printed.[5]

(l) *Restriction.*—An amendment of a summons or other writ by restriction is quite competent. Thus, an action, which when raised was incompetent in respect that it was at the instance of unconnected pursuers each suing for a separate debt, was made competent by restricting the summons to one pursuer, with one set of averments.[6] Where a pursuer restricts his summons, and the action is dismissed *quoad* the portion departed from, the pursuer can raise a new action with regard to that portion.[7] In this case the pursuer consented to dismissal, whereas he might have insisted on absolvitor.[8] Accordingly, a pursuer was held not entitled to insert in a minute of restriction a reservation of right to bring a new action where the minute did not contain an offer of expenses.[9]

Previous to Act of Sederunt, 20th March 1907, it was held that real raisers who had condescended on a fund *in medio* for which they were liable could not restrict the amount of such fund,[10] and that a summons could not be restricted to a conclusion which raised a different question from that intended by the original summons.[11]

Where, in an action of damages for breach of promise of marriage and seduction, the conclusions as to breach of promise were withdrawn, and the defender moved for decree of absolvitor from the

[1] Mags. of Aberdeen *v.* University of Aberdeen, 1877, 4 R. (H. L.) 48.

[2] Clyde Navigation Trs. *v.* Laird & Sons, 1880, 7 R. (H. L.) 115.

[3] Arthur *v.* Lindsay, 1895, 22 R. 417.

[4] Hughes *v.* Edinburgh Town Council, 1905, 13 S. L. T. 672. See also Gelot *v.* Stewart, 1870, 8 M. 649; Keith *v.* Outram & Co., 1877, 4 R. 958; Croucher *v.* Inglis, 1889, 16 R. 774.

[5] Stevens *v.* Motherwell Entertainments, Ltd., 1914, S. C. 957.

[6] Paxton *v.* Brown, 1908, S. C. 406. See also Fischer & Co. *v.* Andersen, 1896, 23 R. 395.

[7] Stewart *v.* Greenock Harbour Trs., 1868, 6 M. 954.

[8] Ibid., per Lord President Inglis, p. 957.

[9] Wilson *v.* Musselburgh Mags., 1868, 6 M. 483.

[10] Campbell's Trs. *v.* Campbell, 1863, 1 M. 1016.

[11] Gibson's Trs. *v.* Fraser, 1877, 4 R. 1001.

conclusion for damages for breach of promise, the motion was refused *hoc statu*.[1]

(m) *Diligence.*—No amendment shall have the effect of validating diligence used on the dependence of any action so as to prejudice the rights of creditors of the defender interested in defeating such diligence, but shall be operative to the effect of obviating any objections to such diligence when stated by the defender himself, or by any person representing him by a title, or in right of a debt contracted by him subsequent to the execution of such diligence.[2]

(n) *Expenses of Amendment.*—Where the pursuer in an action of damages was allowed to amend his record and "to proceed in the cause only on payment" of the expenses of the amendment, the Court, in respect that the order had not been obtempered, assoilzied the defenders.[3] In a recent case defenders were allowed to amend in the Inner House upon payment of expenses since the closing of the record, within one month from the date of the interlocutor allowing the amendment.[4] (See also Maclaren on Expenses, pp. 66-71.)

(o) *Forms of Minutes of Amendment*;—

[*Counsel's name*], for the pursuer, craved leave of the Court to amend the instance—

By adding to [*or* deleting from] the designation of the pursuer [*or* defender] the words "as trustee of the deceased *A. B.*"

Or by adding after the name and designation of the pursuer [*or* defender] the words "and *C. D.* [*designation*] for any interest he may have," and substituting the word "pursuers" [*or* "defenders"] for the word "pursuer" [*or* "defender," *as the case may be*].

[*Where necessary, adding*—and by making the necessary alterations on the conclusions, will, condescendence, and pleas in law thereby rendered necessary.]

[*Counsel's name*], for the pursuer, craved leave of the Court to amend the conclusions of the summons—

By adding after the words "ought and should be decerned and ordained," occurring in the line of the page of the summons, the words "jointly and severally."

Or by substituting the sum of £300 sterling for the sum of £100 sterling therein contained.

[*Always adding, when necessary*—and to amend the condescendence and pleas in law by making the necessary alterations thereby rendered necessary.]

[1] Campbell *v.* Beveridge, 1861, 23 D. 1292.

[2] Court of Session Act, 1868, sec. 29; A. S., 20th March 1907, sec. 2; C. A. S., B, i.; Fischer & Co. *v.* Andersen, 1896, 23 R. 395.

[3] Dougall *v.* Caledonian Rly. Co., 1913, S. C. 349.

[4] Stevens *v.* Motherwell Entertainments, Ltd., 1914, S. C. 957.

[*Counsel's name*], for the defender, craved leave of the Court to add the following additional plea in law for the defender—

"The pursuer has no title to sue the present action."

(p) *Forms of Minutes of Restriction* :—

The pursuer hereby restricts the summons to the petitory conclusion for payment of £ .

[*Counsel's name*], for the pursuer, stated that in respect the principal sum concluded for having been paid by the defender, the pursuer restricts the conclusions of the action to the conclusion for expenses.

[*Counsel's name*], for the pursuer, stated that the pursuer hereby restricts the sum sued for to the sum of £ .

[*Counsel's name*], for the pursuer, stated that in respect the defender had now given the pursuer possession of the subjects referred to in the summons, it was no longer necessary for the pursuer to insist upon the conclusions for implement, and that he departed and hereby departs therefrom, and restricted and hereby restricts the summons to the petitory conclusion for damages, as libelled.

(q) *Interlocutors.*—The following forms of interlocutors may be of service :—

The Lord Ordinary allows the pursuers to amend their summons by inserting therein *A. B.* as an additional defender in terms of minute No. of process, and appoints the summons as amended to be served upon *A. B.*, in terms of the Codifying Act of Sederunt, Book B, Chap. i. sec. 5 ; Allows the said *A. B.* to lodge defences within ten days after service.

The Lord Ordinary opens up the record ; Allows the pursuer to amend the record in terms of the minute No. of process, on condition of his paying to the defender the sum of £ of modified expenses ; And it being stated at the Bar by counsel for the defender that he was satisfied with the undertaking of the pursuer's agents to pay said expenses, of new closes the record, and having heard counsel on the adjustment of issues, makes avizandum.

The Lord Ordinary allows the pursuer to add to the record the plea in law contained in his minute No. of process ; For this purpose opens up the record, and, the said plea having been added, of new closes the record and of new makes avizandum with the cause, reserving all questions of expenses.

The Lord Ordinary having considered the closed record, proof, and productions, allows the pursuer to amend the summons as proposed at the Bar, opens up the record for that purpose, and the summons having been amended, of new closes the record, decerns against the pursuer for the sum of £ , etc.

The Lord Ordinary opens up the record ; Allows the record to be amended in terms of minute for the defender and answers thereto for the pursuer, Nos. and of process ; Of new closes the record ; Finds the pursuer entitled to the expenses of and connected with the amendment, modifying

the same at £ , for which sum decerns against the defender, and makes avizandum with the debate on the issues.

In a case where objection was taken to the Auditor's report on the ground that the interlocutor remitting the cause to him was incompetent in respect that when it was pronounced an amendment had been put on record without any interlocutor allowing the same to be received and closing the record of new, the Court repelled the objection.[1]

[1] Hastie *v.* Steel, 1887, 24 S. L. R. 340.

CHAPTER V

MOTION TO WAKEN

(1) Definition of Wakening.—Wakening is the process by which a cause, which has been called and is asleep is restored to the condition in which it was at the date of the last interlocutor or step of procedure.

(2) A Sleeping Process.—A sleeping process is one in which no procedure has taken place for a year from the date of the last interlocutor or step of process. Until recently the practice has been to fix the period at a year and day, but in the institutional writers[1] the period is fixed at one year, and the latter period has been accepted in the most recent case.[2] Where the time expired on a holiday, and a motion to keep the process awake was enrolled on the day previous, it was held that the cause had fallen asleep.[3] If a cause is asleep, no motion can be made or step in procedure taken in the cause without it being awakened.

A cause is still in dependence although it is asleep.[4]

(3) What Causes may Fall Asleep.—All causes may fall asleep with the exception of Inner House causes,[5] petitions presented to the Junior Lord Ordinary under the Court of Session Act, 1857,[6] causes where issues have been adjusted,[7] Exchequer causes commenced by *subpœna*,[8] Inner House causes remitted to the Outer House,[9] sequestrations,[10] and causes taken to *avizandum*.[11]

In Exchequer causes commenced by *subpœna*, when any such cause shall have lain over for such period as in the case of any ordinary action would have rendered such action a sleeping process, such Exchequer

[1] Stair, iv. 34. 4; Erskine's Inst. iv. 1. 62.
[2] The American Mortgage Co. of Scotland *v.* Sidway, 1906, 14 S. L. T. 521.
[3] H.M. Advocate *v.* Heddle, 1840, 3 D. 264.
[4] Denovan *v.* Cairns, 1845, 7 D. 378.
[5] Erskine's Inst. iv. 1. 62.
[6] 20 & 21 Vict. cap. 56; Wemyss, Petr., 1860, 22 D. 556.
[7] A. S., 16th February 1841, sec. 47; C. A. S., F, iv. 5; Bissett *v.* Mercer, 1854, 16 D. 988.
[8] 19 & 20 Vict. cap. 56, sec. 9.
[9] Gillies *v.* Scott, 1829, 7 S. 839.
[10] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. cap. 20), sec. 42.
[11] Logan *v.* Howatson, 1775, Mor. 10492, 12171.

cause shall not be moved in by the Lord Ordinary or Court until the expiration of ten days from the date of written notice being given by the pursuer or defender to the opposite party in the cause that the cause is to be further proceeded with.[1]

An action which has been sisted may fall asleep.[2]

If an action has distinct conclusions against different defenders, it may be asleep against one of the defenders and awake against the rest.[3] In competitions, multiplepoindings, and rankings and sales, procedure against one defender keeps the action awake against all defenders.[4]

(4) Action must be Pending in Order to be Awakened.—No action can be awakened unless it is a pending process. An action is a pending process at any time between its execution and an interlocutor finally disposing of the merits and expenses.[5] However, if a summons is executed but not called for a year after the day of compearance, it falls and cannot be awakened.[6] If a final decree is not extracted, and the process has been transmitted to the department of the Lord Clerk Register,[7] it is not necessary, in order to obtain extract, that the cause should be wakened, even after the lapse of forty years.[8] An extracted decree cannot be wakened.[9] If the decree is not final, and something remains yet to be done, and it has lain for over a year, the cause may yet be wakened.[10]

An action can be awakened even after the lapse of forty years.[11]

(5) Miscellaneous.—In an action of wakening at the instance of four out of twelve of the pursuers of the original process, it was held that the process could not be proceeded in as duly wakened until all of the pursuers, or the representatives of such of them as were dead, had been called for their interest, and such of them as would not concur as pursuers of the wakening might be called as defenders.[12]

An executor-nominate may, before he has obtained confirmation, raise a wakening of a depending action which has fallen asleep.[13]

[1] 19 & 20 Vict. cap. 56, sec. 9.
[2] American Mortgage Co. of Scotland *v.* Sidway, 1906, 14 S. L. T. 521
[3] Earl of Lauderdale *v.* Lord Yester and Seton, 1710, Mor. 12170.
[4] Ivory, ii. 60 (note).
[5] Aitken *v.* Dick, 1863, 1 M. 1038 ; Alston *v.* Macdougall, 1887, 15 R. 78.
[6] M'Kidd *v.* Manson, 1882, 9 R. 790.
[7] A. S., 22nd January 1876 ; C. A. S., A, v.
[8] Fountainhall's Decisions, i. 279, Bishop of Murray ; White *v.* Oswald, 1709, Mor. 12170.
[9] Alexander, 1845, 7 D. 884.
[10] White *v.* Oswald, 1709, Mor. 12170.
[11] Walker *v.* Earl of Eglinton's Tutors, 1827, 5 S. 240 (N. E. 224).
[12] Blackwood *v.* Mylne, 1845, 8 D. 313.
[13] Flowerdew *v.* Crichton, 1849, 11 D. 563.

Where the defender in an action of divorce lived in America and had received personal intimation under the original process, it was held not necessary to repeat personal intimation in the wakening.[1]

(6) PROCEDURE.—Formerly the procedure adopted to waken a cause was either by joint minute of consent of parties or, where the parties did not consent, by summons of wakening. In 1850,[2] however, it was made competent, where there was no consent, to proceed by motion; and this, in turn, has been superseded by a minute of wakening. Sec. 95 of the Court of Session Act, 1868, which allows the latter procedure to be adopted, is as follows:—

Where, according to the existing practice, a cause would require to be wakened in order to its being proceeded with, it shall be competent for any of the parties to enrol such cause before the Lord Ordinary, and to lodge a minute craving a wakening of the cause; and the Lord Ordinary may thereupon direct intimation of such minute to be made to the known agents of the other parties in the cause, or to such parties themselves, and shall direct intimation to be made in the Minute-Book of the Court of Session; and where said parties have no known agents, or are themselves furth of Scotland, the Lord Ordinary shall also appoint edictal intimation thereof to be made by publication in the record of edictal citations; and on the expiration of eight days from the date of such intimation, or from the latest date thereof, and on a certificate being lodged in process under the hand of the agent of the party applying for the wakening, certifying that he has duly intimated the minute in terms of the Lord Ordinary's interlocutor, the Lord Ordinary may pronounce an interlocutor holding the cause as wakened, and the same may thereafter be proceeded with as wakened accordingly.

It is still competent to proceed by summons of wakening, and a cause may still be wakened by minute of consent of parties.

Where appearance has not been entered in a cause, it has been decided that the process cannot be wakened in the ordinary case by minute under sec. 95 of the Court of Session Act, 1868, and that the only means of wakening is by a summons.[3] In a more recent undefended case, however, where a decree of separation and aliment was pronounced against a husband, and the latter after paying aliment for some time disappeared, the Lord Ordinary allowed the cause to be wakened by minute on the averment that it had been found out that

[1] Campbell *v.* Campbell, 1832, 10 S. 373.

[2] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 30, repealed by 38 & 39 Vict. cap. 66.

[3] Lorrain's Trs., etc., *v.* Brodie, etc., 1881, 19 S. L. R. 278.

the defender had recently died in Belfast, and had left a will appointing an executrix.[1]

(7) Forms of Minutes of Wakening.—(a) *Of Consent*—

[*Name of pursuer's counsel*], for the pursuer, and [*name of defender's counsel*], for the defender, concurred in stating that the last interlocutor in the cause was dated , and that the cause was asleep, and craved the Lord Ordinary to pronounce, of consent, an interlocutor wakening the cause.

(b) *In Terms of Sec.* 95, *Court of Session Act,* 1868—

[*Counsel's name*], for the pursuer [*or* defender], stated that the last interlocutor in the cause was dated , and that the cause was asleep, and craved the Lord Ordinary to waken the cause in terms of the Court of Session Act, 1868 (31 & 32 Vict. cap. 100), sec. 95.

[*Counsel's name*], for the pursuer [*or* defender], stated that the last interlocutor in the cause was dated , and that the cause was asleep; that the agent for the defender [*or* pursuer] , and the defender [*or* pursuer] himself are resident in Scotland, but that all the other defenders [*or* pursuers] are furth thereof and have no known agents in Scotland, and craved the Lord Ordinary to order intimation of this minute to be made in the Minute-Book and to the defender [*or* pursuer] or his known agent, as also edictal intimation to all the other defenders [*or* pursuers], and thereafter to pronounce an order holding the cause as wakened, all in terms of sec. 95 of the Court of Session Act, 1868.

(8) Forms of Interlocutors.—(a) *Of Consent*—

The Lord Ordinary, in respect of the minute for the parties, No. of process, wakens the cause.

(b) *Under Sec.* 95 *of the Court of Session Act,* 1868—

(i.) The Lord Ordinary appoints the minute for the pursuer [*or* defender], No. of process, craving wakening, to be intimated to the known agent for the defender [*or* pursuer] , or to the defender [*or* pursuer] , himself for eight days, and to be intimated edictally to the other defenders [*or* pursuers] by publication in the Record of Edictal Citations for eight days, and intimation also to be made in the Minute-Book in terms of sec. 95 of the Court of Session Act, 1868.

(ii.) The Lord Ordinary, in respect of the certificate of intimation, No. of process, holds the cause as wakened.

(9) Form of Certificate of Intimation.

I, , agent for the pursuer [*or* defender], hereby certify that the intimations required by the Lord Ordinary's interlocutor of last have been duly made, and that the *inducie* have expired.

[*Signature of Agent.*]

[1] Mowatt *v.* Mowatt, 1910, 2 S. L. T. 205.

CHAPTER VI

MOTION FOR TRANSFERENCE

(1) Definition of Transference.—Transference is the step by which a depending action is transferred from a party deceased to his representatives. Any further proceedings in a cause where a party has died are null unless the representatives sist themselves or the action is transferred against them.[1]

(2) Procedure.—(a) *Pursuers.*—Under the old practice, where the representatives of a deceased pursuer refused to sist themselves in his place, the only manner in which the defender could get the action transferred was by a summons of transference. By sec. 96 of the Court of Session Act, 1868, however, it was made competent for a party who might have instituted a summons of transference to proceed by way of minute in the original cause. The terms of the section are as follows:—"Where, according to the existing practice, a cause may be transferred against any party or parties, it shall be competent to any party who might have instituted a summons of transference to enrol the cause before the Lord Ordinary, and to lodge a minute craving a transference of the cause against such party or parties; and the Lord Ordinary may thereupon grant warrant for serving a copy of the summons or other original pleading upon the party or parties against whom such cause is sought to be transferred, and at the same time shall allow such party or parties to give in a minute of objections to such transference within a time to be specified in the interlocutor; and such interlocutor shall also be intimated in common form to the agents of the other parties in the cause, and such and the like procedure may be had in virtue of the service of such summons or pleading under the Lord Ordinary's warrant as might have been had in virtue of the execution of a summons of transference; and if the Lord Ordinary shall think fit to transfer the cause in terms of the said minute (which the Lord Ordinary is hereby authorised to amend if necessary), he shall pronounce an interlocutor holding the cause as transferred against the

[1] Davidson *v.* Robertson, 1827, 5 S. 751 (N. E. 702); Ferrier *v.* Berry, 1828, 6 S. 982; Mercer *v.* Maxwell, 1850, 12 D. 756. See, however, Wilkie *v.* Flowerdew, 1850, 12 D. 818 (death of a consenter).

party or parties named in such minute or amended minute, and the cause shall be taken to be transferred accordingly."

If a minute of objections is not lodged within the time specified in the interlocutor, it is too late to come forward and state objections afterwards.[1]

Where the representatives of a deceased pursuer are willing to sist themselves in his place, it has been the law since the year 1693[2] that they may do so without a summons of transference, and a minute asking to be sisted, accompanied by the production of their title, is all that is required.[3] The title does not require to bear that there is an assignation of the particular action.[4] (See *Motion to Sist Party, infra*, p. 472.)

(b) *Defenders.*—Until the year 1868 it was necessary, in order that a depending cause should be transferred from a deceased defender to his representatives, that a summons of transference should be raised, whether the representatives were willing to sist themselves or not. By sec. 96 of the Court of Session Act, 1868, however, a minute of transference may now be used instead of a summons where the representatives refuse to sist themselves. If they desire to sist themselves they may do so by a minute of sist,[5] accompanied by production of their title. (See preceding paragraph; also *Motion to Sist Party, infra*, p. 472.)

(3) At what Stage Transference is Competent.—An action may be transferred at any time while it is in dependence, *i.e.* at any time after execution and before final judgment disposing of the merits and expenses.[6] Accordingly, where an action has been served but not called, it may be transferred.[7] Again, where an action was raised with conclusions for (1) right of way; (2) removal of obstructions; and (3) expenses, and the defender died after an interlocutor had been pronounced finding that there was a right of way and before further proceedings, it was held that the cause could be transferred against the heir;[8] and where decree was pronounced assoilzieing the defender with expenses, but before the amount had been decerned for the defender died, it was held that the pursuer, who intended to appeal to the House of Lords, was entitled to have the cause transferred in the Court of Session against the defender's heir.[9]

[1] Watson *v.* Cowan, 1894, 2 S. L. T. 168.
[2] Act 1693, cap. 24 (record edition), cap. 15 (12mo edition).
[3] Court of Session Act, 1868, sec. 98.
[4] Kyle *v.* Kyle's Trs., 1821, 1 S. 180 (N. E. 171).
[5] Court of Session Act, 1868, sec. 98.
[6] Aitken *v.* Dick, 1863, 1 M. 1038; Alston *v.* Macdougall, 1887, 15 R. 78.
[7] M'Intosh *v.* Macandrew, 1829, 7 S. 649; Cameron *v.* Chapman, 1838, 16 S. 907; Watson *v.* Watson, 1898, 6 S. L. T. 201.
[8] Anderson *v.* Earl of Morton's Trs., 1859, 21 D. 1055.
[9] Forbes *v.* Clinton, 1872, 10 M. 449.

(4) Persons against whom Transference is Competent.—The only question competent to be discussed at a transference is whether the person against whom the cause is sought to be transferred represents the deceased. If he does so, then the cause may be transferred against him, and it is incompetent for such a representative to plead in the process of transference that, while he represents the deceased generally, he does not represent him as regards the action in question.[1] The heir against whom a cause has been transferred may, however, at once renounce his succession by minute and allow decree *cognitionis causa tantum* to pass against him,[2] and, if he does so without causing unnecessary expense to the pursuer, he is entitled to his expenses.[3] Where a deceased defender had conveyed the subject of the action to trustees and the cause was transferred against his heir, who refused to enter or defend, it was held that decree in the action was not *res judicata* in a question with the trustees.[4]

Where there is both an heir and an executor intromitting with the estate of a deceased party to a cause, it is incompetent to seek a transference against another person as being a special disponee under the deceased's will.[5]

Transference is not competent against the representatives of a defender where the action is one involving penal conclusions, such as a petition and complaint on the ground of malversation as a trustee;[6] nor is it competent to transfer a cause against representatives of a defender who are outwith the jurisdiction of the Scottish Courts.[7] Where the defender is a foreigner who has died intestate and arrestments have been used to found jurisdiction against his representatives, the action may be transferred against them *cognitionis causa tantum*, and it was held not to be a good objection to such a transference that the pursuer had failed to call the whole next of kin of the deceased, in respect that he had called all whose addresses were known and who had taken steps in the country of the defender's domicile *adire hæreditatem*.[8]

(5) Bankruptcy.—Where a party to a cause becomes bankrupt and a trustee is appointed, the latter's act and warrant entitles him to

[1] Wilson *v.* Agnew, 1828, 6 S. 927; Parks *v.* Earl of Stair, 1854, 16 D. 1105.
[2] Low *v.* Campbell, 1824, 3 S. 266 (N. E. 187).
[3] Carruthers *v.* Hogg, 1828, 7 S. 81.
[4] Goldie *v.* Tenants of Maison-Dieu, 1752, Mor. 14065.
[5] Clelland *v.* Baillie, 1845, 7 D. 461.
[6] Gibson *v.* Barbour's Representatives, 1846, 8 D. 427. See also Watson *v.* Cowan, 1894, 2 S. L. T. 168.
[7] Mackenzie *v.* Drummond's Exrs., 1868, 6 M. 932.
[8] Davidson, Pirie & Co. *v.* Dihle's Representatives, 1900, 2 F. 640.

maintain actions in the same way as the bankrupt might have done if his estate had not been sequestrated.[1] Transference against a trustee in bankruptcy of an action raised at the instance of, or against, a bankrupt or a party who has become bankrupt in the course of such litigation is not, however, a competent method of procedure. For the course to be adopted in such case, see *Bankruptcy Proceedings, supra*, p. 235 *et seq.*

(6) Miscellaneous.—Where a defender was called as a defender for his interest and died without entering appearance, it was held competent for the pursuers to proceed with the action without transferring the cause against his representatives.[2]

A person purchasing at a ranking and sale does not become a proper party to such a process, and accordingly it cannot be transferred against his representatives.[3]

In an action of declarator of right of way by five pursuers, it was held competent to transfer the action at the instance of four of the pursuers against the representatives of a deceased defender.[4]

An action of affiliation and aliment in which a decree is given for aliment for seven years, reserving the mother's claim for aliment at the end of that period, may be transferred against the representatives of the putative father.[5]

(7) Form of Minute of Transference.—

[*Counsel's name*], for the pursuer [*or* defender] stated that the defender [*or* pursuer] in the cause died on last, leaving a trust disposition and settlement, dated and recorded , whereby he appointed to be his trustees [*or as the case may be*]; and that the said trustees have failed [*or* declined] to sist themselves as parties to the cause; and he craved the Lord Ordinary [*or* Court] to grant warrant for serving a copy of the summons and of this minute on the said trustees [*or as the case may be*], and allow them to lodge objections within a short period, and thereafter to dispose of any such objections lodged and transfer the cause in common form against the said trustees in room and place of , all in terms of sec. 96 of the Court of Session Act, 1868.

(8) Form of Interlocutor Following upon Minute of Transference.—

The Lord Ordinary, in respect of the minute lodged by the craving a transference of the cause, No. of process, grants warrant for

[1] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. cap. 20), sec. 70.
[2] West Calder Oil Co. *v.* Fell, 1873, 11 M. 546.
[3] M'Innes *v.* Brander, 1844, 6 D. 512.
[4] Anderson *v.* Earl of Morton's Trs., 1859, 21 D. 1055.
[5] Clarkson *v.* Fleming, 1858, 20 D. 1224.

serving a copy of the summons in the cause and of the said minute, along with a copy of this deliverance, on the party named and designed in the said minute, against whom such transference is craved, and allows him to give in a minute of objections to such transference by the day of next, and also appoints a copy of this interlocutor to be intimated in common form to the agents of the other parties in the cause.

CHAPTER VII

MOTION FOR WAKENING AND TRANSFERENCE

WHERE, according to the existing practice, a cause would require to be wakened in order to its being proceeded with, and also to be transferred against any party or parties, it shall be competent to any party who might have instituted a summons of wakening and transference, to enrol the cause before the Lord Ordinary, and to lodge a minute craving a wakening of the cause and a transference thereof against such party or parties; and after such procedure by intimation and service as is hereinbefore directed with respect to motions for wakening and transference respectively, the Lord Ordinary may pronounce an interlocutor holding the cause as wakened, and may, either in the same interlocutor or in an interlocutor to be subsequently pronounced, as justice may require, also transfer the cause against the parties named in such minute.[1] Where a pursuer in a consistorial action was found entitled to expenses, and the decree was not enforced, the defender died and the pursuer was confirmed as his executrix. The action fell asleep, and a minute for wakening and transference of the cause against the executrix was lodged by the law agent for the pursuer in the consistorial action. The pursuer objected, and stated that she had given no authority for the minute, that she objected to the transference of the cause, and that she did not intend to proceed further in the cause. The Lord Ordinary refused the motion.[2]

[1] Court of Session Act, 1868, sec. 97.
[2] Calder *v.* M'Leod, 1914, 1 S. L. T. 240

CHAPTER VIII

MOTION TO SIST PARTY

I. To Sist a Pursuer.—(1) *Motion by Pursuer, or by Person Desiring to be Sisted.*—(a) *Former Rule.*—Formerly the general rule was that a new pursuer could not be sisted without the consent of the defender, and this rule applied equally to the case where a person not called wished to be sisted as a pursuer,[1] and the case where the pursuer himself wished either to substitute for himself another pursuer or to sist an additional pursuer.[2]

The rule had no application in the following cases:—

(i.) The representative of a deceased pursuer dying *pendente processu*, such as an heir, executor, or assignee, was allowed to sist himself upon the production of his title without the consent of the defender.[3] This, of course, was dependent upon the nature of the action, for, while in actions of damages his representative might follow it to a conclusion,[4] the action might be of such a personal nature that a representative had no such right.[5]

(ii.) In applications to the Court under the *Entail* Acts, "should the applicant die, his personal representative or his successor in the entailed estate, or his disponee, legatee, or assignee, or any of them according to their respective rights and interests, shall, except in the case of applications in which it is necessary to obtain the consent or the dispensing with the consent of one or more heirs of entail, be entitled to be sisted in the process, at whatever stage the death may happen, and to prosecute the same."[6]

(iii.) The *assignee* of a living pursuer might also sist himself without consent.[7]

[1] Mags. of Edinburgh *v.* Budge & Co., 1824, 3 S. 403 (N. E. 283); Remington, Crawford & Co. *v.* Bruce, 1829, 7 S. 692; Taylor *v.* Crawford, 1833, 12 S. 39.

[2] Andersen *v.* Harboe, 1871, 10 M. 217; Morison *v.* Gowans, 1873, 1 R. 116; Hislop *v.* MacRitchie's Trs., 1881, 8 R. (H. L.) 95, per Lord Watson.

[3] Act, 1693, cap. 24 (record edition), cap. 15 (12mo edition); Fearn *v.* Cowper, 1899, 7 S. L. T. 68.

[4] Neilson *v.* Rodger, 1853, 16 D. 325. See also Bern's Exr. *v.* Montrose Asylum, 1893, 20 R. 859.

[5] Green or Borthwick *v.* Borthwick, 1896, 24 R. 211.

[6] Entail Amendment Act, 1875, sec. 12 (3); Scott, Petr., 1850, 12 D. 1256.

[7] Fraser *v.* Duguid, 1838, 16 S. 1130; Stewart *v.* Kidd, 1852, 14 D. 527; Watt *v.*

(iv.) A person who is a *proper legal guardian* to a pursuer might also sist himself without the defender's consent,[1] and a curator *ad litem* could be appointed to a person under disability. (See *Curator ad Litem, supra*, p. 185.)

(v.) The *law agent* of a party in a depending cause had also a right to be sisted in order to recover his expenses in cases where his client had obtained (*a*) decree for expenses, or (*b*) judgment necessarily leading to such a decree, or (*c*) where there had been collusion between the parties in order to defeat his claim.[2] In consistorial causes where the parties have become reconciled after an investigation has been made into the facts, the law agent for the wife may sist himself as a party in order that he may recover from the husband the expenses incurred by him on behalf of the wife; if there has been no investigation into the facts, a separate action is necessary.[3]

(vi.) *A trustee of a bankrupt pursuer* had always a right to sist himself if he thought proper. (See *Bankruptcy Proceedings, supra*, p. 235 *et seq.*)

(vii.) In one or two *exceptional* cases a new pursuer was allowed to be sisted without the consent of the defender. Thus, a judicial factor in peculiar circumstances was allowed to be introduced as a concurring pursuer;[4] a landlord was allowed to sist himself in support of his tenant in a suspension and interdict;[5] a creditor with a good title was allowed to be substituted for a creditor whose title was inept in respect that the year of the King's reign was written on an erasure;[6] the instance of an action by the preses and treasurer of an unincorporated society against one of their own members being objected to, the other

Scottish North-Eastern Rly. Co., 1866, 4 M. 318; Campbell *v.* Lindsay, 1867, 39 Jur. 256; Anderson and Watt *v.* Scottish North-Eastern Rly. Co., 1867, 3 S. L. R. 270; Parker *v.* Welsh, 1894, 2 S. L. T. 122; Mavor *v.* Aberdeen Educational Trust, 1902, 10 S. L. T. 156. See, however, Ferguson, Davidson & Co. *v.* Paterson and Dobbie, 1898, 1 F. 227; Gordon *v.* Purves, 1902, 10 S. L. T. 446; 11 S. L. T. 38. In these cases there were minutes of disclamation *ab initio*, and it was held that, as there was no process, there could be no sist of a new pursuer.

[1] Lynch *v.* Stewart, 1871, 9 M. 860; Jack *v.* North British Rly. Co., 1886, 14 R. 263; Court of Session Act, 1868, sec. 98.

[2] Tod and Wright *v.* Wilson and M'Lellan, 1822, 1 S. 381 (N. E. 358); M'Lean *v.* Auchinvole, 1824, 3 S. 190 (N. E. 129); Murray *v.* Kyd, 1852, 14 D. 501; Hamilton and Macqueen *v.* Hay, 1854, 17 D. 107; Cornwall *v.* Walker, 1871, 8 S. L. R. 442; Welsh *v.* Cousins, 1898, 35 S. L. R. 656; Crawford *v.* Smith, 1900, 8 S. L. T. 249.

[3] Macgregor and Barclay *v.* Martin, 1867, 5 M. 583; Smith *v.* Smith, 1871, 9 M. 538; Clark *v.* Henderson, 1875, 2 R. 428; Wales *v.* Wales, 1902, 9 S. L. T. 371.

[4] Morison *v.* Gowans, 1873, 1 R. 116.

[5] Young *v.* Cunningham, 1830, 8 S. 959.

[6] Earl of Dunmore *v.* Dickson, 1835, 13 S. 1107.

members were allowed to sist themselves as pursuers;[1] and in a petition and complaint against the election of magistrates where there was a defence of no process, a councillor was allowed to sist himself as a complainer.[2]

(b) *Present Rule.*—By Act of Sederunt, 20th March 1907, sec. 2 (*a*),[3] an alteration has been made on that portion of the former rule which dealt with the case of an original pursuer who wished to substitute for himself a new pursuer with a good title, or to sist an additional pursuer to cure a defect in the instance of the original pursuer; the remainder of the rule is still in force.

Sec. 2 (*a*) is as follows:—"Where an action or other proceeding has been commenced in the name of the wrong person as pursuer, or where it has been commenced without a person whose conjunction may be deemed necessary to make a good instance, or where it is doubtful whether it has been commenced in the name of the right person, the Court or Lord Ordinary, if satisfied that it has been so commenced through *bonâ-fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, may allow any other person to be sisted as pursuer in substitution for, or in addition to, the original party, on such terms as to expenses as to the Court or Lord Ordinary shall seem proper." Where a beneficiary brought an action in his own name to establish that a debt was due to the estate of a deceased person, and the Lord Ordinary dismissed the action on the ground of no title to sue, the Court allowed the executor of the deceased to be sisted as a pursuer upon the beneficiary finding caution for the executor's expenses.[4]

The attestator in a bond of caution granted in respect of a suspension of a charge was allowed to sist himself as a party to the suspension where the complainer and his cautioner had become bankrupt during the dependence of the action, and the trustee on the complainer's estate had refused to sist himself.[5]

The executor of a party who has raised a competent action and has died *pendente lite* is entitled to be sisted in his place, even though the action is a personal one which does not transmit to an executor, and where the only possible interest is in respect of expenses.[6]

[1] Wood *v.* M'Caul, 1833, 12 S. 50.

[2] Millar *v.* Gibson-Craig, 1827, 5 S. 305 (N. E. 283). See, however, Grant *v.* Dick, 9th February 1821, F. C.

[3] C. A. S., B, i. 1.

[4] Morrison *v.* Morrison's Exrx., 1912, S. C. 892.

[5] Addison *v.* Brown, 1910, 1 S. L. T. 185.

[6] Martin *v.* M'Ghee, 1914, 1 S. L. T. 120.

(2) *Motion by Defender.*—Where the pursuer of an action alienates or is otherwise divested of the subject of the action so that he is no longer interested in it, the transferee of the subject may be required by the defender to sist himself, and failing his doing so the action may be dismissed.[1]

In popular actions, such as rights of way, where a pursuer who has a sufficiently good title and interest, but whose title and interest is shared by others who supply the funds, the Court will appoint those other persons to sist themselves, and failing their doing so will require the pursuer to find caution;[2] at least they will do so if it appears that the pursuer is a man of straw and has been put forward for that reason.[3] Again, where there is a claim for damages arising out of a wrong done, all the parties interested in that claim should sue in one action. Accordingly, in a case where a mother and several children raised an action of damages for the death of their husband and father, the Court, on the motion of the defender, ordered intimation to be made to the other children in order that they might crave, if so desired, to sist themselves.[4]

II. To Sist a Defender.—(1) *Motion by Person Desiring to be Called as a Defender.*—(a) *General Rule.*—Where a person who is not called has a clear interest to defend, the Court will on his motion sist him as a defender.[5] Thus, where a person dies *pendente processu*,[6] or becomes bankrupt,[7] or assigns the property in dispute to a third party,[8] his representative, trustee, or assignee respectively may sist himself to the process as a defender. Where the settlement of a deceased defender was destroyed, it was held that his trustees could not sist themselves until the deed was revived by a decree in a proving of the tenor.[9] In an early case it would appear as if the right of a creditor of a bankrupt to sist himself as a defender in an action where the bankrupt was sued for divorce was admitted,[10] but in a recent case this right was doubted.[11] The trustees of a husband, who obtained decree of divorce and who died

[1] Fraser *v.* Dunbar, 1839, 1 D. 882; Waddel *v.* Hope, 1843, 6 D. 160.

[2] Jenkins *v.* Robertson, 1869, 7 M. 739. See also Robertson *v.* Duke of Atholl, 1905, 8 F. 150.

[3] Potter *v.* Hamilton, 1870, 8 M. 1064.

[4] Smith *v.* Wilsons and Clyde Coal Co., 1893, 21 R. 162.

[5] Stair, iv. 38. 21.

[6] M'Culloch *v.* Hannay, 1829, 8 S. 122; Ritchie *v.* Ritchie, 1874, 1 R. 826.

[7] Bankruptcy (Scotland) Act, 1913, sec. 70; Ellis *v.* Ellis, 1870, 8 M. 805.

[8] Bontine *v.* Dunlop, 1823, 2 S. 115 (N. E. 106).

[9] Geikie *v.* Hutchison, 1848, 10 D. 354.

[10] Greenhill *v.* Ford, 1822, 1 S. 296 (N. E. 275); affd. 1824, 2 Sh. App. 435.

[11] Corbidge *v.* Somerville, 1913, S. C. 858.

prior to the disposal of the reclaiming note, were, however, allowed to sist themselves as respondents.[1] A bankrupt whose trustee fails or refuses to defend may sist himself as defender.[2] A husband married before or during the dependence of a cause may sist himself,[3] and so may the proper guardians of a defender. In one case where a child having an interest in a judgment was born after the date of the judgment a curator *ad litem* was appointed who was sisted as a party.[4] Where a defender becomes insane *pendente processu*, a *curator bonis* may sist himself.[5]

A landlord having the true interest in an action against his tenant has been allowed to sist himself as a defender.[6]

A party claiming a right of property in the subject of litigation is entitled to be sisted as a defender.[7]

The magistrates of a burgh have a right to sist themselves as defenders in any action relating to the rights of the public.[8]

A county council or a district committee of a county council has a right to sist itself as a defender in any action affecting a right of way,[9] but neither a parish council nor its landward committee has such a right.[10] A public company formed for the purpose of preserving rights of way has been allowed to sist itself as a defender in an action of declarator by a proprietor that his lands were free from alleged servitudes of rights of way.[11]

The Lord Advocate has a right to sist himself as a defender in actions of nullity of marriage and of divorce,[12] and also in actions for the adjustment of charitable schemes.[13]

In *patent* cases it was held that a third party claiming a patent had no right to be sisted as a respondent in an interdict by a party holding a similar patent against a party who did not appear.[14] In a subsequent

[1] Ritchie *v.* Ritchie, 1874, 1 R. 826.

[2] M'Whinnie *v.* Johnston and Morrison, 1864, 2 M. 668.

[3] Erskine's Inst. i. 6. 21; Fraser, Husband and Wife, i. 583; Herriot *v.* Jacobsen, 1909, S. C. 1228.

[4] Hamilton, Petr., 1861, 24 D. 31.

[5] Lindsay *v.* Watson, 1843, 5 D. 1194; Copeland *v.* Wimborne, 1912, S. C. 355.

[6] Marquis of Douglas *v.* Earl of Dalhousie, 15th November 1811, F. C.

[7] Lord Blantyre *v.* Lord Advocate, 1876, 13 S. L. R. 213.

[8] Keiller *v.* Mags. of Dundee; Scott *v.* Mags. of Dundee, 1886, 14 R. 191; 57 & 58 Vict. cap. 58, sec. 42.

[9] Alston *v.* Ross, 1895, 23 R. 273; 57 & 58 Vict. cap. 58, sec. 42.

[10] Hope *v.* Landward Committee of Parish Council of Inveresk, 1906, 8 F. 896.

[11] Macfie *v.* Scottish Rights of Way, etc., Society, Ltd., 1884, 11 R. 1094.

[12] Conjugal Rights (Scotland) Act, 1861, sec. 8; Paul *v.* Paul, 1896, 4 S. L. T. 124, 171.

[13] The Trusts (Scotland) Act, 1867 sec. 16.

[14] Laing's Sewing Machine Co. *v.* Norrie & Sons, 1877, 5 R. 29. See also Weir *v.* Denny & Co., 1894, 1 S. L. T. 451.

case where a paint merchant was sought to be interdicted by a firm of paint manufacturers from selling a paint which was an infringement of the latter's patent, the maker of the paint complained of was allowed to sist himself as a respondent;[1] and in a recent case, where a company contracted with patentees to use their plant and processes and allowed the latter to inspect their works to ascertain the amount of royalties, and thereafter entered into a similar contract with a rival firm, and the former patentees proceeded to carry out their inspection of the company's works, the latter patentees raised an action against the company to interdict them from allowing the former patentees to inspect the company's works, as it might disclose their secret processes. The company did not defend, but the other patentees were allowed to sist themselves as respondents.[2]

In *multiplepoindings* a creditor of a claimant who is in right of a liquid or presently exigible debt may lodge a claim called a riding claim.[3] (See *Title and Interest to Defend, supra*, p. 260.)

(b) *If Interest not Sufficient, Sist is Refused.*—The interest must be a present interest and not merely a prospective or possible interest.

Thus, an agent who had raised diligence on a bill for a client and, after a sist had been granted, used a poinding, was not allowed to sist himself as a respondent in a bill of suspension directed against his client alone, although he averred that he was responsible for the regularity of the diligence;[4] a person who alleged that he had a right to the document of debt founded on by a pursuer was held not entitled to appear and prevent decree passing against the debtor;[5] a patentee who had a similar patent to a complainer in a suspension and interdict was held to have no right to be sisted as a respondent where the respondent himself did not appear;[6] and where a trustee in a bankruptcy raised an action and obtained a decree for expenses and was afterwards removed from office, a new trustee declined to sist himself in order to oppose a reclaiming note. The former trustee presented an application to be sisted on the ground that he had an interest in the question of expenses, but the Court refused the application.[7]

[1] Gill *v.* Cutler, 1895, 23 R. 371.

[2] Gas Power and By-Products Co., Ltd. *v.* Power Gas Corporation, Ltd., 1911, S. C. 27.

[3] Gill's Trs. *v.* Patrick, 1889, 16 R. 403. See also Home's Trs. *v.* Ralston's Trs., 1834, 12 S. 727; British Linen Co. *v.* Breadalbane Trs., 1836, 15 S. 356; Royal Bank *v.* Stevenson, 1849, 12 D. 250.

[4] Robertson *v.* Levack and Grieve, 1828, 6 S. 824.

[5] Stewart *v.* Stewart, 1829, 7 S. 440.

[6] Laing's Sewing Machine Co. *v.* Norrie & Sons, 1877, 5 R. 29.

[7] Mackenzie *v.* Fowler, 1897, 24 R. 1080.

(2) *Motion by a Pursuer.*—In considering the question of a motion by a pursuer to sist a new defender, a distinction must be drawn between the case where the pursuer has failed to call all parties interested in the suit, and the case where the pursuer has called the proper defender but the latter has died *pendente processu*, or fallen under some disability.

In the former case, by Act of Sederunt, 20th March 1907, sec. 2 (*e*) (C. A. S., B, i. 5), the pursuer is allowed to amend his record by inserting in the summons or other writ the name of the party omitted, and the record as amended is served upon the new defender by the pursuer, who must pay, as a condition of being allowed to make such amendment, the expenses occasioned to the original defender by such amendment.

In the latter case the procedure depends upon circumstances. If the defender has died *pendente processu* it is incompetent for the pursuer to move for the representatives of the deceased defender to be sisted. Should the representatives not sist themselves, the only method by which the pursuer can make them parties is by a minute of transference, in terms of sec. 96 of the Court of Session Act, 1868. (See *Motion for Transference, supra*, p. 466.) If the defender has become divested by bankruptcy, or by assignation, or otherwise, the method adopted by the pursuer is to move for intimation to be made to the trustee in the sequestration or the assignee, as the case may be, in order that he may sist himself, if so advised. In the same way where a female defender marries, intimation of the dependence of the action will be made to her husband,[1] and where a defender becomes insane, intimation will be made to his *curator bonis*.[2] Beyond intimation, however, the pursuer cannot go, as these parties cannot be compelled to appear. Accordingly, if they do not appear, the pursuer will be entitled to decree.[3] If, however, the pursuer is not satisfied with such a decree, he may call such party as a substantive defender in terms of sec. 2 (*e*) of the Act of Sederunt, 20th March 1907 (C. A. S., B, i. 5).

In certain cases, where the plea of "all parties not called" has not been put forward, or has been repelled, the Court sometimes orders intimation to be made to parties with some interest.[4]

III. At what Stage a New Party may be Sisted.—It is competent for a person to be sisted as a party to a cause after decree has

[1] Herriot *v.* Jacobsen, 1909, S. C. 1228.

[2] Lindsay *v.* Watson, 1843, 5 D. 1194; Rossie *v.* Rossie, 1899, 6 S. L. T. 357; Copeland *v.* Wimborne, 1912, S. C. 355.

[3] Hamilton *v.* M'Gilp, 5 S. 140 (N. E. 129).

[4] Shaw *v.* Caledonian Rly. Co., 1888, 15 R. 504.

become final *quoad* the original party if decree is not extracted;[1] and, after decree has been pronounced in favour of a party, the real parties to the cause may come forward and be sisted in order to obtain extract in their own name.[2] In one case where the Inner House adhered to a judgment of the Lord Ordinary declaring an entail to be invalid, it was discovered that the pursuer had died prior to the judgment of the Inner House, and the pursuer's representatives sisted themselves as pursuers, and their Lordships repeated their judgment.[3]

IV. Plea in Bar of Sist or of Objection to Sist.—If a party has had an opportunity of sisting a new defender,[4] or of reclaiming against a refusal to sist a new defender;[5] or where a person, not called, has had an opportunity of sisting himself as a defender,[6] and has not availed himself of the opportunity, the Court will usually refuse a later application for a sist.

If a party has consented to a sist, as by accepting expenses in respect thereof, he is debarred from objecting either to the sist or to the original instance;[7] and where the opposite party allows the interlocutor allowing a sist to become final, he cannot at a later stage raise the question whether the person sisted has a title to sue.[8]

V. Rights and Liabilities of Party Sisted.—The assignation of a right upon which the cause depends without assignation of the right of action is sufficient to entitle an assignee to be sisted,[9] and also entitles the party sisted to maintain all the pleas competent to the party divested.[10]

A party who sists himself or is sisted as a party to a process is not allowed to make any conditions as to his liability for expenses.[11]

A party who sists himself and is discovered to have no title to defend is liable in expenses from the date of his minute.[12]

[1] Marquis of Douglas *v.* Earl of Dalhousie, 15th November 1811, F. C.

[2] Morrison *v.* Hunter, 1822, 2 S. 68 (N. E. 62).

[3] Gibson's Trs. *v.* Gibson, 1869, 7 M. 1061.

[4] Dobbie *v.* Halbert, 1863, 1 M. 532.

[5] Cunningham *v.* Chalmer, 1740, 1 Pat. App. 267.

[6] Chanter *v.* Thoms, 1845, 7 D. 465.

[7] Wood *v.* M'Caul, 1833, 12 S. 50.

[8] Campbell *v.* Campbell, 1865, 3 M. 360. See, however, Hope *v.* Landward Committee, Parish Council of Inveresk, 1905, 13 S. L. T. 414; 1906, 14 S. L. T. 161; 8 F. 896.

[9] Kyle *v.* Kyle's Trs., 1821, 1 S. 180 (N. E. 171); Watt *v.* Scottish North-Eastern Rly. Co., 1866, 4 M. 318.

[10] Watt *v.* Scottish North-Eastern Rly. Co., 1866, 4 M. 318.

[11] Buchanan v. Corbett, Borthwick & Co., 1827, 5 S. 805 (N. E. 745); Wallace v. Earl of Eglinton, 1836, 14 S. 599; Ellis *v.* Ellis, 1870, 8 M. 805.

[12] Hope v. Landward District Committee, Parish Council of Inveresk, 1906, 14 S. L. T. 161; S. C. 896

A party who sists himself in room of another is liable for the full expenses of the opposite party before, as well as after, he has sisted himself.[1] (See Maclaren on Expenses, pp. 12, 88, 150-3, 157, 265, 353.)

VI. PROCEDURE.—Where a person desires to be sisted at his own instance either in room of a deceased party or otherwise, or as an additional party, the procedure is by minute. The following are forms of Minutes of Sist:—

(i.) [*Counsel's name*], for the minuters, stated that pursuer [*or* defender] in the cause died on last, leaving a trust disposition and settlement whereby he appointed the minuters to be his trustees and executors, and craved the Court to sist the said , as trustees and executors foresaid, in room and place of the said .

(ii.) [*Counsel's name*], for the minuter, craved that the said be sisted as a party defender.

A motion is then made to have the minute sustained.

Where a sist is desired at the instance of the opposite party the proceedure is by motion in the following terms:—

In respect the defender's estates were sequestrated on the day of , and that [*name of trustee*] has been appointed trustee thereon, the pursuer respectfully moves the Court to grant warrant to intimate the dependence of this action to the said as trustee foresaid, and to allow him to sist himself as a party defender within such period as the Court may appoint.

If he consents to sist himself, he lodges a minute, and a motion is made to have it sustained.

[1] Torbet *v.* Borthwick, 1849, 11 D. 694; Ellis *v.* Ellis, 1870, 8 M. 805, per Lord President Inglis, p. 806; Skinner's Tr. *v.* Keith, 1887, 14 R. 563.

CHAPTER IX

MOTION TO SIST PROCESS

(1) Definition of Sist of Process. — Although it is incompetent merely by the consent of parties to prorogate the time for complying with any statutory enactment or order of the Court,[1] it is in the discretion [2] of the Lord Ordinary or Court, on the motion of either party, to order the procedure in a cause to be stopped until the arrival of a certain date, such as the decision in another case,[3] or until the occurrence of an event which may possibly never happen.[4] This stoppage of procedure is called a sist of process.

A sist of process does not prevent an action from falling asleep.[5]

(2) Sist Granted.—A sist has been granted in the following circumstances and for the following reasons :—

(a) *To Enable a Party to Complete or Amend his Title.*—Thus an action of reduction of prior infeftments was sisted to enable the pursuer to amend his title to sue by serving as heir of provision, or otherwise, as advised ;[6] where a disposition forming part of a pursuer's title was destroyed, process was sisted to enable a proving of the tenor to be raised ;[7] a multiplepoinding was sisted to enable a claimant, who was an executor-creditor, to take steps for confirmation ;[8] and where one of several trustees sued for a debt due to the estate, and it was held that he had not sufficient title to sue, consideration of the cause was superseded in order to allow an application to be made for the appointment of a judicial factor.[9]

In a case where a declarator of right to an hereditary office was raised, the defender averred a certain propinquity, which was unsupported by evidence, as giving him a prior claim to said office, and

[1] Court of Session Act, 1868, sec. 26.

[2] Connell *v.* Grierson, 1865, 3 M. 1166, per Lord Curriehill, p. 1167 ; Phosphate Sewage Co. *v.* Molleson, 1876, 3 R. (H. L.) 77, per Lord Selborne, p. 97.

[3] A. B. *v.* C. B., 1911, 2 S. L. T. 99.

[4] Macvean *v.* Maclean, 1873, 11 M. 764.

[5] American Mortgage Co. of Scotland *v.* Sidway, 1906, 14 S. L. T. 521.

[6] Stiven *v.* Brown's Trs., 1871, 8 S. L. R. 626.

[7] Officers of Ordnance *v.* M'Donald, 1825, 3 S. 629 (N. E. 442).

[8] Bridges *v.* Ewing, 1833, 11 S. 335.

[9] Morison *v.* Gowans, 1873, 1 R. 116.

process was sisted to enable the defender to establish his propinquity by appropriate service.[1]

(b) *To Enable a Party to Raise Another Action.*—Thus an action of declarator of nullity of a settlement which was found in the granter's possession torn into two parts was sisted to allow the defender to raise an action of proving the tenor;[2] where an ordinary action was raised for the value of work performed, and the defender pleaded that a decree-arbitral had been pronounced on the same matter, the case was sisted to enable the pursuer to reduce the decree-arbital;[3] a furthcoming regarding certain property belonging to a lady which was arrested by her husband's creditors was sisted until proper proceedings were raised to ascertain the liability of the property for the husband's debts;[4] a process of augmentation was sisted to enable the pursuer to raise an action of declarator of the invalidity of a valuation of teinds;[5] where a Dean of Guild judgment on the merits involved a competition of heritable rights, the process was sisted to allow a declarator to be brought;[6] where an annuitant survived the executors of a trust and executors *ad non executa* were appointed, who gave up what they thought was, but was not, an inventory of the whole estate, in an action of multiplepoinding and discharge by the executors *ad non executa* the Court suspended advising until the raisers of the multiplepoinding should take steps to call the representatives of the original executors to account;[7] in a suspension of a charge on an Irish decree registered in terms of the Judgments Extension Act, the process was sisted in order that an application might be made to the Irish Court in arrest of judgment.[8]

Where a respondent in a note of suspension, having first admitted the genuineness of a document founded upon by the complainer, averred, when the suspension became an Outer House cause, that the document was a forgery, the suspension was sisted until he raised an action of reduction-improbation;[9] where a defender lodged in process a document purporting to be a discharge of the pursuer's claim, process was sisted to enable the pursuer to raise an action of reduction of the alleged

[1] Earl of Lauderdale *v.* Wedderburn, 1903, 11 S. L. T. 194.
[2] Dow *v.* Dow, 1848, 10 D. 1465.
[3] Birrell *v.* Dundee Gaol Commissioners, 1856, 29 Jur. 46.
[4] Loudon *v.* Young, 1856, 18 D. 856.
[5] Orr *v.* Earl of Glasgow, 1866, 5 M. 195.
[6] Smellie *v.* Thomson, 1868, 6 M. 1024.
[7] Nicol and Carny *v.* Wilson, 1856, 18 D. 1000.
[8] Wotherspoon *v.* Connolly, 1871, 9 M. 510.
[9] Macintyre *v.* MacRaild, 1867, 5 M. 526.

discharge.[1] An action will be sisted to allow a party to apply for the benefit of the poor's roll.[2]

By sec. 6 of the Act of Sederunt, 20th March 1907 (C. A. S., C, iv. 4 (*d*)), however, it is provided that where in any action a deed or writing is founded on by either party, all objections thereto may be stated and maintained by way of exception without the necessity of bringing a reduction thereof, unless the Court or Lord Ordinary shall consider that the matter would be more conveniently tried in a separate action of reduction.

A defence involving reduction of a contract can only be pleaded *ope exceptionis* where the pursuer has had fair notice before the proof of the ground upon which reduction is based;[3] and a defence is not competent *ope exceptionis* where the defender has no title to raise the reduction. In the latter case the defender must raise an action of declarator and reduction, and a sist will be granted for this to be done.[4]

(c) *To Await the Decision in Another Case.*—Thus, where law agents raised one action against several parties for advances for which all the parties were liable, the action was sisted until the result of an action of relief pending between the parties;[5] where a party brought an action of reduction of the titles of a proprietor and also an action of legitimacy, the latter action was sisted until defences of *res judicata* and prescription in the former action were discussed;[6] where a pursuer raised an action of reduction of several deeds, and there was a verdict for the defender upon one of the deeds, and the pursuer raised an action of reduction-improbation of the other deeds, it was held that the latter action should be sisted until the decision with regard to the rest of the deeds was given in the first action;[7] where there was an action against a purchaser of shares for reduction of the sale and, alternatively, against the purchaser and other persons for damages for fraudulent representations as to the shares, it was held that the first alternative must go to trial and be decided before the second, and the latter alternative was sisted accordingly;[8] where a husband raised an action of nullity of marriage and his wife replied with an action for separation and aliment, the latter action was sisted until the decision on the former;[9] where there are counter-actions of divorce, the earlier action will be

[1] Maclean *v.* Hassard, 1902, 10 S. L. T. 107.
[2] Milne *v.* Milne, 1885, 13 R. 304.
[3] Oswald *v.* Fairs, 1911, S. C. 257.
[4] Duke of Argyll *v.* Muir, 1910, S. C. 96.
[5] MacRitchies and Murray *v.* Young, 1827, 5 S. 242 (N. E. 226).
[6] Shedden *v.* Patrick, 1849, 11 D. 1333.
[7] Mason *v.* Merry, 1832, 10 S. 555.
[8] Jardine's Trs. *v.* Dawson and Others, 1864, 2 M. 639.
[9] A. B. *v.* C. B., 1911, 2 S. L. T. 99.

sisted until the other is ripe for judgment;[1] where a father first presented a petition for custody of his children, and thereafter raised an action of divorce concluding also for custody of his children, the petition was sisted pending the result of the action of divorce;[2] where a testator domiciled in Scotland left his estate, consisting in part of English heritage, to trustees with a power of sale and a direction to administer his estate according to Scottish law and practice, the trustees raised an action of declarator against the heir with regard to the English heritage, and the heir took proceedings in England to ascertain his rights on the English estate, and the Court sisted the Scottish action to await the decision of the English Courts.[3]

In a case where, of consent, there was a sist until "final judgment" in another case, it was held that a judgment of the Inner House was not a final judgment, as it had been appealed to the House of Lords.[4]

(d) *To Enable a Document Founded on to be After-Stamped.*— Formerly, it was the practice that if a party tendered a document in evidence which was not impressed with the proper stamp, the document was either rejected altogether, or "this alternative will be allowed as an indulgence, that some delay will be given, to enable him to get it stamped, so that he may put it in evidence."[5] It is now the practice, however, that upon the production of an instrument chargeable with any duty as evidence in any Court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the Judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the Court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of £1, be received in evidence, saving all just exceptions on other grounds.[6] In view of this provision it is doubtful whether a sist would now be allowed to after-stamp. The deliverance of the Judge that the stamp is sufficient or not is final.[7]

(e) *To Enable a Point in a Cause to be Decided by Arbitration.*—

[1] Brodie *v.* Brodie, 1870, 8 M. 854.

[2] Paterson *v.* Paterson, 1899, 2 F. 81.

[3] Hewit's Trs. *v.* Lawson, 1891, 18 R. 793.

[4] Orr *v.* Glasgow, Airdrie, and Monklands Junction Rly. Co., 1857, 20 D. 327.

[5] Neil *v.* Leslie, 1867, 5 M. 634, per Lord President Inglis, p. 635. See also Macfarlane *v.* Johnston, 1864, 2 M. 1210.

[6] The Stamp Act, 1891 (54 & 55 Vict. cap. 39), sec. 14.

[7] Court of Session Act, 1868, sec. 41, as amended by 33 & 34 Vict. cap. 99.

Where a clause of arbitration in an agreement is operative, but does not exhaust all the questions at issue in a cause, the Court will sist the action to allow the points reserved for arbitration to be decided.[1] An action has been sisted in order to await the decision of the English Courts as to the validity of an arbitration clause which fell to be determined by the law of England.[2]

(3) SIST REFUSED.—The Court has refused to grant a sist of process in the following cases:—

(*a*) Where a defender pleads an illiquid counter-claim as compensation against a liquid debt the Court has refused to sist the action in order to enable the defender to make his claim liquid.[3] If the illiquid counter-claim is in process of liquidation the action may be sisted,[4] but not where the defender has unduly delayed to have this done.[5] Again, if the illiquid counter-claim arises from the failure of the pursuer himself to fulfil his part of a contract, the defender will be entitled to a sist to liquidate his claim, or otherwise he will be allowed to plead it *ope exceptionis*.[6]

(*b*) In an action of divorce for desertion, where the defender has not been in desertion for four years, the Court will not sist process to await the completion of the statutory period.[7]

(*c*) Where a cause has been properly and competently brought before the Court of Session, the fact that proceedings regarding the same subject-matter are threatened in an English or other foreign Court affords no grounds for sisting process.[8] If the foreign *forum* is more convenient the action will be dismissed; if the Court of Session is the convenient *forum* the action will go on in the usual way.[9] In one case, where an order was pronounced by the President of the Admiralty Division to stay proceedings in the Sheriff Court of Lanarkshire except

[1] Meiklejohn *v.* Waddell, 1894, 1 S. L. T. 601; Wilson and M'Farlane *v.* Stewart & Co., 1898, 25 R. 655; Barr *v.* Queensferry Commissioners, 1899, 1 F. 630; Muir *v.* Muir, 1906, 8 F. 365; W. & A. Robertson *v.* Gerrard, 1908, 16 S. L. T. 100.

[2] Robertson *v.* Brandes, Schönwald & Co., 1906, 8 F. 815.

[3] Thomson *v.* Paxton, 1849, 11 D. 1113; Pegler *v.* Northern Agricultural Implement Co., 1877, 4 R. 435; Mackie *v.* Mackie, 1897, 5 S. L. T. 42.

[4] Erskine's Inst. iii. 4. 16; Munro *v.* Macdonald's Exrs., 1866, 4 M. 687; Ross *v.* Ross, 1895, 22 R. 461.

[5] North British Rly. Co. *v.* North British Grain Storage and Transit Co., 1897, 24 R. 687.

[6] Macbride *v.* Hamilton & Son, 1875, 2 R. 775. See also Johnston *v.* Robertson, 1861, 23 D. 646.

[7] Ross *v.* Ross, 1899, 1 F. 963.

[8] Thomson *v.* North British and Mercantile Insurance Co., 1868, 6 M. 310; Phosphate Sewage Co. *v.* Molleson, 1876, 3 R. (H. L.) 77.

[9] Sim *v.* Robinow, 1892, 19 R. 665, per Lord Kinnear, p. 669.

to assess damages, it was held that an action in the last-mentioned Court, by the widow of a shipmaster for damages for his death, could go on until the damages were arrived at, but decree could not be extracted.[1]

(*d*) Where there are two actions raising the same question, the fact that the decision in one case may be given prior to the decision in the other is no reason for sisting the latter where either of the parties in the later case desires a judgment.[2] A multiplepoinding was raised by a bank which claimed to be a creditor on a bankrupt estate, and the only competing claimant was the trustee on the estate, who averred that the bank was a debtor to the estate and not a creditor. The trustee thereafter raised a count and reckoning against the bank, in which the same questions of law were raised, and the Court refused to sist the latter action, at least while the record was unclosed, to await the decision in the multiplepoinding.[3]

(*e*) Where the whole of a trust estate was made the fund *in medio* in a multiplepoinding, and the trust disposition was reduced by the heir-at-law *quoad* a portion of the estate, the Court refused to sist an action by the heir to ordain the trustees to remove from the property reduced, as the subjects had ceased to be a portion of the fund *in medio*.[4]

(*f*) Where a reduction of a trust settlement is sought by the heir, and pending the reduction the defenders raise an action of constitution to enable them to administer the property, the Court will not sist the latter action in order to await the result of the reduction.[5]

(*g*) Where a pursuer has obtained a decree in the Outer House, and a subsequent action is raised which may, if successful, affect the former action, that is no reason why the former case should be sisted. Thus where a lady was successful in a declarator of marriage which was reclaimed against, and another lady raised another action of declarator of marriage against the same defender, averring a prior marriage to him, the Court refused to sist the former action.[6]

(*h*) Where a party who had been successful in a competition of services, and resisted a declarator of bastardy, was enabled to make up title and get possession of an entailed estate pending an appeal to the

[1] Leadbetter *v.* Dublin and Glasgow Steam Packet Co., 1907, S. C. 538.

[2] Baillie *v.* M'Gibbon's Representatives, 1846, 8 D. 1129; Purves *v.* North British Rly. Co., 1848, 10 D. 853.

[3] Frier *v.* Western Bank, 1855, 18 D. 272.

[4] Barstow *v.* Dunn's Trs., 1870, 8 S. L. R. 169.

[5] Gilmour's Trs. *v.* Gilmour, 1851, 13 D. 986.

[6] Binnie *v.* Binnie, 1849, 11 D. 1419.

House of Lords, and presented a petition for authority to feu, the Court refused to sist the petition till the appeal was disposed of.[1]

(*i*) Where it is not clear that the result of an action will affect the result of another action, the Court will not sist procedure. Thus, where there were two competing petitions to the Sheriff of Chancery, claiming to be served heir of tailzie and provision to certain estates, and also two petitions by the same parties to the Crown claiming a peerage, the Court held that the Sheriff of Chancery should not have sisted procedure on the petitions until the decisions of the Committee on Privileges should be known, as it was not clear that the estates could only fall to the person found entitled to the peerage.[2]

(*j*) Where an action is raised on a clear document of debt, the contents of which the defender is bound to pay, and a subsequent multiplepoinding is raised owing to the document being arrested through the improper conduct of the original defender, the Court will not sist process in the first action, but will allow the pursuer to obtain decree.[3]

(*k*) Where a trustee on a sequestration brought a reduction of a conveyance of heritage by the bankrupt, and in course of the litigation obtained a decree for certain expenses and raised an adjudication of the subjects, a sist of the adjudication, in order to await a suspension of the ground of debt on which the sequestration had issued, was refused.[4]

(*l*) If a pursuer brings an action into Court, the case will not be sisted on his own motion and against the wishes of the defender to await the decision in another action by different pursuers regarding the same subjects. Thus, where a person claiming to be a true heir of tailzie raised a reduction of the titles made up by the defender as heir of tailzie and provision, and, after the record had been closed, moved the Court to sist process to await the decision of an action by the testamentary trustees of the deceased who claimed the estates in question as being carried by the deceased's trust settlement the motion was refused.[5]

[1] Livingstone *v.* Fenton, 1858, 20 D. 1231.
[2] Maitland *v.* Maitland, 1885, 12 R. 899.
[3] M'Farlane *v.* Royal Bank, 1854, 17 D. 228.
[4] Stephen's Tr. *v.* Morison, 1861, 33 Jur. 369.
[5] Connell *v.* Grierson, 1865, 3 M. 1166.

CHAPTER X

MOTION TO REMIT OB CONTINGENTIAM

(1) STATUTORY PROVISIONS.—(a) 48 *Geo. III. cap.* 151.—The Court of Session Act, 1808, sec. 9, provides that "where any action, matter, process, complaint, or cause has been brought before one of the Divisions or the Lords Ordinary thereof, the other Division, or the Lords Ordinary thereof, shall remit any action, process, matter, complaint, or cause subsequently brought before them relating to the same subject, matter, or thing, or having a connection or contingency therewith, to the consideration of the Division or Lords Ordinary before whom the first cause, action, process, complaint, or matter had been previously brought."

(b) *Act of Sederunt, 24th December* 1838, *To Regulate the Enrolment of New Causes, etc.*—With reference to remits of causes *ob contingentiam*, and keeping in view the provision of 48 Geo. III. cap. 151, whereby the cause first brought is the leading cause, sec. 6 of this Act of Sederunt provides—"It is specially declared that where such contingent causes shall be brought for the first time before two or more Lords Ordinary in the same weekly rolls of new causes, the cause enrolled before the senior Lord Ordinary shall (provided the enrolment is regular) be deemed the first or leading process; and the other Lords Ordinary shall remit the contingent causes to the said senior Judge;[1] and the cause or causes so remitted, whether conjoined with the first or previous cause or not, shall be held henceforward as causes marked for the same Division of the Court, with the cause enrolled before the senior Judge. Further, when two or more causes having a contingency with each other are enrolled before the same Lord Ordinary for the first time in his weekly roll, but marked for different Divisions, if the parties cannot agree as to the Division to which the whole causes are to belong, the Lord Ordinary shall determine the same; and his Lordship's order on that matter shall be final and not subject to the review of either Division of the Court."

The weekly printed rolls of new causes were abolished by sec. 22 of the Court of Session Act, 1868, and the Calling Lists were ordered to be printed and published in the daily rolls of Court.

[1] Laing *v.* Park and Primrose, 1853, 15 D. 663.

(c) *Act of Sederunt, 7th December* 1871.[1]—By this Act it is provided:—

"I. That when a cause appears in the Calling List, it shall be held, within the meaning of sec. 9 of the Act 48 Geo. III. cap. 151, to be brought before the Lord Ordinary and Division of the Court specified in the *partibus* of the summons.[2]

"II. That when two or more causes having a contingency with each other appear in the Calling List on the same day, the cause which is brought before the senior Lord Ordinary shall be deemed the first or leading cause.

"III. That an appeal shall be held to be brought before a Division of the Court in the sense of sec. 9 of the Act 48 Geo. III. cap. 151, when it appears in the Single Bills; and when two or more appeals having a contingency with each other appear in the Single Bills of both Divisions on the same day, the appeal which appears in the Single Bills of the First Division shall be held to be the first or leading appeal."

Sec. 9 of 48 Geo. III. cap. 151 is imperative,[3] and accordingly may be put in force by the Court *ex proprio motu*.[4]

Where one Lord Ordinary remits to another *ob contingentiam* of a previously depending process, the second action belongs to the same Division as the first, although they have been marked for different Divisions, and the first reclaiming note be against an interlocutor pronounced in the second action.[5]

Where two multiplepoindings relating to the same matter were signeted and called of similar dates, it was held that as the question was one of competency and not of contingency, the Act of Sederunt, 7th December 1871, did not apply, and that the multiplepoinding which was first served was to be preferred, while the other fell to be dismissed.[6]

In a competition between a suspension and a multiplepoinding regarding priority of process, it appeared that the note of suspension was passed in the Bill Chamber on the 24th day of April and marked on the 27th April, and the interlocutor became final on the 8th day of May. The multiplepoinding was called on the 29th day of April, and it was held that marking the process in the suspension fixed its character as a Court of Session action, and that it was accordingly the earlier process.[7]

[1] C. A. S., B, iv. 1, 2, 3.

[2] Davidson *v.* Stewart, 1874, 1 R. 1223. This case was decided on 24th November 1871, but was not reported until as above mentioned.

[3] Bryce *v.* Chalmers, 1859, 22 D. 213; M'Douall *v.* Caird, 1868, 6 M. 222.

[4] M'Neill *v.* Scott, 1866, 4 M. 608.

[5] Buchanan *v.* Cullen, 1861, 23 D. 606.

[6] Lowe's Trs. *v.* Lowe, 1893, 1 S. L. T. 29; C. A. S., B, iv.

[7] Crichton *v.* Lindsay, 1897, 5 S. L. T. 24.

(2) Decision upon Contingency.—The Division or Judge before whom the motion to remit *ob contingentiam* is made is the Judge of the contingency,[1] although that decision is subject to review.[2]

(3) At what Stage a Remit may be Made.—A remit may be made at any time when the cause to which the remit is to be made is a depending process. "It may not signify whether in the other Division or before the Lord Ordinary, or in the House of Lords, but it must be an existing process."[3] Thus a remit cannot be made to a Court before which another cause, which had a contingency therewith, formerly depended, however desirable that might be;[4] whereas, if a final decree has not been extracted or a question of expenses still remains to be decided,[5] or if the extract of a decree has been superseded,[6] a remit is competent.

(4) What is Contingency.—Lord President Inglis admitted that it was no easy task to define the legal term "contingency,"[7] and, so far as the decided cases disclose, he never made the attempt. This is to be regretted, as the definition of Lord Justice-Clerk Moncreiff, that there is no contingency unless a decision in one of the actions would decide the other in whole or in part,[8] is a negative one, and hardly corresponds with some of the decided cases. These are not numerous, but it would appear from them that there is contingency which would warrant a remit—

(*a*) Where the same parties are in dispute about the same matter. Thus a suspension of a charge on a decree was remitted to a suspension by the same complainer against the same respondent in respect of a prior charge on the same decree.[9]

(*b*) Where there are cross-actions about the same subject.[10]

(*c*) Where there are separate actions by different parties of a similar nature affecting the same bankrupt estate. Thus an adjudication of

[1] Blaikie *v.* Aberdeen Rly. Co., 1854, 16 D. 496.

[2] Cochrane *v.* Hamilton, 1847, 9 D. 794; Cleland *v.* Clason and Clark, 1850, 7 Bell's App. 153.

[3] Forster *v.* Forster, 1871, 9 M. 397, per Lord Justice-Clerk Moncreiff, p. 398.

[4] Gibson *v.* Stewart, 1827, 5 S. 803 (N. E. 743); Jenkins *v.* Robertson, 1864, 2 M. 1162; Forster *v.* Forster, 1871, 9 M. 397. See also Hamilton *v.* Hamilton, 1830, 8 S. 607; Glasgow *v.* Allan, 1839, 2 D. 276; Drew *v.* Drew, 1851, 14 D. 212.

[5] Bryce *v.* Chalmers, 1859, 22 D. 213, per Lord Justice-Clerk Inglis and Lord Cowan.

[6] Gordon *v.* Ross, 1827, 6 S. 257.

[7] Liquidators of Western Bank *v.* Douglas, 1860, 22 D. 447, at p. 472.

[8] Duke of Athole *v.* Robertson, 1869, 8 M. 304, at p. 305.

[9] Bryce *v.* Chalmers, 1859, 22 D. 213.

[10] Reid's Trs. *v.* Reid, 1873, 45 Jur. 191.

an estate by a creditor was remitted to an adjudication of the same estate by a different creditor.[1]

(*d*) Where the second action arises directly out of the prior action. Thus a count and reckoning against a *curator bonis* was remitted to the Division which made the appointment;[2] a petition for the recall of an inhibition was remitted to the cause in respect of which the inhibition was used;[3] a suspension of a diligence was remitted to a suspension on the merits of the same case;[4] an action of damages for wrongous sequestration was remitted to an advocation of the same sequestration on the question of expenses;[5] and there was held to be contingency between a process in which a decree had been pronounced, with expenses in favour of the agents of the party, and a suspension by the unsuccessful party against the agents in respect of irregularities in the extract of the decree and subsequent procedure.[6]

(*e*) Where the result in the one case, though it may not negative the result in the other case, may seriously modify its consequences. Thus an action by a wife against her husband on the ground of adultery, was remitted to an action by her husband against herself and a co-defender on the same ground.[7]

(*f*) Where, though the parties are different, the subject-matter in dispute is the same and the decision will decide the matter in dispute as regards the world. Thus an action regarding the validity of a contract at the instance of an original party to it was remitted to an action regarding the validity of the same contract at the instance of an assignee;[8] and a suspension regarding a nuisance was remitted to a suspension by a different complainer against the same respondent regarding the same nuisance.[9]

(*g*) Where, though the parties are different, the matter in dispute may turn out to be the same and the decision will decide the matter in dispute as regards the world. Thus a declarator of right-of-way was remitted to another declarator of right-of-way by a different set of pursuers against different defenders, as from the nature of the averments it might turn out that the actions were identical.[10]

[1] A. B. *v.* Graham, 1829, 8 S. 113.
[2] Gordon *v.* Ross, 1827, 6 S. 257.
[3] M'Diarmid's Trs. *v.* Mather, 1828, 6 S. 658.
[4] Jaffray *v.* Gordon, 1830, 8 S. 803.
[5] Cochrane *v.* Hamilton, 1847, 9 D. 794.
[6] Cleland *v.* Clason and Clark, 1850, 7 Bell's App. 153.
[7] Powrie *v.* Powrie, 1868, 6 M. 1111.
[8] Bayne *v.* Gibson, 23rd January 1810, F. C.
[9] Downie *v.* Earl of Moray, 1825, 3 S. 471 (N. E. 327).
[10] Cuthbertson *v.* Young, 1851, 13 D. 1308.

(*h*) Where, though parties are different, it is expedient that the whole matter in dispute should be decided once for all and not piecemeal. Thus an action by riparian proprietors to stop pollution of a river was remitted to a similar action by the same pursuers against different defenders.[1]

(5) Motion Refused.—The Court has held that there is no contingency to warrant a remit between—

An action at the instance of an agent for payment of his business account and the suit still pending, in the previous stages of which the account was incurred.[2]

A note of suspension and interdict of a poinding and an action by the respondent in the suspension against the cautioner in the suspension.[3]

An action by a superior against parties whom he alleged were responsible for a nuisance and an action by an inhabitant against the superior to remove the nuisance.[4]

An action by the liquidators of a bank against its directors for damages for neglect of duty and actions by shareholders against some of the same defenders (*a*) for relief for the consequence of purchases of shares entered into through fraudulent misrepresentations on the part of these defenders; and (*b*) for damages sustained through said purchases, and in consequence of the same course of mismanagement and malversation.[5]

A petition by an heir of entail in possession for authority to record an instrument of disentail and a declarator by the trustee on the estate of the immediately preceding heir to have the deed of entail declared invalid.[6]

A note of suspension and interdict and a petition and complaint for breach of *interim* interdict granted in the Bill Chamber in the first-mentioned case.[7]

A petition to have the respondent ordered to restore a turnpike gate which had been thrown down and an action brought by the respondent against the petitioner for declarator that it was illegal to levy a toll at said gate.[8]

In one case the pursuer raised an action of damages in the Sheriff

[1] Duke of Buccleuch *v.* Cowan, 1866, 4 M. 475.
[2] Landale *v.* Tod, 1831, 9 S. 268.
[3] Buchanan *v.* Douglas, 1851, 13 D. 547.
[4] Mackay *v.* Greenhill, 1858, 20 D. 1251.
[5] Liquidators of Western Bank *v.* Douglas, 1860, 22 D. 447.
[6] Glassford *v.* Borthwick, 1862, 24 D. 1136.
[7] M'Neill *v.* Scott, 1866, 4 M. 608.
[8] Duke of Athole *v.* Robertson, 1869, 8 M. 304.

Court and appealed to the Court of Session for jury trial. Prior to the date of trial pursuer granted to the defenders a deed purporting to be a discharge of his claims, the consideration being £40, which the pursuer admittedly received. This discharge put a stop to the trial. The pursuer, thereafter, raised an action of reduction of this discharge on the ground of fraud and misconception, and moved that it be remitted to the same Judge as should have heard the jury trial, but the motion was refused on the ground that the original action was not called before the other Judge and that the actions related to two entirely different sets of facts.[1]

(6) PROCEDURE.—Where it is desired that a cause should be remitted *ob contingentiam* from one Lord Ordinary to another, a motion is made to the Lord Ordinary in the later cause for that purpose, and, if he decides that there is contingency, he issues an interlocutor in the following terms:—

> The Lord Ordinary remits the process to Lord to depend before him *ob contingentiam* of another cause between the same parties [*or as the case may be*] presently depending before his Lordship.

In the same way, one Division may remit *ob contingentiam* a cause depending before it to the other Division.

Where the prior contingent cause is pending before one of the Divisions and the other cause is before a Lord Ordinary, and marked to a different Division, the practice after the motion to remit *ob contingentiam* is made to the Lord Ordinary has not been uniform. In an early case the Lord Ordinary remitted the cause directly to the Division before which the prior contingent cause was pending;[2] in a later case the Lord Ordinary reported the case to the Division to which the later cause was marked, and that Division directed the Lord Ordinary to remit the cause to the other Division;[3] whereas in a later case the Lord Ordinary reported the case to the Division to which the later cause was marked, and that Division remitted the case to the other Division.[4] The present practice seems to be for the Lord Ordinary to report the case by interlocutor to the Division to which it is marked and to grant warrant to enrol, and for that Division to remit to the other Division.

Where the prior contingent cause is pending before a Lord Ordinary and the other cause is before a Division other than the one

[1] Mitchell *v.* Kinnear, Moodie & Co., 1895, 3 S. L. T. 38.
[2] Downie *v.* Earl of Moray, 1825, 3 S. 471 (N. E. 327).
[3] Gordon *v.* Ross, 1827, 6 S. 257.
[4] A. B. *v.* Graham, 1829, 8 S. 113.

to which the prior cause is marked, it seems to follow that the Division may remit the cause pending before it to the Lord Ordinary, although it may be the more correct course for the Division to remit its cause to the other Division and for the latter to remit it to the Lord Ordinary.[1] An advocation reported to the Inner House under the Court of Session Act, 1850, was remitted by it *ob contingentiam* to a process depending before a Lord Ordinary;[2] but the Inner House does not now remit appeals *ob contingentiam* to a Lord Ordinary, but sists process *in hoc statu;* and it has refused to remit to a Lord Ordinary *ob contingentiam* of an action depending before him a process of proving the tenor, although it concluded for an accounting, and a proof of the tenor was rendered unnecessary by recovery of the deed.[3] The report does not give any reason for the refusal, but it may have been that there was no contingency. Where it is desired to have a cause which is to be tried by jury removed from a Lord Ordinary to be tried along with a cause arising out of the same *res gestæ* set down to be tried at the sittings, the proper procedure is by report by the Lord Ordinary and not by note to the Lord President. Thus in an action of damages for slander the day for trial was fixed and notice of trial at the sittings duly given. Seven days before the day of trial the Lord Ordinary adjusted issues in an action of damages for assault between the same parties, arising out of the same *res gestæ*, and on the motion of the pursuer to have both cases tried together reported the matter six days before the trial to the Inner House. The Court granted the motion and appointed the causes to be tried together.[4]

[1] M'Neill *v.* Scott, 1866, 4 M. 608, per Lord Deas, pp. 612, 613
[2] M'Douall *v.* Caird, 1868, 6 M. 222.
[3] Sutherland *v.* Fraser's Trs., 1824, 3 S. 305 (N. E. 215).
[4] Pirie *v.* Meikle, 1874, 1 R. 1198.

CHAPTER XI

MOTION FOR TRANSMISSION OB CONTINGENTIAM

(1) Procedure.—Formerly, where there existed a contingency between a process in the Sheriff or other inferior Court and a process in the Court of Session, it was necessary to proceed by a note of advocation in the Bill Chamber.[1] The practice is now regulated by sec. 74 of the Court of Session Act, 1868, which provides that "in place of advocations of actions and proceedings in inferior Courts *ob contingentiam* of a process in the Court of Session, it shall be lawful for the party desiring to remove any such action or proceeding to the Court of Session to lay before the Lord Ordinary, or the Division of the Court before which such Court of Session process shall actually be at the time, a copy of the inferior Court record or of such pleadings as may have been lodged, and of the interlocutors in the cause, certified by the clerk of the said inferior Court, and to move for the transmission of the inferior Court process to the Court of Session; and if upon consideration thereof the said Lord Ordinary or Division of the Court shall be of opinion that there is contingency between the said processes, he or they shall grant warrant to the clerk of the inferior Court process for the transmission thereof; and upon such transmission being made the said process shall thenceforth be proceeded with in all respects as if it had been advocated *ob contingentiam* to the Court of Session according to the present law and practice."

The provisions of the above section are imperative.[2]

The reasons of transmission are stated orally on the Motion Roll or the Single Bills.

(2) Decision to Transmit is Final.—The decision of the Lord Ordinary or of the Court, as the case may be, upon such motion for transmission shall be final at that stage; but in the event of the application being refused, it shall be competent for either party to renew the motion at any subsequent stage of the cause.[3]

[1] 50 Geo. III. cap. 112, sec. 36; 1 & 2 Vict. cap. 86, sec. 3; A. S. (An Act to Regulate Proceedings in the Bill Chamber), 24th December 1838, sec. 2.

[2] Wilson *v.* Junor, 1907, 15 S. L. T. 182.

[3] Court of Session Act, 1868, sec. 75.

(3) Motion Granted.—The reasons which have weighed with the Court in holding that there is contingency between a case in the inferior Courts and one in the Court of Session are similar to those which have already been mentioned under the head of *Motion to Remit ob Contingentiam, supra*, p. 488 *et seq.* (*q.v.*). In addition to the cases there mentioned the Court has held that there is contingency between—

A sequestration for rent by a landlord in the Sheriff Court and a declarator by the tenant that he is entitled to possession raised in the Court of Session.[1]

An action in the Sheriff Court for implement of missives of lease and damages and a multiplepoinding and declarator in the Court of Session by the defender that he was not bound to implement.[2]

A petition for ejectment in the Sheriff Court and an action in the Court of Session by respondent in the petition to compel the petitioner to grant a lease.[3]

An action of damages in the Sheriff Court by the wife of a deceased person and an action in the Court of Session by the same pursuer as executrix-dative against the same defenders in respect of a contract of insurance between them and the deceased.[4]

An action in the Sheriff Court by a client against an agent for an accounting, or, failing an accounting, for payment of £1000, and an action in the Court of Session by the agent against the client for a sum of £394 due by the client on a just accounting.[5]

(4) Motion Refused.—There is only one reported case where the Court refused the motion for transmission on the ground that there was no contingency. In that case a sequestration for rent in the Sheriff Court was held not to have a contingency with an action of damages in the Court of Session for unwarrantable use of the said sequestration.[6] The Court was equally divided, and the opinion of the Judges in the robing-room was taken when a majority was against transmission. A later case[7] on the question of remit in the Court of Session seems, however, to be in absolute conflict with this decision, and it is thought that the earlier decision cannot be regarded as authoritative. Reference is made to *Motion for Remit ob Contingentiam, supra*, p. 488 *et seq.*

[1] Cameron *v.* Macdonell, 1824, 3 S. 341 (N. E. 242).
[2] Baird *v.* Hosie, 1824, 3 S. 361 (N. E. 255).
[3] Fleming *v.* Morrison, 1835, 13 S. 859.
[4] M'Fadyen *v.* United Alkali Co., Ltd., 1897, 4 S. L. T. 321.
[5] Wilson *v.* Junor, 1907, 15 S. L. T. 182.
[6] Earl of Mansfield *v.* Aitchison, 1829, 8 S. 243.
[7] Cochrane *v.* Hamilton, 1847, 9 D. 794.

(5) At what Stage a Motion for Transmission may be Made.—In an early case an advocation *ob contingentiam* was allowed before any decree had been pronounced in the inferior Court,[1] and there seems no reason now, whatever reasons there may have been formerly,[2] why a motion for the transmission of a process from an inferior Court should not be granted so long as the time for appeal has not elapsed or the decree has not been extracted. (See *Motion to Remit ob Contingentiam, supra*, p. 488.)

[1] Baird *v.* Hosie, 1824, 3 S. 361 (N. E. 255).

[2] Hamilton *v.* Caledonian Rly. Co., 1848, 10 D. 678 ; Somerville *v.* Mags. of Lanark, 1866, 1 S. L. R. 155.

CHAPTER XII

MOTION FOR CONJUNCTION OF PROCESSES

(1) Distinction between Conjoining of Processes and Remission ob Contingentiam.—"In the practice of this Court from a very early period, actions which were in any way naturally or necessarily connected with one another were always, as much as possible, brought together under the jurisdiction of the same Court, or part of the Court, and dealt with, as much as possible, in conjunction; and the rules as to remits *ob contingentiam* go back to a very early period. But they are recognised distinctly enough in the statute of 48 Geo. III. cap. 151, sec. 9, where it is provided that one cause shall be remitted to another where the second cause relates to the same subject-matter or thing, or has a connection or contingency therewith; and although these are words of very large and comprehensive signification, I think they have been pretty well understood in practice to mean that where there is such a connection between two causes that it is expedient that they should go on side by side, and before the same Judge, then the one shall be remitted to the other. *It does not by any means follow that because they are remitted to the same Judge they shall therefore be conjoined, and form, by means of that conjunction, one process;* because when they come to be considered by the same Judge, it may often appear to him that instead of conjoining the two processes, the proper course is to sist one and proceed with the other; and that is just one of the things that he is enabled to do by having both the processes before him. The object of the remit is answered, because he has then the power of seeing and determining what is the proper order in which these cases should be tried. But if it is not desirable that the one should be kept separate from the other, that the one should be tried before the other, or that the one should be tried or disposed of in a different form or manner from the other, and if they have a natural contingency, and raise the same question, then I think the leaning of the mind of the Court will generally be to a conjunction. *It is, no doubt, always a question of discretion,* supposing there is a natural connection between the two processes, to say whether they ought to be conjoined. They may be so complicated, and there may be

such shades of distinction between the questions which they raise, that confusion and perplexity and embarrassment may be produced by conjoining them, or trying them together; and of course if there is the least prospect of that the Court will never do it. But if that is not so —if they raise one issue—if the same issue will try both causes, then is it not expedient that that issue should be tried once for all in the two processes, and that for that purpose the processes should be conjoined?"[1]

(2) Discretion in Deciding upon Conjunction.—Unlike a remit *ob contingentiam* or a transmission *ob contingentiam*, a conjunction of processes is entirely in the discretion of the Judge or Division before whom the motion is made.[2]

(3) Effect of Conjunction.—The actions become one process before the same Judge and clerk, and any step taken affects both. It is doubtful if the Court can award expenses in a cause remitted but not conjoined against a party in the other cause.[3]

(4) Where Motion Granted.—The Court has conjoined causes—where a supplementary action has been raised to bring additional matter to the adjudication of the Court;[4] or to bring new defenders;[5] or to bring in new reasons or grounds of action.[6] Supplementary actions for such reasons are now unnecessary in consequence of Act of Sederunt, 20th March 1907. The Court has also conjoined causes where different pursuers have raised separate actions arising out of the same accident;[7] where the same person was appointed, by different petitions, *curator bonis* to different members of the same family;[8] where the same petitioners have asked to uplift and invest separate sums consigned under the Lands Clauses Act;[9] where actions are raised to try the same question, as where a defender who is sued for a reduction of a deed

[1] Lord Justice-Clerk Inglis in Duke of Buccleuch *v.* Cowan, 1866, 4 M. 475, at p. 480.

[2] Wauchope *v.* North British Rly. Co., 1862, 4 Macq. 348; Duke of Buccleuch *v.* Cowan, 1866, 4 M. 475, per Lord Justice-Clerk Inglis, p. 480; Gatt *v.* Angus Shipping Co., Ltd., 1907, 14 S. L. T. 749.

[3] Thomson *v.* Kerr; Thomson *v.* Edinburgh and District Tramways Co., 1901, 3 F. 355.

[4] Turner *v.* Tunnock's Tr., 1864, 2 M. 509.

[5] Thomson *v.* Gilkison, 1830, 9 S. 27; Thomson *v.* Kerr; Thomson *v.* Edinburgh and District Tramways Co., 1901, 3 F. 355; Neil *v.* Edinburgh and Leith Tramways Co., 1903, 10 S. L. T. 524.

[6] Scott *v.* Wilson, 1822, 1 S. 535 (N. E. 491).

[7] Gatt *v.* Angus Shipping Co., *supra*; Wilson *v.* Rapp; M'Lachlan *v.* Rapp, 1909, 2 S. L. T. 295; 1911, S. C. 1360; Boyle *v.* Olsen; Lindsey Steam Fishing Co., Ltd. *v.* Actieselskabet Bonheur, 1912, S. C. 1235.

[8] Barlas, Petr., 1894, 1 S. L. T. 451.

[9] Valentine's Trs., Petrs., 1906, 14 S. L. T. 137.

raises an action against parties other than the pursuer in the action of reduction to have the validity of the deed declared;[1] where the same pursuer raises an action and also an action of reduction relative to the same matter;[2] or where the pursuers and defenders are different in the two actions, provided the interests are the same.[3]

(5) WHERE MOTION REFUSED.—An action of relief will not be conjoined with the original action. Thus, where a party brought an action of count and reckoning and payment, and the defender raised an action of relief against certain other parties, it was held incompetent to conjoin them;[4] and where an action was brought against a superior by an inhabitant to remove a nuisance, the Court refused to conjoin with it an action by the superior against the parties whom he alleged to be responsible for the nuisance.[5]

In actions by the same pursuer against different defenders on the same subject-matter, where the pleas of the several defenders are quite different, the actions will not be conjoined. Thus, where two actions by the same company were raised against two joint shareholders for payment of separate calls upon shares held by them, conjunction was refused, as the defenders in the one action set forth several pleas not stated on the other record.[6]

Actions by the same pursuer against the same defender will not be conjoined if the parties sue and are sued in different capacities in the different actions and there are different grounds of action. Thus, where a widow sued her deceased husband's employers for damages in respect of his death, and thereafter as his executrix-dative raised an action against his employers in respect of a contract of insurance which the employers had entered into with the deceased, the Lord Ordinary held that there was contingency, but refused to conjoin the actions.[7]

The Lord Ordinary will not conjoin processes *in limine* without the records being closed.[8]

In an action of damages for two written slanders, it was attempted at adjustment to add a verbal slander, but this was not allowed, and the pursuer accordingly raised a supplementary action and moved to have it conjoined with the first action, but the Lord Ordinary refused to

[1] M'Dowall *v.* Campbell, 1838, 16 S. 629.
[2] Shand *v.* Shand, 1832, 10 S. 384.
[3] Duke of Buccleuch *v.* Cowan, 1866, 4 M. 475; affd. 1876, 4 R. (H. L.) 14.
[4] Gray *v.* Kerr, 1837, 15 S. 494.
[5] Mackay *v.* Greenhill, 1858, 20 D. 1251.
[6] National Exchange Co. *v.* Drew and Dick, 1861, 23 D. 1278.
[7] M'Fadyen *v.* United Alkali Co., Ltd., 1897, 4 S. L. T. 321.
[8] M'Leay *v.* Rose, 1826, 4 S. 481 (N. E. 486).

conjoin them, the argument of the defender being that if the actions were conjoined and the pursuer got a verdict on one of the issues it would carry expenses in the conjoined actions.[1]

(6) Sist of One Action instead of Conjunction.—After two actions have been remitted *ob contingentiam* it may often appear to the Judge who has both processes before him that it would be better to sist one action rather than conjoin the actions.[2] Accordingly, where a party brought an action of reduction of several deeds, and a record was closed, issue joined, and a verdict found as to one of the deeds, and the case *quoad ultra* was depending, and the pursuer brought a reduction-improbation of the deeds not falling under the verdict, a motion to conjoin was refused, and the later action was sisted until the original one was decided or abandoned,[3] and where actions of reduction were conjoined, and it appeared later that the necessity for the second reduction would not arise until the first action was decided, the Court on a reclaiming note disjoined the actions and sisted the second action until the first action was decided.[4]

(7) Conjunction in Adjudications.—See *Action of Adjudication*, Part vii. Chap. xiv. (2), (h), *infra*.

(8) Disjunction.—Where it appears in the course of procedure in conjoined actions that they should be disjoined the Court has power to disjoin them.[5]

(9) Procedure.—If the actions to be conjoined are not pending before the same Lord Ordinary or Division, the later action, or the action in the inferior Court, will first require to be remitted or transmitted *ob contingentiam* (*q.v.*). The two processes are then put out on the roll for the same day before the Lord Ordinary or Court to whom the cause has been remitted or who has ordered the transmission of the inferior process, and an interlocutor is pronounced upon the leading process conjoining with it the remitted or transmitted cause:—"The Lord Ordinary conjoins herewith the process at the instance of , being No. of this day's roll." Thereafter the numbers of process of the second case are marked as numbers of the leading process, and the actions proceed as one case, being enrolled as conjoined actions.

[1] Phillips *v.* Miller, 1894, 1 S. L. T. 498.

[2] Duke of Buccleuch *v.* Cowan, 1866, 4 M. 475, per Lord Justice-Clerk Inglis, p. 480.

[3] Mason *v.* Merry, 1832, 10 S. 555.

[4] Turner *v.* Tunnock's Tr., 1864, 2 M. 509.

[5] Ibid.; Yellowlees *v.* Alexander, 1882, 9 R. 765.

CHAPTER XIII

MOTION FOR A JUDICIAL REMIT

(1) Generally.—Where in the course of a cause it is deemed advisable to have the opinion of a professional man, or of a person of skill, upon some technical matter, a motion may be made for a remit to such a person, and the remit may be made on the motion of either of the parties, or of consent, or by the Court *ex proprio motu*.

It is also the proper method of procedure in a petition presented for the appointment of a *curator bonis* to a person of unsound mind where the facts are disputed,[1] unless the next of kin of the alleged *incapax* demand a cognition;[2] and also where the question involved is the health of a person.[3] (*For Remits on Petitions*, see *Petitions*, Part viii., *infra*.)

In the Teind Court a remit has been made to the teind clerk to ascertain the practice upon certain points and to report.[4] In a process of locality, however, it was held that a question as to whether teinds were or were not bishop's teinds should be inquired into in the ordinary way by proof and not by a remit to the teind clerk.[5]

(2) Questions of Law or Mixed Fact and Law.—It is incompetent to remit a question of law to a reporter,[6] except when the remit is of consent and assumes the character of a judicial reference.[7] It is also incompetent, except of consent, to remit a matter of law and fact.[8] A remit may, however, be made to a commissioner to examine titles and to prepare a detailed and articulate state thereof simply for information, and not to fix anything;[9] and it is a common thing to remit to a reporter learned in the law to prepare a scheme for carrying on a lapsed trust or charitable bequest.[10] Where in a case it is necessary that the law of England or of a foreign country should be ascertained,

[1] C. B. *v.* A. B., 1891, 18 R. (H. L.) 40.
[2] A. B. *v.* C. B., 1890, 18 R. 90, per Lord M'Laren, p. 97.
[3] Bankes *v.* Anderson, 1899, 1 F. 1194.
[4] Logan *v.* City of Edinburgh, 1858, 20 D. 794.
[5] Macleod *v.* Wedderburn, 1862, 24 D. 774.
[6] Mushet *v.* Duke of Buccleuch, 1851, 13 D. 713, per Lord Fullerton, p. 715.
[7] Philp *v.* Swayne, 1838, 16 S. 427.
[8] Quin *v.* Gardner & Sons, Ltd., 1888, 15 R. 776.
[9] Mushet *v.* Duke of Buccleuch, 1851, 13 D. 713.
[10] Forbes *v.* Dalziel, 1877, 5 R. 328.

English and foreign counsel have sometimes been adduced as witnesses,[1] and there are statutes whereby the law of any other part of His Majesty's dominions[2] or of a foreign country[3] may be ascertained by a case stated to the superior Courts of the several countries, but a remit may also be made to foreign counsel to state what is the law of their respective countries.[4]

(3) The Stage at which a Remit may be Made.—It is not the practice to make a remit before the record is closed,[5] although it is quite competent to do so.[6] It is not incompetent for a Sheriff, after proof has been taken and judgment given, to remit to a man of skil to report, where the circumstances have changed since judgment was pronounced;[7] and it was held quite competent for a Lord Ordinary, after proof and judgment of the material question at issue, to remit to men of skill to make a report which would be of use to assist the Court in the matter of regulation, but the facts assumed on the report must be consistent with the proof.[8]

(4) Remit of Consent.—Where a remit is of consent,[9] or is acquiesced in,[10] and a complete and conclusive report has been made,[11] it is incompetent thereafter to have other proof on the subject of the remit. The Court may, however, ask the person to whom the remit was made to reconsider his report, but this can only be done on specific objections and on allegations of omission of duty.[12] Where a remit was

[1] Barclay *v.* Barclay, 1850, 22 Jur. 354; Whitehaven and Furness Junction Rly. Co. v. Bain, 1851, 13 D. 944; Parnell v. Walker, 1890, 17 R. 552.

[2] 22 & 23 Vict. cap. 63.

[3] 24 & 25 Vict. cap. 11.

[4] Aberdeen Banking Co. *v.* Maberley & Co., 1837, 15 S. 1052; Lord Cranstoun *v.* Cuninghame, 1839, 1 D. 521; Fyffe v. Fyffe, 1840, 2 D. 1001; Welsh *v.* Milne, 1844, 7 D. 213.

[5] Donaldson *v.* Bannatyne, 1828, 7 S. 130; Fettes *v.* Buchanan, 1828, 7 S. 141.

[6] Mackintosh *v.* Macqueen's Tr., 1830, 8 S. 668.

[7] Leonard *v.* Lindsay and Benzie, 1886, 13 R. 958.

[8] Earl of Kintore *v.* Pirie & Sons, Ltd., 1905, 42 S. L. R. 607.

[9] Rowat *v.* Whitehead, 1826, 5 S. 19 (N. E. 18); Meason and Barker *v.* Duke of Queensberry's Exrs., 1827, 6 S. 326; Halkett *v.* Earl of Elgin, 1831, 9 S. 412; Grant v. Dunbar, 1834, 12 S. 717; M'Laren *v.* Ferrier, 1865, 3 M. 833; Bankes *v.* Anderson, 1899, 1 F. 1194; Barclay *v.* Bruce's Trs., 1904, 12 S. L. T. 100.

[10] Dixon *v.* Monkland Canal Co., 1821, 1 S. 145 (N. E. 141); 1825, 1 W. & S. 636; Murray *v.* Presbytery of Glasgow, 1833, 12 S. 191; Mackintosh *v.* Ashburton, 1834, 12 S. 518; Wilson *v.* Struthers, 1837, 15 S. 523; Brown *v.* Love, 1842, 4 D. 386; Welsh *v.* Milne, 1844, 7 D. 213; Bertram *v.* Presbytery of Lanark, 1864, 2 M. 1406; Pearce Bros. *v.* Irons, 1869, 7 M. 571; Thom *v.* Macbeth, 1875, 3 R. 161, per Lord Gifford, p. 165.

[11] Galbreath *v.* Taylor, 1843, 5 D. 423.

[12] Rowat *v.* Whitehead, 1826, 5 S. 19 (N. E. 18); Hunter *v.* Duke of Queensberry's Exrs., 1827, 6 S. 89; Meason and Barker *v.* Duke of Queensberry's Exrs., 1827, 6 S. 326; Edinburgh Northern Tramways Co. *v.* Mann, 1896, 23 R. 1056.

made to two persons of skill who made a report which did not exhaust the case and one died shortly thereafter, it was held that the proper mode of making further investigation was not by proof but by appointing a new reporter to act with the survivor;[1] and where two inspectors under a remit were at issue with each other and returned an incomplete report, the Court conjoined a third party with them and remitted of new.[2]

Where a party acquiesced in an interlocutor pronounced after a discussion on objections to an accountant's report by which the Lord Ordinary, of consent of parties, remitted of new to the accountant to inquire and report upon one particular branch of the accounting, he was held to be debarred from asking further probation.[3]

Where it was part of an agreement that the value of subjects should be ascertained by mutual referees, and this was not done extra-judicially, it was held to be quite competent to do so, in an action for their value, by remitting to a person of skill, the Court holding that it was part of the agreement and was final.[4]

(5) Remit Without Consent.—"*Prima facie* the pursuer's right is to be allowed to prove his averments, and the defender may maintain that he is not bound to submit to any but the ordinary mode of proof, unless the case is unadapted for that procedure."[5]

Where a Sheriff was asked by one party to remit a contentious matter which was opposed by the other party the petition was held to be incompetent.[6] There are, however, cases of a limited class where the Court, on the motion of either of the parties, and despite the opposition of the other party, or *ex proprio motu*, is entitled to remit to a man of skill.[7] Thus a remit has been made to ascertain whether fixtures belong to an heir or an executor, or whether machinery is conform to contract;[8] to ascertain the amount of deductions which should be allowed under sec. 37 of the Poor Law Act;[9] to an architect

[1] Lord Blantyre *v.* Glasgow, Paisley and Greenock Rly. Co., 1851, 13 D. 570.

[2] Muir *v.* Anderson, 1833, 12 S. 129.

[3] Gibson *v.* Ewan, 1852, 15 D. 211.

[4] Munro *v.* Mackenzie, 1823, 2 S. 593 (N. E. 508).

[5] Quin *v.* Gardner & Sons, Ltd., 1888, 15 R. 776, per Lord President Inglis, p. 779.

[6] Mags. of Kilmarnock *v.* Reid, 1897, 24 R. 388; Sutherland *v.* Squair, 1898, 25 R. 656. See also M'Gillivray *v.* Souter, 1860, 32 Jur. 634.

[7] Mags. of Kilmarnock *v.* Reid, 1897, 24 R. 388, per Lord President Robertson, p. 392.

[8] Quin *v.* Gardner & Sons, Ltd., 1888, 15 R. 776, per Lord Shand, p. 780. See also Smith Bros. & Co. *v.* Scott, 1875, 2 R. 601, per Lord Justice-Clerk Moncreiff, p. 608; Nisbet *v.* Mitchell-Innes, 1880, 7 R. 575.

[9] Broxburn Oil Co., Ltd. *v.* Morrison, 1903, 5 F. 694.

to tax a builder's account;[1] to report on intended operations which are asked to be interdicted;[2] to report on the working of coal;[3] and generally to place on record what is patent and visible to an accurate observer,[4] or what is of a fugitive character.[5] In such cases, however, the report is not considered as final and binding on the parties.[6]

In the same way, judicial remits of a ministerial character, such as remits to the Auditor;[7] to Clerks of Court to ascertain points of practice,[8] and to men of business,[9] may be made by the Judge without consent, and are not conclusive, but are treated with the consideration due to the experience and skill of such reporters.

A remit to an engineer to inspect and report has been granted in the Bill Chamber contrary to the wish of one of the parties.[10]

(6) Remit before Answer.—A remit before answer means that before the Judge can say anything about the case he wishes a report made by a man of skill.[11] Accordingly, if the remit before answer is of consent, it binds the parties to the decision in the report.[12] If the remit before answer is not of consent, the report is no bar to the parties resorting to other proof,[13] and the proper form of interlocutor in such a case seems to be "before answer, and without prejudice to any course of investigation that may hereafter be thought proper."[14]

A remit before answer may be made in the Bill Chamber to an engineer to inspect and report without the consent of both parties.[15]

Where there is a remit before answer with power to examine witnesses, this only means before answer as to the law and relevancy, and does not authorise the admission of incompetent evidence.[16]

(7) Remits to Accountants.—The following are the statutory provisions with regard to remits to accountants:—

[1] Robertson *v.* Thomson, 1866, 1 S. L. R. 248.
[2] Mags. of Montrose *v.* Birnie, 1829, 8 S. 108.
[3] Robertson *v.* Hyndman, 1834, 12 S. 544.
[4] Mags. of Kilmarnock *v.* Reid, 1897, 24 R. 388, per Lord President Robertson, p. 392.
[5] Gordon's Trs. *v.* Melrose, 1870, 8 M. 906, per Lord Neaves, p. 909.
[6] Steel *v.* Steel, 1898, 25 R. 715.
[7] Wilson *v.* North British Rly. Co., 1873, 1 R. 304.
[8] Logan *v.* City of Edinburgh, 1858, 20 D. 794.
[9] 31 & 32 Vict. cap. 100, sec. 92.
[10] Scott *v.* Scott, 1839, 1 D. 1176.
[11] Galbreath *v.* Taylor, 1843, 5 D. 423, per Lord Mackenzie, p. 425.
[12] Ibid.; Pearce Bros. *v.* Irons, 1869, 7 M. 571.
[13] Duke of Buccleuch *v.* M'Murdo, 1827, 5 S. 677 (N. E. 632); Hunter *v.* Duke of Queensberry's Exrs., 1827, 5 S. 678 (N. E. 633).
[14] Carron Co. *v.* Stainton's Trs., 1857, 19 D. 932, at p. 936; Dykes *v.* Allanshaw Coal Co., 1894, 1 S. L. T. 530.
[15] Scott *v.* Scott, 1839, 1 D. 1176.
[16] Robertson *v.* Murphy, 1867, 6 M. 114.

(a) *Attendance of Accountant at Debate before Remit, etc.*—The Court (in any branch of its jurisdiction), where a question of accounting is to be investigated, may request the accountant to whom it is intended to remit the cause to attend in Court at the debate, and in the advising of the cause may take the assistance of such accountant out of Court in settling the terms of the remit to be made to him.[1]

(b) *Power of Accountant to Compel Attendance of Witnesses, etc.*—The accountant shall have power, by signed order, to require the attendance of the parties before him at such times, either in session or in vacation, as he may appoint; and also to fix the times within which notes of objections and answers, vouchers, and other necessary papers shall be lodged before him; and the time appointed by such order may be at once prorogated without special cause shown; and a second time upon special cause to be mentioned in the order of prorogation; provided in case of such second prorogation that application is made before the expiration of the time previously appointed. When the accountant has power under the remit to examine witnesses or havers, the Clerk of the Bills shall issue letters of second diligence against any defaulting witness or haver on a bill presented by the agent and countersigned by the accountant.[2]

(c) *In Case of Default, Accountant to Proceed ex parte.*—In case of failure to lodge any note or answer or productions within the time appointed, the accountant shall proceed to dispose of the cause upon the evidence and statements submitted to him; and in case of the failure of one of the parties to attend any diet without reasonable excuse, he shall proceed to dispose of the cause, after hearing the explanations of the other party, according to his opinion on its merits.[3]

(d) *Application to Court for Special Direction.*—It shall be competent for the accountant to apply, either by written note, or *vivâ voce* in presence of the parties, to the Court for direction as to any point which may arise in the course of the remit; and the Court may give such directions, either *vivâ voce* or by interlocutor thereon, or may suspend the remit, and proceed to deal with the point raised as in the cause, and dispose of it accordingly.[4]

(e) *Parties may Appeal from Accountant, etc.*—It shall be competent for either party, with the leave of the accountant, to bring under review of the Court any *interim* order or proceeding of the accountant, or, with leave as aforesaid, to move the Court to give

[1] Court of Session Act, 1868, sec. 81.
[2] Ibid., sec. 82. [3] Ibid., sec. 83. [4] Ibid., sec. 84.

the accountant special directions on any point arising in the course of the remit.[1]

(f) *Report of Accountant.*—The report of the accountant shall state, in the form of a certificate, the facts he has found to be established and the results at which he has arrived, and also the points falling within the remit which he suggests as proper for the consideration of the Court; and any necessary explanations of the grounds of the accountant's findings and opinion shall be stated in the form of a note appended to such certificate; and such states of accounts only shall be prepared as the accountant or the Court shall consider essential for the proper decision of the cause.[2]

(g) *Accountant may Assist the Court in Applying their Judgment.*—The accountant shall, if required by the Court or by either of the parties, attend at the debate on his report; and it shall be lawful for the Court to take the assistance of the accountant out of Court in the preparation of the draft of the judgment in which the opinions they may communicate to him shall be applied to the various points of the case, so as to bring out the proper results of such opinions, and so as, if possible, to obviate the necessity of a second remit; and for this purpose the opinion of the Court may be communicated to the accountant by the Judge upon whom the preparation of the judgment of the Court may be devolved, in any way he may think fit.[3]

The whole of the above-mentioned provisions in relation to actions of accounting shall be applicable to causes in dependence before any of the Lords Ordinary.[4]

Where a remit is made to an accountant by the Court, it is not of the character of a *quasi* reference, but the parties are entitled to object on all grounds on which he forms his opinion.[5]

(8) Objections to Report.—When, in any cause, a report has been obtained from an accountant or other professional person, and the parties, or either of them, shall be dissatisfied with the report, the cause shall be enrolled before the Lord Ordinary for debate on the report, and a note of the objections shall be furnished to the opposite party forty-eight hours before enrolment; and at the time of enrolling the cause a copy of the note of objections shall be furnished to the Lord Ordinary's clerk for his Lordship's use; and upon hearing

[1] Court of Session Act, 1868, sec. 85. See Liquidator of Western Bank *v.* Baird's Trs., 1868, 5 S. L. R. 671.

[2] Court of Session Act, 1868, sec. 86. [3] Ibid., sec. 87. [4] Ibid., sec. 88.

[5] Cameron *v.* Anderson, 1844, 7 D. 92.

parties the Lord Ordinary may order cases, or otherwise dispose of the note of objections as he sees cause.[1]

If the report has been made on a remit of consent, there can be no objections allowed to the facts found by the report, so far as they are within the terms of the remit. (See *Remit of Consent, supra*, p. 503.) A clerical error, however, may be objected to and corrected, and there may be objections that the report is incomplete, or that it is ambiguous and contradictory, in which cases the Court, if satisfied that the objections are sound, will remit of new.[2] Objections may also be made to the conduct of the remit, such as bribery and corruption on the part of the reporter.

If the report is made upon a remit which has not been of consent, objections to the merits may be stated, and as the report is not conclusive, the objectors will be entitled to other proof. (See *Remit without Consent, supra*, p. 504.)

It is the duty of a reporter to confine his report strictly to the terms of the remit. Accordingly, where a remit was made to a reporter to see work begun, proceeded with, and completed according to certain plans, it was held premature for him to make criticisms, while the work was proceeding, upon the plans.[3]

Where a report has been approved of, it is incompetent to raise objections to it.[4]

A final report in one case is not held conclusive in another case where the subject-matter in dispute is the same.[5]

Where a report showed that some items were overcharged and some undercharged, it was held that the defender could not reject the report on the partial undercharge and found upon it in proof of partial overcharge.[6]

(9) Expenses of a Remit.—A person to whom a remit has been made by the Court is entitled to recover his fee from the parties to the cause conjunctly and severally,[7] and he can retain the vouchers and documents put into his hands in order to draw up the report until paid

[1] A. S., 11th July 1828, sec. 67; C. A. S., C, ii. 13.

[2] Muir *v.* Anderson, 1833, 12 S. 129; Fyffe *v.* Fyffe, 1840, 2 D. 1001; Galbreath *v.* Taylor, 1843, 5 D. 423; Lord Blantyre *v.* Glasgow, Paisley, and Greenock Rly. Co., 1851, 13 D. 570.

[3] Marshall *v.* Callander and Trossachs Hydropathic Co., 1897, 24 R. 712.

[4] Hunter *v.* Cochrane's Trs., 1831, 9 S. 477. See also Stewart *v.* Baikie, 1829, 7 S. 330.

[5] Gray *v.* Watson, 1844, 6 D. 925.

[6] Thomson *v.* Moffat, 1831, 10 S. 124.

[7] Robert Wilson and Others, Petrs., 10th July 1813, F. C.; Brodie *v.* Cawdor, 1836, 14 S. 1097; Ballantine *v.* Reddie, 1884, 22 S. L. R. 136.

his fee.[1] If one party pays the whole fee he is entitled to recover the proportion for which the others are liable;[2] and if one party has paid the whole fee and obtained the report the Court will not ordain him to deliver it up to the opposite party unless the latter pays his proportion of the fee.[3]

A report ordered by the Court is payable one half by each party to the cause.[4]

"Where a remit shall be made by the Court regarding matters in the record between the parties, to an accountant, engineer, or other reporter, the agents shall not, without special agreement, be personally responsible to the reporter for his remuneration, the parties alone being liable."[5] This rule does not apply to a commissioner, for whose fees the agents in the cause are personally liable.[6]

Where the expense of a report made in a judical remit is objected to on the ground of extravagance, the charge may either be remitted by the Court to another man of skill to report upon it,[7] or to the Auditor to tax and report.[8]

In questions of pollution, where the defenders admit the pollution but aver that the complaint has been obviated by stopping the pollution, the complainers are entitled to have a remit to a man of skill to report upon the question, and the respondents are liable in the expense of the report notwithstanding that its terms show that the pollution has come to an end.[9]

(10) Forms of Interlocutors making a Remit.—(*a*) *To an Accountant.*—The Lord Ordinary, on the motion of the pursuer (*or* defender, *or* of consent) remits to Mr. to report on the accounts in question, and in particular on the various points in dispute between the parties in relation to the accounts libelled, with power to the reporter to meet with the parties and receive their explanations, as also to call for and receive all books, vouchers, and other writings that may be necessary, and, if necessary, to examine witnesses and havers; and for that purpose grants to him commission, and to each of the

[1] Stewart *v.* Stevenson, 1828, 6 S. 591.

[2] Robert Wilson and Others, Petrs., 10th July 1813, F. C.; Brodie *v.* Cawdor, 1836, 14 S. 1097.

[3] Sutherland *v.* Goalen, 1855, 17 D. 509. See, however, M'Queen *v.* M'Queen's Trs., 1851, 13 D. 502.

[4] Forrest *v.* Clyne, 1831, 10 S. 121.

[5] General Regulation VII., A. S., 15th July 1876; C. A. S., K, iv., at p. 143.

[6] A. B. *v.* C. D., 1843, 6 D. 95; M'Lachlan *v.* Flowerdew, 1851, 13 D. 1345.

[7] Fraser *v.* Johnstone's Trs., 1833, 12 S. 209.

[8] Logan *v.* City of Edinburgh, 1858, 20 D. 794.

[9] Dodd *v.* Hilson, 1874, 1 R. 527.

parties diligence for citing witnesses and havers, and recommends the reporter to make his report in terms of the statute, and with as little delay as possible.

(b) *To any other Man of Skill.*—The Lord Ordinary, of consent (*or* on the motion of the pursuer, *or* defender), remits to Mr. (*here will follow the terms of the remit*) with power to him to hear parties, and to examine such witnesses as may be necessary, for which purpose grants commission to him, and diligence to the parties to cite them.

CHAPTER XIV

MOTION FOR A JUDICIAL REFERENCE

(1) Definition of Judicial Reference.—A judicial reference is the submission by the parties to a cause, with the approval of the Court, of the whole subject-matter of the cause, or any part or parts thereof, to a referee. It is substantially the same as an ordinary submission except that the cause is in the hands of the Court, and, after the award has been made by the referee, the successful party must come back to the Court for the formal judgment on the summons and warrant for execution.[1] All parties interested must concur, otherwise it is not binding on them. Thus, a cautioner in a suspension is not bound by a decree of Court proceeding on the award of a referee in a judicial reference entered into by the suspender without the knowledge of the cautioner,[2] although a cautioner in the loosing of arrestments is so bound.[3] Again, where three out of four joint tenants submitted an action of damages and a decree-arbitral was pronounced, it was held that no submission entered into by the three could affect the fourth, and the latter was allowed to waken the cause.[4]

(2) Procedure to Obtain a Reference.—The usual procedure is for the parties or counsel to sign a minute in the following terms:—

[*Counsel's name*], for the pursuer, and [*counsel's name*], for the defender, concurred in stating that the parties had agreed to refer to the amicable decision of [*referee's name and designation*], as judicial arbiter, the matters at issue in this action [*or as the case may be*], and craved the Court to interpone authority hereto, and to remit in terms hereof.

This minute is lodged with the Clerk of Court and the case enrolled, and the Court is moved to interpone its authority.

It is in the discretion of the Court to interpone its authority or not as it sees fit.[5] When the Court in the exercise of its discretion approves of the reference, it is usual to interpone its authority by interlocutor. The signing of an interlocutor, however, is not of the essence of the

[1] Brakinrig *v.* Menzies, 1841, 4 D. 274, per Lord Moncreiff, p. 284. See also Mackenzie *v.* Girvan, 1840, 3 D. 318, per Lord Moncreiff, p. 327.

[2] Stewart *v.* Hickman, 1843, 6 D. 151.

[3] Potter *v.* Bartholomew, 1847, 10 D. 97.

[4] Mackintosh *v.* Robertson, 1834, 12 S. 321.

[5] Brakinrig *v.* Menzies, 1841, 4 D. 274, per Lord Medwyn, p. 280.

contract to refer, and accordingly, where parties appeared before a referee, who thereafter pronounced an award, it was held that the parties had waived any objection to the want of an interlocutor.[1] If an interlocutor has been signed it cannot be recalled except of consent,[2] although there is *locus pœnitentiæ* to either of the parties before the authority of the Court has been interponed.[3]

The referee usually accepts office by signing a minute or docquet written on the minute of reference.

(3) At what Stage a Reference may be Made.—A reference may be made at any time while the cause is depending. Thus, a reference was allowed on the cause coming into Court;[4] after the record was closed;[5] after proof was allowed;[6] after a proof had been heard in a leading cause and an advocation *ob contingentiam*;[7] after issues had been adjusted;[8] at a trial, before the jury was empannelled;[9] and after the jury was sworn.[10]

(4) Who may Refer.—The parties themselves may agree to refer. Counsel may do so, although holding no special mandate or authority from their clients;[10] and a reference has been upheld where a party has protested that his counsel had no authority to refer and that the reference was contrary to his wish.[11] A law agent can refer without express authority.[12] A trustee in bankruptcy may, with the consent of the commissioners, enter into a judicial reference which will be binding on the creditors and the bankrupt.[13]

(5) What may be Referred.—Strictly speaking, a judicial reference may not go outside the record of the cause in which the reference is made.[14] If, therefore, the reference seems to go beyond the averments on record, the referee need only decide the dispute set forth on record in order to exhaust the judicial reference. Thus, where the parties

[1] Fairley *v.* M'Gown, 1836, 14 S. 470; Gillon *v.* Simpson, 1859, 21 D. 243, per Lord Cowan, p. 249.

[2] Walker *v.* Shaw-Stewart, 1855, 2 Macq. 424, per Lord Chancellor Cranworth, p. 429.

[3] Reid *v.* Henderson, 1841, 3 D. 1102.

[4] Paul *v.* Henderson, 1867, 5 M. 613.

[5] Roberts *v.* Roberts, 1833, 12 S. 210.

[6] Colquhoun *v.* Haig, 1825, 3 S. 424 (N. E. 298).

[7] Campbell *v.* Campbell, 1843, 5 D. 530.

[8] Berry *v.* Watson, 1827, 6 S. 256; Anderson *v.* Kinloch, 1836, 14 S. 447.

[9] Brakinrig *v.* Menzies, 1841, 4 D. 274.

[10] Gilfillan *v.* Brown, 1833, 11 S. 548.

[11] Edinburgh Oil Gas Light Co. *v.* Clyne, 1832, 10 S. 723; 1835, 2 S. & M'L. 243; Forbes *v.* Lord Duffus, 19th January 1837, 12 Fac. 321.

[12] Livingston *v.* Johnston, 1830, 8 S. 594.

[13] 3 & 4 Geo. V. cap. 20, sec. 172; Goudy on Bankruptcy, 3rd ed. p. 371.

[14] Mackenzie *v.* Girvan, 1840, 3 D. 318, per Lord Moncreiff, p. 329.

agreed "to refer the two actions, with full powers to determine all questions between the parties," and the referee gave judgment on the claims made by each party respectively in these actions, and reserved *quoad ultra*, it was held that he had exhausted the reference;[1] in fact, the words "referring the cause, and all questions," or even "referring the cause, and all other questions," between the parties to a judicial reference must be taken to mean all questions in dispute between the parties in the cause referred.[2]

It has been held that a judicial referee may give an award of expenses, although there is no mention of expenses in the cause referred,[3] and no express power given to him by the minute of reference.[4]

(6) WHO MAY BE REFEREE.—The choice of the referee by the parties to a cause is seldom interfered with, although the Court does not blindly interpone its authority to their selection.[5]

The Lord Ordinary,[6] or the Sheriff,[7] may be appointed referee, but it must be done in the clearest terms,[8] and the reference must be *extra cursum curiæ*.[9] Accordingly, a deviation from the ordinary course of judicial procedure on the part of a Lord Ordinary or Sheriff does not constitute the proceedings a reference, unless it follows upon an agreement by the parties, and is assented to by the Judge.[10]

A reference has also been made to the counsel on both sides o a case.[11]

Where two referees were appointed and they disagreed, a third was added, with power to the majority to decide.[12]

(7) POWERS AND DUTIES OF REFEREE.—The procedure to be adopted at the reference is substantially the same as in an ordinary submission.

A referee has the power of determining the nature of the pleadings,

[1] Edinburgh Oil Gas Light Co. *v.* Clyne, 1832, 10 S. 723.

[2] Clyne's Trs. *v.* Edinburgh Oil Gas Light Co., 1835, 2 S. & M'L. 243, per Lord Brougham, pp. 269, 270.

[3] Paul *v.* Henderson, 1867, 5 M. 613, per Lord Cowan, p. 620.

[4] Smith *v.* Banks, 1830, 8 S. 920; Fairley *v.* M'Gown, 1836, 14 S. 470; Robertson *v.* Brown, 1836, 15 S. 199; Ferrier *v.* Alison, 1843, 5 D. 456, per Lord Jeffrey, p. 460; affd. 1845, 4 Bell's App. 161.

[5] Brakinrig *v.* Menzies, 1841, 4 D. 274, per Lord Medwyn, p. 280.

[6] Shiels *v.* Shiel's Trs., 1874, 1 R. 502.

[7] Dykes *v.* Merry and Cuninghame, 1869, 7 M. 603.

[8] Lindsay *v.* Walker's Trs., 1877, 4 R. 870.

[9] Steel *v.* Steel, 1898, 25 R. 715, per Lord M'Laren, p. 720.

[10] Gordon *v.* Bruce & Co., 1897, 24 R. 844, per Lords M'Laren and Kinnear.

[11] Berry *v.* Watson, 1827, 6 S. 256.

[12] Potter *v.* Bartholomew, 1847, 10 D. 97, at p. 98.

if any, and what proof is to be admitted.[1] Thus, he may judge upon written evidence alone, without further proof;[2] or he may disregard proof altogether,[3] especially where he himself is conversant with the subject-matter of the reference,[4] but he cannot deliberately refuse to allow a party to adduce evidence where such evidence is essential to the matter at issue,[5] nor to hear parties where a hearing is necessary.[6] A referee may not give decree by simple default,[7] but it is permissible, where the reference has begun and one of the party refuses to obey his orders, to make an award in the reference.[8]

He may, *ex propri motu*, order a proof,[9] and may award expenses although no express power is given to him by the minute of reference.[10]

A judicial referee has power to consult with and employ professional men and persons of skill in order to profit by their advice and assistance. For such employment it would seem that the referee was primarily liable, but he would be entitled to charge their fees in his own account of expenses in the same way as he does the fees of his clerk.[11]

(8) Effect of a Judicial Reference on the Cause.—An agreement by the parties in a cause to have a judicial reference does not affect the dependence of the cause in which it is made. Thus, diligence upon the dependence still remains good,[12] and the cause, if in the Outer House, may fall asleep, in which latter case it will require to be wakened before the report of the reference can be received.[13] The judicial reference itself, however, does not fall by lapse of year and day.[14] There can

[1] Kirkaldy *v.* Dalgairns' Trs., 16th June 1809, F. C.; Campbell *v.* Campbell, 1843, 5 D. 530, per Lord Justice-Clerk Hope, pp. 538, 539.

[2] Colquhoun *v.* Haig, 1825, 3 S. 424 (N. E. 298).

[3] Union Canal Co. *v.* Davidson, 1836, 15 S. 194; Campbell *v.* Campbell, 1843, 5 D. 530; Miller *v.* Millar, 1855, 17 D. 689.

[4] Johnston *v.* Cheape, 1817, 5 Dow's App. 247.

[5] Sharpe *v.* Bickerdyke, 1815, 3 Dow's App. 102; Johnston *v.* Cheape, 1817, 5 Dow's App. 247, per Lord Eldon, p. 263; Mowbray *v.* Dickson, 1848, 10 D. 1102, per Lord Justice-Clerk Hope, p. 1109; Miller *v.* Millar, 1855, 17 D. 689; Ivory's Erskine, p. 1019.

[6] Macdonald *v.* Macdonald, 1843, 6 D. 186. See, however, Flounders *v.* Flounders, 1826, 4 S. 459 (N. E. 464).

[7] United Collieries *v.* Gavin, 1899, 2 F. 60.

[8] George *v.* Milne, 1836, 14 S. 404.

[9] Berry *v.* Watson, 1827, 6 S. 256.

[10] Smith *v.* Banks, 1830, 8 S. 920; Ferrier *v.* Alison, 1843, 5 D. 456, per Lord Jeffrey, p. 460; affd. 1845, 4 Bell's App. 161.

[11] M'Leod *v.* Bisset, 1825, 4 S. 330 (N. E. 335); Caledonian Rly. Co. *v.* Lockhart, 1860, 3 Macq. 808, per Lord Chancellor Campbell, pp. 812, 813; Burnet v. Henry, 1866, 5 M. 96.

[12] Stewart *v.* Earl of Galloway, 1770, Mor. 7004.

[13] Stewart *v.* Hickman, 1843, 6 D. 151.

[14] Bell on Arbitration (2nd ed.), p. 282.

be no reference to oath after a reference.[1] Where a judicial reference was brought within three years of the date of a claim, and the referee died without giving an award, it was held that the pursuer was entitled to prove his claim after three years *prout de jure*.[2]

(9) Warrant to Cite Witnesses and Havers.—Where a warrant to cite witnesses or havers resident in Scotland is required, a motion should be made to the Lord Ordinary or Division before which the cause is still pending, and not to the Lord Ordinary on the Bills,[3] except in vacation.

If the witnesses or havers are resident in England or Ireland, the Court will confirm the appointment of a commissioner named by the referee.[4] In a recent case, the Court, while confirming the appointment of a commissioner in England, did not grant letters of diligence, Lord President Dunedin observing that if the witnesses did not appear in answer to the commissioner's citation, the latter could apply to the Courts in England.[5] It is incompetent for the Court to grant a warrant to cite English or Irish witnesses or havers to appear before a referee in Scotland.[6]

(10) Procedure after the Report.—The referee reports to the Court in order that its award may be enforced by the Court, and if the award is not challenged, the Court will pronounce decree in terms thereof.[7]

The Court cannot amend the report; it can only grant decree in terms of the award, or quash it on any of the grounds of objection competent. If, however, the award is ambiguous, or if any alterations are necessary, the Court will remit to the referee either to make the award clear, or to make the necessary alterations, as the case may be.[8] Again, if the report is defective or inaccurate yet so as to admit of rectification by remitting the process of new to the referee, it is the practice of the Court so to remit.[9]

[1] M'Larens *v.* Shore, 1883, 10 R. 1067.

[2] Dunn *v.* Lamb, 1854, 16 D. 944.

[3] Harvey *v.* Gibson, 1826, 4 S. 809 (N. E. 816); Caird, Petr., 1865, 3 M. 851.

[4] 6 & 7 Vict. cap. 82; Blaikie *v.* Aberdeen Rly. Co., 1851, 13 D. 1307.

[5] John Nimmo & Son, Ltd., Petrs., 1905, 8 F. 173.

[6] Gordon *v.* Neilson, 1741, Mor. 634; Highland Rly. Co., Petrs., 1868, 6 M. 896.

[7] Mackenzie *v.* Girvan, 1840, 3 D. 318, per Lord Moncreiff, p. 327; Brakinrig *v.* Menzies, 1841, 4 D. 274, per Lord Moncreiff, p. 284; Gillon *v.* Simpson, 1859, 21 D. 243, per Lord Wood, pp. 247, 248.

[8] Kid *v.* Walker, 1828, 7 S. 82; Anderson, etc. *v.* Pott, etc., 1832, 10 S. 534; 1833, 11 S. 778; Lord Advocate *v.* Heddle, 1856, 18 D. 1211.

[9] Baxter *v.* Macarthur, 1836, 14 S. 549.

(11) Grounds of Challenge of Report or Award. — It is an established principle of the law of Scotland that when an award in a judicial reference is clear in its terms, correct in its form, embracing nothing which is not referred, and exhausting all that is referred, it is not competent for the Court to review such award on its general merits, or set it aside, or refuse effect to it, on any idea of mere error in judgment in the matters properly within the cognisance of the referee.[1] Awards in judicial references stand on the same footing as decrees-arbitral in extra-judicial submissions, and the former cannot be challenged except on grounds such as would be sufficient to set aside the latter.[2]

In order to set aside an award in a judicial reference, however, it is not necessary to raise an action of reduction, as is the case in an extra-judicial decree-arbitral, and when the motion is made to confirm by decree the award in a judicial reference it is competent to object to granting the decree on any ground which would be competent and sufficient for setting aside an extra-judicial decree-arbitral.[3]

In order to make a relevant objection, it is necessary that a specific case of irregularity or incompetency in the proceedings in reference should be stated, averring distinctly what is the particular ground of objection which it is proposed to substantiate.[4]

The following are the grounds upon which a report or award in a judicial reference may be challenged :—

(a) *That the Report does not Exhaust the Reference.*—If the reference is not exhausted, it will be remitted back to the referee to exhaust it.[5]

(b) *That the Report goes Beyond the Reference.*—If the award has gone beyond the terms of the reference, the Court will set it aside[6]

[1] Mackenzie *v.* Girvan, 1840, 3 D. 318, per Lord Moncreiff, p. 328 ; 1843, 2 Bell's App. 43. See also Spearman *v.* Steele, 1828, 6 S. 645 ; Anderson *v.* Kinloch, 1836, 14 S. 447 ; Brakinrig *v.* Menzies, 1841, 4 D. 274, per Lord Meadowbank, pp. 279, 280 ; Hilton *v.* Walkers, 1867, 5 M. 969.

[2] Campbell *v.* Campbell, 1843, 5 D. 530.

[3] Mackenzie *v.* Girvan, 1840, 3 D. 318, per Lord Moncreiff, p. 327 ; Brakinrig *v.* Menzies, 1841, 4 D. 274, per Lord Medwyn, p. 280 ; Hilton *v.* Walkers, 1867, 5 M. 969, per Lord Deas, p. 972.

[4] Campbell *v.* Campbell, 1843, 5 D. 530, per Lord Justice-Clerk Hope, p. 538 ; Rogerson *v.* Rogerson, 1885, 12 R. 583.

[5] Colquhoun *v.* Haig, 1825, 3 S. 424 (N. E. 298). See also Edinburgh Oil Gas Light Co. *v.* Clyne, 1832, 10 S. 723 ; George *v.* Milne, 1836, 14 S. 404 ; Watmore *v.* Burns, 1841, 4 D. 150 ; Campbell *v.* Campbell, 1843, 5 D. 530.

[6] Steele *v.* Steele, 22nd June 1809, F. C. ; Napier *v.* Wood, 1844, 7 D. 166 ; *cp.* Dougalston Trs. *v.* Dudgeon's Tr., 1855, 17 D. 455.

if the portion within the reference cannot be separated from the portion outwith the reference.[1] If, however, they can be separated, the Court may sustain the part falling within the reference.[2]

(c) *That the Referee has been Guilty of Corruption, Bribery, or Falsehood in Terms of the Articles of Regulation concerning the Session, dated 29th of April* 1695, *sec.* 25.—The aforementioned section refers to the reduction of a decree-arbitral, but the same objections apply to judicial references.[3]

Formerly, corruption was held to include any plain failure in duty distinct from an error in judgment,[4] and not necessarily to mean moral corruption, or any moral wrong or wilfully dishonest motive or purpose on the part of the referee;[5] but this construction of the term has been strongly disapproved of by the House of Lords in recent years.[6] Accordingly, in order to make a successful challenge under the Articles of Regulation, a specific averment of corruption, bribery, or falsehood in the usual and ordinary acceptation of these respective terms, must be made.[7]

(d) *That the Actings of the Referee have been Contrary to the Principles of Justice.*—This ground of challenge has been recognised from an early date.[8] The following are examples:—

Where a referee refused to hear parties;[9] where he heard only one side;[10] where he refused to grant a proof where a proof was necessary;[11] and where he plainly transgressed an Act of

[1] Reid *v.* Walker, 1826, 5 S. 140 (N. E. 130); Napier *v.* Wood, 1844, 7 D. 166.

[2] Grosat *v.* Cunningham, 1739, Mor. 626; Kidd *v.* Paterson, 19th June 1810, F. C.; Stewart *v.* Ross, 1822, 1 S. 335 (N. E. 313); Adam *v.* Dove, 1852, 24 Jur. 476; Adams *v.* Great North of Scotland Rly. Co., 1889, 16 R. 843.

[3] Campbell *v.* Campbell, 1843, 5 D. 530; Hilton *v.* Walkers, 1867, 5 M. 969; Rogerson *v.* Rogerson, 1885, 12 R. 583.

[4] Mitchell *v.* Cable, 1848, 10 D. 1297, per Lord Mackenzie, p. 1307.

[5] Miller *v.* Millar, 1855, 17 D. 689.

[6] Adams *v.* Great North of Scotland Rly. Co., 1890, 18 R. (H. L.) 1, per Lords Watson and Bramwell; Holmes Oil Co., Ltd. *v.* Pumpherston Oil Co., Ltd., 1891, 18 R. (H. L.) 52. See also Cameron *v.* Menzies, 1868, 6 M. 279.

[7] Rogerson *v.* Rogerson, 1885, 12 R. 583.

[8] Sharpe *v.* Bickerdyke, 1815, 3 Dow's App. 102.

[9] Glennie *v.* M'Phail, 1825, 3 S. 574 (N. E. 395); Langmuir *v.* Sloan, 1840, 2 D. 877; Lyle *v.* Neilson, 1844, 6 D. 1163; Field and Allan *v.* Lownie, 1909, 2 S. L. T. 317. See, however, Latta *v.* Macrae, 1852, 14 D. 641.

[10] Sharpe *v.* Bickerdyke, 1815, 3 Dow's App. 102; Heggie & Co. *v.* Stark, 1825, 3 S. 488 (N. E. 339); Earl of Dunmore *v.* M'Inturner, 1835, 13 S. 356.

[11] Johnston *v.* Cheape, 1817, 5 Dow's App. 247, per Lord Eldon, p. 263; Union Canal Co. *v.* Davidson, 1836, 15 S. 194; Miller *v.* Millar, 1855, 17 D. 689; Paterson & Son, Ltd. *v.* Corporation of Glasgow, 1900, 2 F. 1201.

Parliament,[1] but not where he merely made a mistake in law.[2]

(12) Endurance of the Reference.—A reference endures so long as the cause in which it is made is in dependence, and when from any cause the action ceases, the reference falls along with it.[3] Unlike a submission, a judicial reference does not fall by the death of either of the parties,[4] although it falls by the death of the referee without an award.[5] Where one of the parties dies, the representatives of the deceased party may sist themselves as parties.[4]

(13) Remuneration of Referee and Clerk.—A judicial referee is an officer of Court, and as such is entitled to remuneration.[6] The fees charged by the referee and his clerk respectively are remitted, along with the other expenses in the reference, to the Auditor to tax,[7] and, when taxed, the referee and his clerk are entitled to decree therefor against both parties conjunctly and severally.[8] Where neither party was found entitled to expenses, and one party had paid the whole fee, is was held that he might obtain decree for one half from the other party.[9] Where the referee had not included his own fee in the decerniture, and the fee had been paid by the successful party, the Court, on the motion of the latter, found the other party, who had been found liable in expenses, bound to pay the whole fee;[10] and where the referee held the defenders liable in modified expenses and the parties could not agree upon the proportion payable by each, the Court remitted to the referee to decide the point, when he found that each party should pay one-half of his fee.[11]

The fees to the clerk are earned whether or not the report is delivered up by the referee before his death, and though the report remains in the hands of the clerk, the parties cannot deprive the latter of his right to his fees by delaying to take up the award.[12]

[1] Clyne's Trs. *v.* Edinburgh Oil Gas Light Co., 1835, 2 S. & M'L. 243; Alexander *v.* Bridge of Allan Water Co., 1869, 7 M. 492. See also Mackenzie *v.* Girvan, 1840, 3 D. 318, per Lord Moncreiff, pp. 327, 328; Wauchope *v.* Edinburgh and Dalkeith Rly. Co., 1846, 8 D. 816.

[2] Edinburgh and District Water Trs. *v.* Clippens Oil Co., 1902, 4 F. (H. L.) 40.

[3] Gillon *v.* Simpson, 1859, 21 D. 243.

[4] Watmore and Taylor *v.* Burns, 1839, 1 D. 743.

[5] Walker & Co. *v.* Shaw Stewart, 1855, 27 Jur. 323, per Lord Cranworth, p. 327.

[6] Henderson *v.* Paul, 1867, 5 M. 628, per Lord Neaves, p. 633.

[7] Baxter *v.* Macarthur, 1838, 16 S. 1085.

[8] Beattie, etc., 1873, 11 M. 954, and cases therein cited.

[9] Edinburgh Oil Gas Light Co. *v.* Clyne's Trs., 1835, 13 S. 413.

[10] Yates *v.* Mitchell, 1848, 10 D. 1233.

[11] Morris *v.* Stewart Rowell & Co., 1852, 14 D. 501.

[12] Jackson *v.* Galloway, 1867, 5 S. L. R. 130.

(14) Expenses of Reference. — A referee may dispose of the question of expenses though they are not specially mentioned in the minute of reference.[1] He may award a lump sum as expenses, *i.e.* he may modify expenses instead of having the account taxed by the Auditor.[2] He cannot, however, award expenses where the latter are specially excluded.[3] (See Maclaren on Expenses, pp. 376, 378.)

[1] Smith *v.* Banks, 1830, 8 S. 920; Fairley *v.* M'Gown, 1836, 14 S. 470; Robertson *v.* Brown, 1836, 15 S. 199; Ferrier *v.* Alison, 1843, 5 D. 456; affd. 4 Bell's App. 161.

[2] Hilton *v.* Walkers, 1867, 5 M. 969.

[3] Kidd *v.* Paterson, 19th June 1810, F. C.

CHAPTER XV

MOTION FOR LEAVE TO INSPECT

THIS motion is not to be confounded with the motion for a view in a jury trial.[1] It is an application at the instance of a party in a cause craving the Court to ordain his opponent to allow the inspection by experts of the subject of an action.

(1) INSPECTION OF WORKS, ETC.—This may be done before[2] or after the record has been closed.

In actions arising out of the alleged infringement of patent manufactures, the Court has, *after* the record is closed, pronounced orders allowing the inspection by experts of the works and manufacture of both parties,[3] or of the party alleged to be the infringer,[4] in order to enable the experts to give evidence at an approaching trial. In an action for the reduction of the sale, in virtue of a right of pre-emption, of certain shares of a company to the company, on the ground that the true value of the shares had been fraudulently concealed from the sellers by the company, the pursuers were held entitled, *after* the record was closed and a trial fixed, to have an opportunity of examining the stores and minerals of the defenders (an iron manufacturing company) for the preparation of their case;[5] and where an action concluded for an accounting for royalties on esparto obtained otherwise than from the pursuer or his broker, the defenders averred that the pursuer had failed to implement part of his agreement by not communicating to them the necessary particulars for the treatment of esparto fibre for the manufacture of paper, and the Court allowed the pursuer, his agent, and a man of skill, access to the defenders' works to inspect their process of manufacture with a view to meeting the defenders' case;[6] and, in an action of reduction of a *mortis causa* trust deed on the ground of facility, the Court, after issues were adjusted, allowed the pursuers

[1] 55 Geo. III. cap. 42, sec. 29; A. S., 16th February 1841, sec. 16; C. A. S., F, i. 9.

[2] Christie *v.* Munro, 1885, 23 S. L. R. 267; Murray *v.* Waterproofing Co., Ltd., 1914, 1 S. L. T. 46.

[3] Russell *v.* Crichton, 1837, 15 S. 1270.

[4] Brown *v.* Brown and Somerville, 1840, 2 D. 1356.

[5] Jardine's Trs. *v.* Carron Co., 1864, 2 M. 1372.

[6] Routledge *v.* Somerville & Son, 1866, 4 M. 830.

an inspection of the plant, machinery, and working plans of certain collieries belonging to the trust estate in order to estimate their value for the pursuer's case.[1]

Where an action of damages was raised by the owner of a picture in respect of its illegal seizure by parties who alleged a right to it, the Court ordered the picture to be made accessible to the defenders for seven days previous to the trial.[2] In another case the pursuer sued for recovery of a picture, but was unable to describe it in his summons in terms sufficiently specific to identify it, and the Court allowed him, *before closing the record*, to examine the defenders' collection of pictures to enable him to discover the picture claimed, and to place a specific description of it on record.[3] In the same way an inspection of machinery was allowed *before* the closing of a record in order to allow the pursuer's case to be properly stated.[4]

A warrant to inspect the defenders' premises was granted to a firm of aerated water manufacturers in an action by them to compel another firm of aerated water manufacturers to return aerated water bottles—an inspection being the only method of proof open to the pursuer.[5]

The names and designations of the witnesses who are to make an inspection should be forwarded to the opposite party before the inspection is made.[6]

(2) Inspection of the Person.—Where a pursuer sues for damages for personal injury he is bound to submit to examination by the defenders' medical experts,[7] even before the closing of the record.[8]

In actions of declarator of nullity of marriage the parties must submit to examination by medical experts.[9]

A first substitute heir of entail cannot be compelled to be medically examined in order to ascertain the probable duration of his life, in a petition for disentail.[10]

Where a widow averred that she was pregnant of a posthumous child, a motion for *ventris inspectio* was granted.[11]

(3) Inspection of Bankers' Books.—On the application of any

[1] Bell *v.* Hamilton's Trs., 1889, 16 R. 1001.
[2] Snare *v.* Earl of Fife's Trs., 1851, 13 D. 1353.
[3] Christie *v.* Munro, 1885, 23 S. L. R. 267.
[4] Murray *v.* Waterproofing Co., Ltd., 1914, 1 S. L. T. 46.
[5] Stevenson *v.* Gray & Sons, 1902, 9 S. L. T. 489.
[6] Clippens Oil Co. *v.* Edinburgh and District Water Trs., 1904, 12 S. L. T. 40.
[7] Junner *v.* North British Rly. Co., 1877, 14 S. L. R. 438.
[8] Smyth *v.* Gow, 1895, 2 S. L. T. 473.
[9] A. B. *v.* C. D., 1894, 22 R. 186.
[10] M'Donald *v.* M'Donalds, 1879, 6 R. 869.
[11] Ross *v.* Gray, 1699, Mor. 16455.

party to a legal proceeding, a Court or Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's books for any of the purposes of such proceedings. Such an order may be made with or without summoning the bank or any other party, and shall be served on the bank *three* clear days before the same is to be obeyed, unless the Court or Judge otherwise directs.[1]

[1] Bankers' Books Evidence Act, 1879 (42 Vict. cap. 11), sec. 7.

CHAPTER XVI

MOTION FOR A REFERENCE TO OATH

(1) Oath of Party.—It is competent for either party to a cause, with leave of the Court, to refer the whole, or any part, of the cause to the oath of the other party. "A distinction is taken throughout the laws by all our authors between oath of party and oath of witness. Oath of party is considered and treated as a species of contract, as a *quasi* contract though of a peculiar kind. The party making the reference subjects himself to the conditions of that contract; and one of the conditions is that the oath when emitted shall be conclusive of the matter referred. It is not to be taken into computation along with other evidence that has been led in the cause. It is not to be taken in connection with the documentary or parole evidence that has been adduced. It may be hostile to all other evidence. It is to be judged by itself, and the question for the Court to determine upon an oath emitted under a reference is, not what upon the aspect of the whole cause appears to be truth of the matter, but it is—what has the party sworn? It may be competent, in such a reference, to examine the party at great length, to examine him on various circumstances before putting to him the general question involved in the oath as to the justice and truth of the case referred; but still it is upon the import of the oath itself that the decision of the Court must proceed, and it shuts its eyes to all the evidence previously addressed in the cause."[1]

(2) The Stage at which a Motion for Reference may be Made.—It is doubtful whether there can be a reference before the closing of the record,[2] although in special circumstances the oath has been allowed to be taken, before answer, to lie *in retentis*.[2] In ordinary cases, however, it is incompetent to have a reference to oath while the dilatory pleas are undisposed of.[3] With these exceptions, it is competent to refer to the oath of a party at any stage of a cause *before* extract, even after final judgment of the Court of Session or House of Lords.[4]

[1] Longworth *v.* Yelverton, 1865, 3 M. 645, per Lord President M'Neill, pp. 660, 661.

[2] Riley *v.* M'Laren, 1853, 16 D. 323; *cp.* Bell *v.* Syme's Trs., 1829, 7 S. 893.

[3] Henderson *v.* Smith, 1852, 14 D. 583.

[4] Fleming *v.* Simpson, 7th March 1789; Hume's Dec. 412; M'Lennan *v.* Imray,

It is even competent *after* extract, where the decree has been extracted before approval of the Auditor's report and decerniture for expenses.[1] It is competent after parties have renounced probation;[2] after a verdict is obtained;[3] and even after a verdict is applied.[4]

A reference to oath is just as competent in the Bill Chamber as in the Court of Session. Thus, after a note of suspension has been refused in the Bill Chamber it is competent to refer to the charger's oath before a certificate of refusal is issued.[5] In a case where a certificate had been issued, the suspender reclaimed to the Inner House, which adhered, but remitted to the Lord Ordinary on the Bills to decern for expenses, and a minute of reference to the charger's oath was thereafter held to be competent.[6]

(3) Discretion of Court.—The right to make a reference to oath is not an absolute one; there is a discretion in the Court to allow or refuse it.[7] The Court is entitled to consider the grounds on which the motion is made, and will refuse to grant it if it appear to be for some improper purpose of delay, or from any other insufficient motive, and not from the pure desire of obtaining justice;[8] or where there are interests of other persons involved;[9] or where it would lead to a perversion of justice.[10]

As a condition of granting a reference to a defender, the Court has insisted upon consignation of the sum in dispute;[11] and where a reference was granted to a pursuer after the process had been transmitted to the Extractor but not extracted, the Court attached the condition that the pursuer should pay or consign the expenses of the cause for which the defender had obtained decree.[12]

(4) Persons to whose Oath Reference may be Made.—(a) *Statu-*

1826, 4 S. 781 (N. E. 789); Kirkpatrick *v.* Bell, 1864, 2 M. 1396; Longworth *v.* Yelverton, 1865, 3 M. 645; 1867, 5 M. (H. L.) 144, per Lord Chancellor Chelmsford, p. 146; Aikman *v.* Aikman's Trs., 1868, 6 M. 277.

[1] Drew *v.* Drew, 1855, 17 D. 784.

[2] Anstruther *v.* Wilkie, 1856, 18 D. 405.

[3] Nisbet *v.* Taylor's Exrs., 1840, 3 D. 332; Conacher *v.* Conacher, 1859, 21 D. 597.

[4] Shirreff *v.* Shirreff's Trs., 1836, 15 S. 115.

[5] A. *v.* B., 1843, 16 Jur. 86; Macdonald *v.* Cooper, 1848, 10 D. 740; Crow *v.* Fowlie, 1865, 38 Jur. 28.

[6] Brown *v.* Ferguson, 1852, 14 D. 841.

[7] Ritchie *v.* Mackay, 1829, 3 W. & S. 484; Pattinson *v.* Robertson, 1846, 9 D. 226, per Lord Justice-Clerk Hope, p. 228; Macleay *v.* Campbell, 1876, 3 R. 999, per Lord President Inglis, p. 1001.

[8] Adam *v.* Maclachlan, 1847, 9 D. 560, per Lord Medwyn, p. 575.

[9] Longworth *v.* Yelverton, 1865, 3 M. 645, per Lord President M'Neill, p. 661.

[10] Ibid., per Lord Curriehill, p. 665.

[11] Pattinson *v.* Robertson, 1846, 9 D. 226.

[12] Aikman *v.* Aikman's Trs., 1868, 6 M. 277

tory.—If the right to refer is given by a statute, which also specifies the particular person to whose oath reference is to be made, the particular person mentioned is the only party whose oath may be taken. Thus, where a defender pleads the triennial prescription, the words "by oath of his party" in the Act 1579, cap. 83, mean his adversary in the cause and no one else.[1] With regard to a corporation, however, a reference to the treasurer who contracted the debt in name of the corporation has been held good,[2] but not where the debt was not originally contracted by the corporation.[3]

(b) *Outwith Statute.*—(i.) *General Rule.*—The general rule is that the reference must be to the party or parties having the substantial interest.[4]

(ii.) *Joint Reference.*—Where a reference is made to two persons jointly, the Court cannot sustain a reference to one and refuse the reference to the other;[5] and where only one appears and depones, the reference is not exhausted.[6]

(iii.) *Partners.*—The oath of the managing partner of a firm is sufficient.[7] Where, however, all the partners participate in the management, the reference must be to all the partners,[8] especially if the firm has been dissolved.[9]

(iv.) *Pro Indiviso Owners and Part Owners.*—Where there are *pro indiviso* owners it is necessary to refer to the oath of all the owners.[10] Where a reference has been made to all the part owners of a ship, the oath of one of the part owners affirmative of the reference will only bind himself.[11]

(v.) *Co-obligants.*—It has been stated,[12] but doubted,[13] that where a creditor has referred to the oath of *one* co-obligant, and the oath is

[1] Bertram & Co. *v.* Stewart's Trs., 1874, 2 R. 255.

[2] White *v.* Caledonian Rly. Co., 1869, 7 M. 583, per Lord President Inglis, p. 588.

[3] White *v.* Caledonian Rly. Co., 1869, 7 M. 583. See also Johnston *v.* Aberdeen Dean of Guild, 1676, Mor. 12480; Dykes *v.* Hill, 1828, 6 S. 479.

[4] M'Nab *v.* Lockhart, 1843, 5 D. 1014, per Lord Medwyn, p. 1020; Farquhar *v.* Farquhar, 1886, 13 R. 596, per Lord Shand, p. 598.

[5] Bertram & Co. *v.* Stewart's Trs., 1874, 2 R. 255, per Lord President Inglis, p. 257.

[6] Cleland *v.* P. & W. M'Lellan, 1851, 13 D. 504.

[7] Gow *v.* M'Donald, 1827, 5 S. 472 (N. E. 445); Nisbet's Trs. *v.* Morrison's Trs., 1829, 7 S. 307, per Lord Pitmilly, p. 310; M'Nab *v.* Lockhart, 1843, 5 D. 1014, per Lord Medwyn, p. 1020.

[8] M'Nab *v.* Lockhart, 1843, 5 D. 1014, per Lord Medwyn, p. 1020; Broom *v.* Edgley, 1843, 5 D. 1087, per Lord Justice-Clerk Hope, p. 1094.

[9] Neill *v.* Campbell, 1849, 11 D. 979.

[10] Dickson *v.* Blair, 1871, 10 M. 41.

[11] Duncan *v.* Forbes, 1831, 9 S. 540.

[12] Stair, iv. 44. 8.

[13] Erskine's Inst. iv. 2. 10; Mein *v.* Towers, 1829, 7 S. 902, per Lord Pitmilly.

negative of the reference, the other co-obligants are thereby relieved from liability. However that may be, the oath of *one* co-obligant affirmative of a reference is only binding on himself.[1]

With regard to resting-owing of a debt due by co-obligants, the earlier doctrine seems to have been in favour of the resting-owing being provable by the oath of any of the co-obligants,[2] but the later opinion of the Court seems to lie in the direction of only making the co-obligants liable upon reference to all their oaths.[3]

(vi.) *Husband and Wife.*—As to debts incurred by a wife after marriage, a reference to her oath is competent to prove the constitution, but the reference must be to the husband's oath to prove resting-owing.[4] In debts incurred before marriage a reference may be made to the wife's oath, but it will only affect her own private estate if the oath is affirmative of the reference.[5]

(vii.) *Tutors and Curators.*—A reference to the oath of a tutor is competent in matters falling within his administration.[6] Where *functus officio,* however, the matter has not been settled.[7]

The oath of a curator is not competent.[8]

A factor *loco tutoris* may not be examined on matters which occurred prior to his appointment.[9]

(viii.) *Agent.*—It is not competent to refer to the oath of an agent, by whom an alleged contract was made for the party, the terms of the contract.[10] Accordingly the terms of a settlement of a cause cannot be referred to the oath of a party's solicitor.[11]

Reference to the oath of a bank agent was allowed where a sus-

[1] Erskine's Inst. iv. 2. 10; Allan *v.* Ormiston, 1817, Hume's Dec. 477.

[2] Christie *v.* Henderson, 1833, 11 S. 744; Black *v.* Black, 1838, 16 S. 1220.

[3] Darnley *v.* Kirkwood, 1845, 7 D. 595; Drummond *v.* Crichton, 1848, 10 D. 340; Boyd *v.* Fraser, 1853, 15 D. 342; Russell and Others *v.* King's Trs., 1897, 4 S. L. T. 265.

[4] Paterson *v.* Taylor, 5 Brown's Supp. 474 (no date); Gilmour *v.* Stewart's Representatives, 1797, Mor. 12042; Mitchells *v.* Moultrys, 1882, 10 R. 378, per Lord Young. See, however, Barclay *v.* Binnie, 1630, Mor. 12479; Young & Co. *v.* Playfair, 1802, Mor. 12486; Fraser, Husband and Wife, p. 628.

[5] Erskine's Inst. iv. 2. 10; Ker *v.* Lady Covington, 1627, Mor. 12489; Morrice *v.* Munro & Son, 1829, 8 S. 156; Gifford *v.* Rennie, 1853, 15 D. 451; Fraser, Husband and Wife, p. 600.

[6] Stair, i. 6. 20; Erskine's Inst. iv. 2. 10; Hepburn *v.* Hamilton, 1661, Mor. 8465.

[7] Johnston *v.* Aberdeen Dean of Guild, 1676, Mor. 12480; Waddel *v.* Wadderstoun, 1707, Mor. 12484.

[8] Forbes *v.* Lord Pitsligo, 1628, Mor. 12479.

[9] Stewart *v.* Syme and Fraser, 12th December 1815, F. C.

[10] Bell's Prin., sec. 2263; Kirkwood *v.* Wilson, 1823, 2 S. 425 (N. E. 378); Stein's Assignees *v.* Earl of Mar, 1827, 6 S. 1.

[11] Sawers *v.* Clark, 1892, 19 R. 1090.

pender, who had been charged by the bank on a bill accepted by him, averred that it had been retired though not delivered up.[1]

(ix.) *Executor.*—The creditors of a person deceased can only prove their claims by the oath of his executor in so far as the executor's proper interest extends. Accordingly a debt cannot be proved, by the oath of the executor, to have been due by the deceased, so as to affect the shares belonging to the widow, next of kin, or creditors of the deceased.[2]

(x.) *Trustee.*—Where the radical right and interest remain in the truster no debt can be fixed against a truster by the oath of the trustee.[3] Where these have been transferred to the trustee, the latter's oath is sufficient.[4]

(xi.) *Assignation.*—If the assignation is not intimated, a reference to the oath of the cedent is permissible, and may extinguish the debt. If the assignation has been intimated, the cedent's oath is not available.[5]

Where the subject has been rendered litigious before intimation,[6] or is held in trust for the cedent,[7] or has been assigned gratuitously,[8] reference to oath of the cedent is permissible.

(xii.) *Bankruptcy.*—Reference to the oath of a bankrupt is inadmissible.[9] A reference by a claimant to the oath of the trustee is also inadmissible;[10] but a reference by the trustee to the oath of a claimant is quite competent.[11]

(xiii.) *Arrestment.*—An arrester may refer to the oath of the arrestee, but if his oath is to the effect that no debt is due by him to the common debtor, this will not affect the common debtor or his assignee.[12]

[1] Dickson *v.* Ker, 1830, 9 S. 125.

[2] Erskine's Inst. iv. 2. 10; Monteith *v.* Smith, 1624, Mor. 12477; Scot *v.* Cockburn 1627, Mor. 12477; Ker *v.* Lady Covington, 1627, Mor. 12478.

[3] Erskine's Inst. iv. 2. 10.

[4] Murray *v.* Laurie's Trs., 1827, 5 S. 515 (N. E. 484); Bertram & Co. *v.* Stewart's Trs., 1874, 2 R. 255; Farquhar *v.* Farquhar, 1886, 13 R. 596, per Lord Shand, p. 598.

[5] Stair, iii. 1. 18; Erskine's Inst. iii. 5. 9; Pitfoddels *v.* Glenkindy, 1662, Mor. 12454; Boyd *v.* Storie, 1674, Mor. 12456; Crawfurd *v.* M'Carter, 1675, Mor. 12458.

[6] Stair, iii. 1. 18; Erskine's Inst. iii. 5. 10; Somerville, 1673, Mor. 8325; Houston *v.* Nisbet, 1708, Mor. 8329.

[7] Knox *v.* Martin, 1850, 12 D. 719.

[8] Steil *v.* Orbiston, 1679, Mor. 8467; Fotheringhame *v.* Agnew, 1684, Mor. 12460 Aitchison's Assignees *v.* Drummond, 1737, Elchies *voce* Assignation, No. 3.

[9] Mein *v.* Towers, 1829, 7 S. 902; Dyce *v.* Paterson, 1846, 9 D. 310; Adam *v.* Maclachlan, 1847, 9 D. 560; Thomson *v.* Duncan, 1855, 17 D. 1081; Campbell *v.* M'Neille, 1856, 18 D. 843.

[10] Dickson on Evidence, sec. 1463.

[11] Jackson *v.* M'Iver, 1875, 2 R. 882.

[12] Erskine's Inst. iii. 6. 16; 2 Bell's Comm. 67; Elies *v.* Watson, 1712, Mor. 14041 Fergusson *v.* Maitland, 1722, Mor. 14042.

An arrestee may prove by the oath of the common debtor whatever the latter could competently advance in defence against the arrestee.[1]

(5) Where a Reference is Incompetent.—It is not competent for a party to refer to his adversary's oath where the former has adduced the latter as a witness;[2] or where the adversary has adduced himself as a witness and has been cross-examined;[3] nor where there has been an award in a judicial reference.[4]

A question of law cannot be referred.[5] Where the matter at issue is a mixture of fact and law, the party to whose oath the matter is referred is entitled to have them clearly separated.[6] There can be no reference where the process is incompetent,[7] or irrelevant,[8] or wanting in specification;[9] or where writing is indispensable both *in modum probationis* and as a solemnity.[10]

A reference to a lunatic[11] or a pupil[12] is incompetent, although it may be made to a person whose faculties are impaired owing to advanced age yet *compos mentis*,[13] and to a deaf and dumb person who is at the same time capable of making himself understood.[14] Reference may be made to the oath of a *minor pubes*.[15]

A reference to the oath of a public prosecutor in criminal matters is not competent;[16] nor to the oath of the accused.[17] In civil matters the reference will not be sustained where the result of the reference

[1] Erskine's Inst. iii. 6. 16; Dickson on Evidence, sec. 1477; Houston *v.* Aberdeen Town and County Bank, 1849, 11 D. 1490.

[2] 16 & 17 Vict. cap. 20, sec. 5.

[3] Macleay *v.* Campbell, 1876, 3 R. 999. See, however, Melrose *v.* Spalding, 1868, 6 S. L. R. 14.

[4] M'Larens *v.* Shore, 1883, 10 R. 1067.

[5] Taylor *v.* Hall, 1829, 7 S. 565; Conacher *v.* Robertson, 1829, 8 S. 141; Grubb *v.* Porteous, 1835, 13 S. 603.

[6] Lawson *v.* Murray, 1829, 7 S. 380.

[7] Hamilton *v.* Main, 1823, 2 S. 356 (N. E. 313); Macfarlane *v.* Watt, 1828, 6 S. 1095.

[8] M'Laren *v.* Buik, 1829, 7 S. 780.

[9] Phœnix Fire Insurance Co. *v.* Young, 1834, 12 S. 921; *cp.* Napier *v.* Graham, 1874, 1 R. 906.

[10] Stair, iv. 44. 5; Erskine's Inst. iv. 2. 9; Dickson *v.* Blair, 1871, 10 M. 41.

[11] Campbell *v.* Arrott, 1836, 14 S. 505.

[12] Gordon's Tutors, 1707, Mor. 8909.

[13] Nicholson *v.* M'Alister, 1829, 7 S. 743; Kirkpatrick *v.* Bell, 1864, 3 M. 252.

[14] Carnegie, 1710, 4 Brown's Supp. 805.

[15] Maitland *v.* Caschogill, 1623, Mor. 8917; Forbes *v.* Lord Pitsligo, 1628, Mor. 12479; Earl of Mar, 1628, Mor. 8918; Somervell, 1670, 2 Brown's Supp. 497.

[16] Cameron *v.* Paul, 1853, 1 Irvine, 316.

[17] Stair, iv. 44. 5; Erskine's Inst. iv. 4. 94.

may be to force the party deponing to admit criminal acts,[1] save of consent.[2]

There can be no reference to oath in declarators of marriage.[3]

(6) Procedure to Obtain a Reference.—The party desiring a reference to his opponent's oath first enrols the cause and moves for leave to lodge a minute of reference. If the motion is granted the interlocutor mentions a date on or before which the minute must be lodged. The minute is then lodged, and may be in any of the following forms:—

"The pursuer refers the resting-owing of the sum sued for to the oath of the defender"; or "The pursuer refers the cause to the oath of the defender"; or "The pursuer refers [*here insert the particular part of the case, and make a reference to the particular article or articles of condescendence necessary*] to the oath of the defender"; or "The defender refers the defence set forth in Condescendence to the oath of the pursuer."

A minute of reference should distinctly state what is referred, so that the Court may be able to form a judgment whether the party is able to make a general denial, or must admit the truth of what has been put to him.[4] In a petition for *cessio*, objection was taken at the diet for examination of the petition to the jurisdiction of the Sheriff in respect of the petitioner's domicile, and the oath of the petitioner was taken in reference to the objection without a minute of reference, and the Court upheld the procedure;[5] and where the Lord Ordinary on the Bills *per incuriam* supposed that there had been a minute of reference, and appointed a party to depone, the Court held that there had been acquiescence, and sustained the proceedings.[6]

The next step is to enrol the cause, when counsel are heard upon the relevancy of the minute of reference. If the reference is relevant the Lord Ordinary issues an interlocutor holding the minute of reference relevant and appointing the party to depone upon a certain day.

[1] Roger *v.* Cooper, 1823, 2 S. 444 (N. E. 396); M'Callum *v.* M'Call, 1825, 3 S. 551 (N. E. 380); Thomson *v.* Young, 1828, 7 S. 32; Longworth *v.* Yelverton, 1865, 3 M. 645; 1867, 5 M. (H. L.) 144.

[2] Conacher *v.* Conacher, 1859, 21 D. 597.

[3] Longworth *v.* Yelverton, 1865, 3 M. 645; 1867, 5 M. (H. L.) 144, per Lord Chancellor Chelmsford.

[4] Finlay *v.* Outram, 1851, 14 D. 48, per Lord Justice-Clerk Hope, p. 53; Stewart *v.* Clark, 1871, 8 S. L. R. 524. See also Napier *v.* Graham, 1874, 1 R. 906, per Lord Neaves, p. 909.

[5] Hamilton *v.* Lindsay, 1852, 14 D. 844.

[6] Hewit *v.* Pollock, 1821, 1 S. 167 (N. E. 159).

Where proof has been limited to the writ or oath of a party, it is usual, before a reference to his oath is sustained, for the Court to find that proof by writ has been renounced or failed.

Where a cause has been finally decided in the Inner House, and a reference is desired to the oath of the successful party, the proper procedure is to present a petition or other application, craving leave of the Court to refer, and thereafter, if leave is given, to sustain the minute of reference.[1]

If the reference to oath is not sustained, an interlocutor will be pronounced refusing the same, and this interlocutor has been held to be an interlocutor deciding the merits, and therefore may be reclaimed against within twenty-one days.[2]

(7) Procedure at the Diet of Examination.—Where a reference to oath is made and sustained either by the Lord Ordinary before whom the cause depends, or by one of the Divisions of the Court, the deposition may be taken either by the Lord Ordinary or by one of the Judges of said Division, or by a commissioner.[3]

The examination is conducted by the party referring or by his counsel. He is not confined in his examination to the bare question as stated generally in the reference. He is entitled to put all special interrogatories pertinent to that question. If special interrogatories are to be put, they ought to be put first and before putting the general question.[4] Documents may be shown to the deponent, not for the purpose of contradicting his oath, but in order to assist his memory, or that he may correct himself.[5] Where a party makes a reference of more than is necessary to entitle him to a judgment, he is not bound to prove all that he refers. He need only prove what is sufficient to make out his case.[6]

The deponent is also entitled to the assistance of counsel.[7] He may object to incompetent questions,[8] and suggest to the commissioner questions to exhaust the whole matter or to refer the deponent to

[1] Scott and Livingston, Petrs., 1831, 10 S. 174; Winton & Co. *v.* Thomson & Co., 1862, 24 D. 1094; Longworth *v.* Yelverton, 1865, 3 M. 645, at p. 660.

[2] M'Larens *v.* Shore, 1883, 10 R. 1067.

[3] The Evidence (Scotland) Act, 1866 (29 & 30 Vict. cap. 112), sec. 3; Forman *v.* Bookless, 1864, 2 M. 787; Cowbrough & Co. *v.* Robertson, 1879, 6 R. 1301.

[4] Stair, iv. 44. 11; Dickson on Evidence, sec. 1490; Jameson *v.* Barclay, 14th January 1820, F. C.; Heddle *v.* Baikie, 1841, 3 D. 370, per Lord Gillies, p. 376.

[5] Boyd *v.* Kerr, 1843, 5 D. 1213; Heddle *v.* Baikie, 1847, 9 D. 1254; Gordon *v.* Pratt, 1860, 22 D. 903; Broatch *v.* Dodds, 1892, 19 R. 855.

[6] Heddle *v.* Baikie, 1841, 3 D. 370, per Lord Mackenzie, p. 376.

[7] Blair *v.* M'Phun, 1856, 18 D. 1202.

[8] Dickson on Evidence, sec. 1486.

documents,[1] but he cannot cross-examine his client as if he were a witness in a proof *prout de jure*.[2] A commissioner appointed to take an oath may put such questions as appear to him proper for eliciting the whole truth of the case referred, whether these questions may be agreeable to the parties or not.[3]

The interpretation and effect of the oath on reference does not fall within the scope of the present work.

(8) Re-examination.—Where the oath is clear and particular a re-examination is not to be admitted on any pretence. If, however, it is in general or doubtful terms a re-examination may be allowed by the Court.[4] It has been ordered by the Court for various reasons. Thus, where part of the oath was unsatisfactory and unintelligible;[5] where the deponent should have, but did not consult his books to refresh his memory;[6] where the reference was not exhausted;[7] where the opposite party, owing to want of intimation,[8] or some irregularity,[9] was absent when the deposition was taken; where, by inadvertence, a document had not been put to the deponent,[10] and generally where anything is required to be cleared up in the deposition,[11] a re-examination has been allowed.

(9) Party Held as Confessed.—If a party duly cited fails to appear and depone at the diet fixed, he will be held as confessed.[12] If he declines to give any answer to plain and pertinent questions;[13] or depones *non memini* to a recent fact of which he cannot be presumed to be ignorant,[14] or refuses to sign his deposition,[15] he is also held as confessed.

It is only a party who can be held as confessed.[16]

[1] Blair *v.* M'Phun, 1856, 18 D. 1202, per Lord President M'Neill, p. 1204.
[2] Heslop *v.* Runcie, 1894, 22 R. 83.
[3] Soutar *v.* Soutar, 1851, 14 D. 140.
[4] Erskine's Inst. iv. 2. 15.
[5] Young *v.* Pollock, 1832, 10 S. 570.
[6] Anstruther *v.* Lewis, 1851, 13 D. 841.
[7] Megget *v.* Brown, 1827, 5 S. 343 (N. E. 318); Thomson *v.* Thomson, 1830, 8 S. 571.
[8] Hill *v.* Cameron, 1835, 13 S. 764.
[9] Peacock *v.* Smiles, 1828, 6 S. 1081.
[10] Mowat *v.* Earl of Southesk, 1673, Mor. 9421.
[11] Erskine's Inst. iv. 2. 15; Fothringhame *v.* Mauld, 1679, Mor. 16179; Fraser *v.* Fraser, 27th June 1809, F. C.
[12] Stair, iv. 44. 21; Erskine's Inst. iv. 2. 17.
[13] Murray *v.* Murray, 1839, 1 D. 484, per Lord Cuninghame (Ordinary), pp. 485, 486.
[14] Erskine's Inst. iv. 2. 14; Irving *v.* Carruthers, 1675, Mor. 12031; Littlegill, 1682, Mor. 12035; Crow *v.* Fowlie, 1865, 1 S. L. R. 86.
[15] Carin *v.* Wilson, 1672, Mor. 12532.
[16] Caut *v.* Loch, 1665, Mor. 12029.

(10) Reponing by Party Held as Confessed.—A party may be reponed against being held as confessed if he apply *de recenti*,[1] and upon his showing good cause.[2] No person, however, can be restored *ex intervallo* except on the most pregnant grounds.[3]

The party reponed will require to pay the expenses occasioned by the default.[4]

(11) Reference of Part of a Cause.—A reference of isolated parts of a cause is not permissible after final judgment, as the proof of such facts will revive and reopen the litigation which has terminated by judgment. A separate part of the cause may be referred, however, where the judgment has expressly rested upon such part, for in that case there can be no possible revival of discussion in the event of an oath being given affirmative of the reference.[5]

(12) Retractation of Reference.—As a reference is a judicial contract, it is not allowed to be withdrawn without sufficient reason.[6] The decision is accordingly in the discretion of the Court, and leave will be refused, not only in cases where the party has made the reference from improper motives, but also where, in consequence of the reference (through delay or otherwise) the opposite party has been put to a disadvantage.[7] Where a reference to oath was made in an inferior Court after a plea of prescription had been wrongly sustained, it was held that the reference was binding.[8] Where the reference is allowed to be retracted, the party retracting will require to pay his adversary's expenses from the date of the interlocutor referring the cause.[9]

(13) Deference.—After a *re*ference has been granted on the motion of a party to the oath of his opponent, there may be a *de*ference by the latter to the oath of the former.[6] In such circumstances it remains with the Court, in the exercise of its discretion, to

[1] Stair, iv. 44. 22.

[2] Erskine's Inst. iv. 2. 17 ; *ep.* Buchanan *v.* Logie, 1676, Mor. 12034.

[3] Erskine's Inst. iv. 2. 17.

[4] Drummond *v.* Gilmour, 1832, 10 S. 266 ; Miller *v.* Cooper, 1835, 13 S. 369.

[5] White *v.* Murdoch, 9th June 1812, F. C. ; Campbell *v.* Turner, 1822, 1 S. 500 (N. E. 465) ; Rankin *v.* Buchanan, 1866, 1 S. L. R. 168 ; Sinclair *v.* M'Beath, 1869, 7 M. 934. See, however, Broom *v.* Edgley, 1843, 5 D. 1087, per Lord Justice-Clerk Hope, p. 1093.

[6] Galbraith *v.* M'Neill, 1828, 7 S. 63.

[7] Dick *v.* Hutton, 1876, 3 R. 448. See also Chalmers *v.* Jackson, 18th February 1813, F. C. ; Galbraith *v.* M'Neill, 1828, 7 S. 63.

[8] M'Donald *v.* Burden, 1829, 7 S. 306.

[9] Chalmers *v.* Jackson, 18th February 1813, F. C. ; Bennie *v.* Mack, 1832, 10 S. 255.

decide which party has had the best opportunities of knowing the matter at issue, and to order such party to depone.[1]

(14) Use of Deposition in Another Process.—Where an oath on reference has been emitted in a process, it is permissible to take it into consideration in another process, not as an oath on reference in the latter process, but as a piece of evidence.[2]

[1] Stair, iv. 44. 13 ; Erskine's Inst. iv. 2. 8.

[2] Hunter *v.* Nicolson, 1836, 15 S. 159. See also Elies *v.* Watson, 1712, Mor. 14041.

PART VI

PROOF AND JURY TRIAL

CHAPTER I

GENERALLY

(1) Definition of Proof.—Proof is the method by which the disputed facts in a cause are judicially determined.

(2) Where no Averments are made by Defender.—If the averments are all on the part of the pursuer, and the defender confines himself to a denial of the pursuer's averments, the proper interlocutor is to "allow the pursuer a proof of his averments and to the defender a conjunct probation."[1]

(3) Where the Defender makes Averments.—Formerly, where the defender made averments and both parties were allowed a proof, a form of interlocutor not unusual was to "allow both parties a proof and to either a conjunct probation." This form of interlocutor was held to be erroneous and misleading, and there was substituted therefor "allow both parties a proof of their respective averments and to the pursuer a conjunct probation," the reason given being that the defender was bound to lead his conjunct probation when he led his proof in chief. Accordingly, the practice under this latter interlocutor was to allow the pursuer to lead his proof in chief; thereafter the defender led his conjunct probation and at the same time his proof in chief; and lastly, the pursuer was entitled to lead his conjunct probation to the defender's proof in chief.[2] The practice, however, has changed, and it is now the practice for the pursuer to lead his evidence in chief and at the same time his evidence in anticipation of the defence as disclosed on record; thereafter the defender leads his conjunct probation and at the same time his proof in chief; and if there is anything which the pursuer could not possibly anticipate in the defender's proof in chief, he may be allowed a proof in replication confined solely to such matters in the defender's proof in chief as he could not reasonably anticipate.[3] In view of the present practice under which each party's conjunct probation

[1] Mags. of Edinburgh *v.* Warrender, 1862, 1 M. 13, per Lord Justice-Clerk Inglis, p. 14.

[2] Ibid. See also Scott, Simpson, and Wallis *v.* Forrest and Turnbull, 1897, 24 R. 877, per Lord President Robertson, p. 879.

[3] Richardson *v.* Fleming, 1867, 5 M. 586; Gairdner *v.* Young, 1874, 2 R. 173; Dick and Stevenson *v.* Mackay, 1880, 7 R. 778.

must be led at the same time as his proof in chief, it would rather seem that the appropriate form of interlocutor, where a defender makes averments and both parties are allowed a proof, is simply "allow both parties a proof of their respective averments."

(4) Where Parties Agree as to the Tribunal and Mode of Proof.—Where parties at the closing of the record agree as to the tribunal and mode of proof, the Lord Ordinary, if himself satisfied of the propriety of the proof proposed, appoints the same to be taken.[1]

(5) Where Parties do not Agree as to the Tribunal and Mode of Proof.—Where parties are at variance as to the tribunal or mode of proof, or both of these matters, the cause is appointed to be enrolled in the Procedure Roll, and, after hearing parties on that roll, the Lord Ordinary decides upon the particular tribunal before which, and the mode in which, the proof is to be taken.[2] (See *Adjustment of Record*, *supra*, pp. 354 and 405; *Adjustment of Issues*, *supra*, p. 356; *Procedure Roll*, *supra*, pp. 357 and 406.)

(6) Lord Ordinary or Court ex Proprio Motu may Order Proof.—Even when parties have renounced probation the Lord Ordinary or the Inner House may *ex proprio motu* order proof at any after-stage of the cause, if they shall deem proof to be necessary for the purpose of enabling the Court to do complete justice between the parties, subject to such conditions as to expenses as shall seem just.[3]

It accordingly becomes necessary to inquire into the several tribunals before which proof may be led, the different modes of proof, the determination of the tribunal and mode of proof in particular cases, and the procedure adopted in the several tribunals.

(7) Preliminary Proof.—Preliminary proof is ordered on preliminary pleas where the facts are in dispute. Thus, a plea of "no jurisdiction" involving questions of fact;[4] an averment that a claim has been discharged;[5] an averment by a pursuer which, if proved, would take him outside of a clause in a statute excluding his claim;[6] an averment that notice under a statute has not been given;[7] an averment of *dominus litis*;[8] and an averment that a pursuer in an action of damages at

[1] A. S., 10th March 1870, sec. 1 (2); C. A. S., C, ii. 4 (*b*).
[2] A. S., 10th March 1870, sec. 1 (3); C. A. S., C, ii. 4 (*c*).
[3] A. S., 10th March 1870, sec. 1 (1); C. A. S., C, ii. 4 (*a*).
[4] M'Leod *v.* Tancred, Arrol & Co., 1890, 17 R. 514.
[5] Docherty *v.* M'Alpine & Sons, 1899, 2 F. 128; M'Lean *v.* Hassard, 1903, 10 S. L. T. 593; Gray *v.* The Rivet, Bolt, and Nut Co., Ltd., 1912, 2 S. L. T. 341.
[6] Gilillan *v.* Lanark County Council, 1902, 9 S. L. T. 432.
[7] Duncan *v.* Fife Coal Co., 1905, 7 F. 958. See also M'Leod *v.* Pirie, 1893, 20 R. 381.
[8] Robertson *v.* Duke of Atholl, 1905, 8 F. 150

common law against his employer had accepted payments under the Workmen's Compensation Act[1] have been remitted to probation *ante omnia.*

In an action of damages for slander against a detective officer, the pursuer averred that the slander was uttered by the defender as an individual. The defender averred that he was acting in his official capacity, and asked for a preliminary proof on the point, but the motion was refused.[2]

[1] Hunter *v.* Darngavil Coal Co., Ltd., 1900, 3 F. 10; Sinclair *v.* Lochgelly Iron and Coal Co., Ltd., 1905, 13 S. L. T. 103; Buchanan *v.* Alexander Cross & Sons, Ltd., 1911, 2 S. L. T. 33. See, however, Campbell *v.* Caledonian Rly. Co., 1899, 1 F. 887.

[2] M'Kinnon *v.* Keith, 1912, 2 S. L. T. 501.

CHAPTER II

THE SEVERAL TRIBUNALS BEFORE WHICH PROOF MAY BE LED

(1) Proof before a Commissioner.—Proof on commission seems to have been in operation prior to the year 1800 in cases where witnesses were unable to attend before the Judges of the Court of Session who were specially deputed to take proofs.[1] In that year, however, owing to the increase in the business of the Court of Session and the hardship of bringing witnesses from distant parts, commissions to take and report proofs were granted to members of the Faculty of Advocates of more than five years' standing in all causes where proof was required to be reported to the whole Court;[2] and when the Jury Court was established in the year 1815, the practice of taking proof on commission was almost universal.[3] The introduction of jury trial by the Jury Trials (Scotland) Act, 1815,[4] as amended by the Court of Session Act, 1825,[5] somewhat curtailed the practice, and although there was a further slight curtailment made by the Court of Session Act, 1850,[6] the same Act[7] allowed proof to be taken on commission in all the causes enumerated for jury trial except in actions of libel or for nuisance, or where the action was properly and in substance an action of damages. In the year 1861[8] an Act was passed granting power to the Lord Ordinary to take evidence in consistorial actions, and by the Evidence (Scotland) Act, 1866, proof by commission was abolished,[9] except in the following cases:—(*a*) the deposition of havers; (*b*) in any cause in which, upon special cause shown or with consent of both parties, commission to take evidence might, according to the existing law and practice, be granted; (*c*) where according to the existing practice the evidence of any witness who was resident beyond the jurisdiction of the Court, or who, by reason of age, infirmity, or sickness, was unable

[1] Erskine's Inst. iv. 2. 31.
[2] A. S., 11th March 1800.
[3] Ivory's Form of Process, i. 229.
[4] 55 Geo. III. cap. 42.
[5] 6 Geo. IV. cap. 120, sec. 28.
[6] 13 & 14 Vict. cap. 36, secs. 46 and 48.
[7] Ibid., sec. 49.
[8] The Conjugal Rights (Scotland) Amendment Act, 1861, sec. 13.
[9] 29 & 30 Vict. cap. 112, sec. 1.

to attend the diet of proof; and (*d*) where according to the existing practice commissions were granted for the examination of aged and infirm witnesses to take their evidence to lie *in retentis* before a proof had been allowed.[1] (See *Commission and Diligence*, Part x., *infra*.)

Examples of what is, and is not, special cause may be found in the undernoted cases.[2] Even on special cause shown, or by consent of parties, proof on commission will not be granted in any cause enumerated as specially appropriated for trial by jury.[3]

Proof in a divorce case has been taken wholly on commission,[4] but the reason was, that all the witnesses were outwith the United Kingdom.

(2) Proof before a Judge Alone.—By sec. 1 of the Evidence (Scotland) Act, 1866,[5] it is provided that a Lord Ordinary before whom a cause depends may authorise proof to be taken before himself, without the consent of both parties and without reporting to and obtaining the leave of the Inner House, where it is competent, according to the practice existing at the passing of that Act, to take proof by commission. At that date proof on commission could be taken in all causes except those specially appropriated for trial by jury;[6] consistorial causes which had already been appropriated for proof before a Lord Ordinary alone;[7] and two other cases now in disuse.[8] A later section of the Evidence Act, however, has abolished the exclusive appropriation of any cause for trial by jury, and if both parties consent, or if special cause be shown,[9] a Lord Ordinary may take proof in any cause depending before him notwithstanding the provisions of the Judicature Act[10] and the Court of Session Act, 1850.[6]

Accordingly proof before a Judge alone is now competent in every case except cases specially appropriated for jury trial by sec. 49 of the Court of Session Act, 1850, and is also competent in such appropriated cases where the parties consent or special cause is shown.

What is usually done when a proof before a Judge alone is allowed

[1] 29 & 30 Vict. cap. 112, sec. 2.

[2] Fairholme *v.* Fairholme's Trs., 1856, 19 D. 178; Watt *v.* Watt, 1857, 19 D. 787; Craig *v.* Jack, 1857, 19 D. 862; Cameron *v.* Kerr, 1861, 23 D. 1257; Mackenzie *v.* The British Linen Co., 1879, 17 S. L. R. 241.

[3] Nicol *v.* Britten and Owden, 1872, 10 M. 351; 13 & 14 Vict. cap. 36, sec. 49.

[4] A. B. *v.* C. B., 1911, 1 S. L. T. 264.

[5] 29 & 30 Vict. cap. 112.

[6] 13 & 14 Vict. cap. 36, sec. 49.

[7] The Conjugal Rights (Scotland) Amendment Act, 1861 (24 & 25 Vict. cap. 86), sec. 13.

[8] 13 & 14 Vict. cap. 36, secs. 46 and 48.

[9] 29 & 30 Vict. cap. 112, sec. 4.

[10] 6 Geo. IV. cap. 120, sec. 28.

is to submit either the whole averments on record to probation or to limit the proof to such averments as are relevant.[1] Accordingly, where parties are allowed a proof of their averments, this means a proof of the whole averments,[2] and a diligence for the recovery of documents cannot be refused on the ground that the averments remitted to probation are irrelevant;[3] whereas, if the allowance of proof is confined to the averments of the pursuer, a diligence for the recovery of documents showing or tending to show that the defender's averments are true will not be allowed.[4]

There are two other ways, however, in which proof may proceed before a Judge alone—first, with issues if parties consent;[5] and second, on special questions of fact, to which alone the parties may direct their proof.[6] The former method of procedure is now quite obsolete; the second is scarcely ever used, and when used it has been held that the question of the expenses of the proof lies entirely in the discretion of the Lord Ordinary.[7]

(3) Proof before a Judge with a Nautical Assessor.—In any action or proceeding in the Court of Session arising out of or relating to collision at sea, salvage, towage, or any other maritime matter, the Court, if it thinks fit, may, and on the application of any party shall, summon to its assistance at the trial, or at any subsequent hearing, whether on reclaiming note, appeal, or otherwise, one or more persons of nautical skill and experience, who may be willing to sit with the Court and act as assessor or assessors, but, where it is proposed to summon any person as an assessor, objection to him, either personally or in respect of his qualification, may be stated by any party to the action or proceeding, and shall be disposed of by the Court.[8] The Judge who tries the case requires to make a note of the questions submitted by him to such assessor or assessors, and of the answer or answers thereto.[9] The assessors are appointed from a list of persons approved for the purpose by the Lord President.[10]

The procedure in the Outer House, including motion by party; intimation of interlocutor to Principal Clerk of Session; notice of

[1] Scott, Simpson, and Wallis *v.* Forrest and Turnbull, 1897, 24 R. 877; M'Neill *v.* Kinneil Cannel and Coking Coal Co., 1898, 25 R. 962.
[2] Barr *v.* Bain, 1896, 23 R. 1090.
[3] Duke of Hamilton's Trs. *v.* Woodside Coal Co., 1897, 24 R. 294.
[4] Scott, Simpson, and Wallis *v.* Forrest and Turnbull, 1897, 24 R. 877.
[5] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 46.
[6] Ibid., sec. 48.
[7] Vaughan *v.* Davidson, 1854, 16 D. 922.
[8] Nautical Assessors (Scotland) Act, 1894 (57 & 58 Vict. cap. 40), sec. 2.
[9] Ibid., sec. 3. [10] Ibid., sec. 4.

proposed assessor's name; attendance of assessor; and where the Lord Ordinary desires an assessor, is set forth in the Codifying Act of Sederunt, Book A, Chap. viii.; as is also Inner House procedure; number of assessors in Inner House; remuneration of assessor; and consignation to meet expense.

(4) Proof before a Judge with an Assessor in Patent Cases.—By the Patents and Designs Act, 1907,[1] sec. 31 (1), it is provided that "In an action or proceeding for infringement or revocation of a patent the Court may, if it think fit, and shall on the request of either of the parties to the proceeding, call in the aid of an assessor specially qualified, and try the case wholly or partially with his assistance; the action shall be tried without a jury unless the Court otherwise directs."

The remuneration of the assessor is determined by the Court.[2]

Sec. 94 (1) provides that "In any action for infringement of a patent in Scotland the provisions of this Act, with respect to calling in the aid of an assessor, shall apply, and the action shall be tried without a jury, unless the Court shall otherwise direct, but otherwise nothing shall affect the jurisdiction and forms of process of the Courts in Scotland in such an action, or in any action or proceeding respecting a patent hitherto competent to those Courts; and for the purpose of the provisions so applied 'Court of Appeal' shall mean any Court to which such action is appealed."

Sec. 94 (3) provides that "proceedings for revocation of a patent shall be in the form of an action of reduction at the instance of the Lord Advocate, or at the instance of a party having interest with his concurrence, which concurrence may be given on just cause shown only, and service of all writs and summonses in that action shall be made according to the forms and practice existing at the commencement of this Act."

(5) Proof before a Judge with a Jury.—The trial of civil causes in Scotland before a Judge with a jury which had fallen into disuse was revived by the Jury Trials (Scotland) Act, 1815.[3] In that Act there were no causes enumerated as specially appropriated for jury trial, but this defect was subsequently remedied. The causes enumerated are:—"All actions on account of injury to the person, whether real or verbal, as assault and battery, libel or defamation; all actions on account of any injury to moveables or to land, when in the last case the title is not in question; all actions of damages on account of breach of promise of marriage, or on account of seduction or adultery;

[1] 7 Edw. VII. cap. 29. [2] Ibid., sec. 31 (3).
[3] 55 Geo. III. cap. 42.

all actions founded on delinquency or *quasi*-delinquency of any kind where the conclusion shall be for damages only and expenses; all actions on the responsibility of shipmasters and owners, carriers by land or water, innkeepers or stablers, for the safe custody and care of goods and commodities, horses, money, clothes, jewels, and other articles, and in general all actions grounded on the principle of the edict *nautæ caupones stabularii;* all actions brought for nuisance; all actions of reduction on the head of furiosity and idiotcy, or on facility and lesion, or on force and fear; all actions on policies of insurance, whether for maritime or fire or life insurance; all actions on charter-parties and bills of lading; all actions for freight; all actions on contracts for the carriage of goods by land or water; and actions for the wages of masters and mariners of ships or vessels."[1]

The Court established to try these causes was called the Jury Court—a tribunal separate from the Court of Session. After existing for fifteen years as a separate Court the Jury Court was abolished, and its powers transferred to the Court of Session.[2] It accordingly became necessary to try the causes in the foregoing enumeration before a Judge of the Court of Session with a jury. By the Court of Session Act, 1850,[3] however, the causes specially appropriated for jury trial were limited to actions for libel or for nuisance or property and in substance actions of damages. Even this exclusive reservation of causes for trial by jury is now gone, for by the Evidence (Scotland) Act, 1866,[4] if both parties consent, or if special cause be shown, the Lord Ordinary may take proof in any cause depending before him notwithstanding the provisions contained in the Judicature Act,[1] and the Court of Session Act, 1850;[3] and the judgment pronounced by him upon such proof is subject to review in the like manner as other judgments pronounced by him.

Where proof is taken before a Judge with a jury, it is usual to try the cause with issues, but the cause may be tried on the record without issues if it shall appear to the Lord Ordinary expedient that such cause should be so tried.[5] This kind of trial has only been adopted in cases of personal injury; but when adopted, the jury should not be furnished with copies of the record.[6]

[1] 6 Geo. IV. cap. 120, sec. 28.

[2] 11 Geo. IV. and 1 Will. IV. cap. 69. [3] 13 & 14 Vict. cap. 36, sec. 49.

[4] 29 & 30 Vict. cap. 112, sec. 4.

[5] A. S., 10th March 1870, sec. 1, subsec. (5) (proviso); C. A. S., C, ii. 4 (*e*). M'Laughlan *v.* Caledonian Rly. Co., 1902, 9 S. L. T. 335; Mulholland *v.* Glasgow Harbour Tunnel Co., 1903, 5 F. 637.

[6] Brannan *v.* North British Rly. Co., 1884, 12 R. 61.

CHAPTER III

DETERMINATION OF TRIBUNAL

(1) Discretion of Lord Ordinary.—The discretion to determine the tribunal before which proof in a particular cause should be led is in the Lord Ordinary, and the Inner House will be slow to interfere with its exercise.[1] His discretion, however, is not absolute.[2] Where, therefore, the Lord Ordinary decided the tribunal, not upon the particular facts of the case, but on a general ground applicable to a class of similar cases, the decision of the Lord Ordinary was reviewed;[3] and where the reason given by the Lord Ordinary in fixing upon a proof before answer and not a jury trial was, that the case was partly relevant and partly irrelevant, and the Inner House was not satisfied that any part of the case was irrelevant, the Lord Ordinary's decision was recalled.[4]

The discretion of the Lord Ordinary may only be exercised after the question of the tribunal has been argued before him, and after a motion has been made to take the case from the usual tribunal in such cases.[5]

Where both parties desire a certain tribunal, the Lord Ordinary, in the exercise of his discretion, should comply with their wishes.[6]

In actions arising out of or relating to collision at sea or other maritime matter, there seems to be no discretion left to the Lord Ordinary where an application is made by one of the parties for a nautical assessor.[7] There is, however, a discretion to send the cause either to proof or to jury trial, but the discretion has invariably been

[1] Dent *v.* North British Rly. Co., 1880, 17 S. L. R. 368; Smith *v.* Mags. of Edinburgh, 1891, 28 S. L. R. 637; Weir *v.* Grace, 1898, 25 R. 739; Fearn *v.* Cowpar, 1899, 1 F. 751; Edinburgh Railway Access and Property Co. *v.* John Ritchie & Co., 1903, 5 F. 299; M'Caig *v.* Glasgow University Court, 1904, 6 F. 918; Vallery *v.* M'Alpine & Sons, 1905, 7 F. 640; Cass *v.* Edinburgh and District Tramways Co., 1908, S. C. 841; Young *v.* Healy, 1909, S. C. 687.

[2] Dunn *v.* National Amalgamated Furnishing Trades Association, 1907, 44 S. L. R. 262; Govan *v.* J. & W. M'Killop, 1907, 15 S. L. T. 658.

[3] Rhind v. Kemp & Co., 1893, 21 R. 275; Young *v.* Healy, 1909, S. C. 687, per Lord M'Laren, p. 689.

[4] Bell *v.* Adam & Co., 1907, 44 S. L. R. 775.

[5] Reid *v.* Frederick Johnston & Co., 1911, 2 S. L. T. 149.

[6] Dent *v.* North British Rly. Co., 1880, 17 S. L. R. 368, per Lord Shand.

[7] 57 & 58 Vict. cap. 40, sec. 2.

exercised in favour of proof where a nautical assessor has been applied for.[1]

(2) General Rules.—Actions for libel or for nuisance, or actions properly and in substance actions of damages, should be sent to trial by jury;[2] but of consent of parties, or on special cause shown, these actions may be sent to proof before a Judge alone.[3] (See *Proof before a Judge with a Jury, supra*, p. 543.)

Proof on commission may be granted of consent of parties or on special cause shown, in all causes where at the date of the Evidence (Scotland) Act, 1866, the law and practice was to take evidence by commission.[4] (See *Proof before a Commissioner*, pp. 541 and 555; and *Commission and Diligence, infra*, Part x.)

It has been held that *special cause has been shown* where actions are of doubtful relevance,[5] are partly relevant and partly irrelevant,[6] are partly competent and partly incompetent,[7] and where there are legal questions of contributory negligence coupled with doubtful relevancy;[8] also where actions are founded both upon contract and fault;[9] where there is difficulty in adjusting issues;[10] where an action has been remitted *ob contingentiam* to, but not conjoined with, a process between the same parties;[11] and where there are questions of great delicacy both of fact and law.[12]

It has been held that it is *not special cause* that the injury is slight or that there is an anticipation that the award will be small;[13] that ordinary questions of law, which can be kept apart by the Judge, are

[1] M'Lean *v.* Johnstone, 1906, 8 F. 836; Kerr, etc. *v.* The Screw Collier Co., Ltd., 1907, 15 S. L. T. 444; Leadbetter *v.* Dublin and Glasgow Steam Packet Co., 1907, S. C. 538; Rodger *v.* Glen-Coats, 1913, 1 S. L. T. 434.

[2] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 49.

[3] The Evidence (Scotland) Act, 1866, sec. 4.

[4] Ibid., sec. 2.

[5] Vallery *v.* M'Alpine & Sons, 1905, 7 F. 640; Dunn *v.* National Amalgamated Furnishing Trades Association, 1907, 44 S. L. R. 262; Cass *v.* Edinburgh and District Tramways Co., 1908, S. C. 841.

[6] Bell *v.* Adam & Co., 1907, 44 S. L. R. 775.

[7] Hughes *v.* Robertson, 1913, S. C. 394.

[8] Cooke *v.* Leith Harbour and Dock Commissioners, 1905, 13 S. L. T. 536.

[9] Stocks *v.* Holstein, 1907, 15 S. L. T. 339; Govan *v.* J. & W. M'Killop, 1907, 15 S. L. T. 658; Clelland *v.* East of Scotland Public-House Trust, Ltd., 1908, 16 S. L. T. 65.

[10] M'Quillan *v.* Glasgow Daily Mail, 1902, 9 S. L. T. 393.

[11] M'Fadyen *v.* United Alkali Co., 1897, 4 S. L. T. 321.

[12] Fowler *v.* North British Rly. Co., 1914, S. C. 866; Williamson *v.* North of Scotland, etc., Navigation Co., 1915, S. C. 295.

[13] Mitchell *v.* Urquhart, 1884, 11 R. 553; Crabb *v.* Fraser, 1892, 19 R. 580; Donnachie *v.* Thom, 1892, 20 R. 210; Rhind *v.* Kemp & Co., 1893, 21 R. 275; Cowie *v.* Diez, 1903, 5 F. 1173.

raised;[1] that the action is founded on a local Act of Parliament,[2] or on the Employers' Liability Act;[3] that the evidence of the defender may require to be taken on commission;[4] and that the action is against a trade society.[5]

(3) Particular Cases of Proof or Jury Trial.—(a) *Slander.*—Actions of damages for slander are appropriated for trial by jury, unless of consent of parties or special cause is shown.[6] It is no special cause that the action for slander is only incidental to an action founded on a breach of agreement.[7]

(b) *Breach of Promise, Seduction, etc.*—Ordinary actions of damages for breach of promise of marriage,[8] or seduction and aliment,[4] are sent for trial before a jury.

(c) *Breach of Contract.*—Cases founded on breach of contract do not fall within the enumerated cases, and require special cause to be shown for sending them to jury trial. Accordingly, where no special cause was shown in an action of damages for breach of the contract of employment, the Lord Ordinary sent it for proof before himself.[9]

(d) *Nuisance or Pollution.*—Ordinary actions for nuisance should be sent to trial by jury, unless of consent of parties or where special cause is shown.[10] In the same way, actions of declarator and for interdict against pollution of a river are in the ordinary case sent to be tried by a jury.[11] Where, however, there are legal questions involved, this is held to be special cause, and proof before a Judge alone is more appropriate.[12]

(e) *Servitude Rights.*—Actions concerning servitude rights are

[1] M'Intosh *v.* Lochgelly Commissioners, 1897, 25 R. 32.

[2] Smith *v.* Mags. of Edinburgh, 1891, 28 S. L. R. 637.

[3] M'Avoy *v.* Young's Paraffin, etc., Co., Ltd., 1881, 9 R. 100; Cunning *v.* M'Alpine, 1905, 13 S. L. T. 77. See, however, Vallery *v.* M'Alpine & Sons, 1905, 7 F. 640.

[4] Mackinnon *v.* Nurse, 1904, 12 S. L. T. 101.

[5] Hewit *v.* Edinburgh and District Lathsplitters, etc., Association, 1906, 14 S. L. T. 489; *cp.* Dunn *v.* National Amalgamated Furnishing Trades Association, 1907, 44 S. L. R. 262.

[6] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 49; the Evidence (Scotland) Act, 1866, sec. 4.

[7] Grainger *v.* Stirling, 1898, 5 S. L. T. 272.

[8] Trotter *v.* Happer, 1888, 16 R. 141.

[9] Sutherland *v.* Treacher & Co., 1897, 5 S. L. T. 55; *cp.* Willison *v.* Petherbridge, 1893, 20 R. 976; Jackson *v.* Cowie & Sons, 1872, 9 S. L. R. 617.

[10] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 49; the Evidence (Scotland) Act, 1866, sec. 4; Hay *v.* Waldegrave Leslie, 1896, 4 S. L. T. 124.

[11] Hume *v.* Young, Trotter & Co., 1875, 2 R. 338.

[12] White *v.* Dixon, 1875, 2 R. 904; Inglis *v.* Shotts Iron Co., 1881, 8 R. 1006.

usually sent for proof before a Judge alone,[1] although in one case the right to a servitude road was sent to a jury.[2]

(f) *Rights-of-Way.*—Ordinary actions of right-of-way must be tried by jury.[3] Where, however, there are complicated questions and prejudice arising from newspaper discussions;[4] where the road passes through the lands of several proprietors and only one is a party to the case;[5] where the question is one of use as an authorised substitute for a right-of-way existing from time immemorial;[6] where there is a delicate question of law with regard to the terminus of the right-of-way;[7] where the title to an alleged public road is in question;[8] and where there are questions of delicacy as to the character and sufficiency of the evidence,[9] the appropriate mode of proof is before a Judge without a jury.

(g) *Personal Injury.*—Ordinary actions of damages for personal injury are sent for jury trial.[10] Where, however, questions of agency and failure in statutory duty are involved;[11] or difficult questions of the laws of contract and the Sale of Goods Act;[12] or where the construction of railway regulations are concerned;[13] or where there are legal questions of contributory negligence;[14] or where the pursuer seeks to reduce an agreement to accept compensation;[15] or where there are

[1] Macfie *v.* Stewart, 1872, 10 M. 408.

[2] Malcolm *v.* Lloyd, 1885, 12 R. 843.

[3] Macfie *v.* Stewart, 1872, 10 M. 408, per Lord Justice-Clerk Moncreiff, p. 409; Fraser Tytler's Trs. *v.* Milton, 1890, 17 R. 670, per Lord President Inglis, p. 673; Hope *v.* Gemmell, 1898, 25 R. 678; Robertson *v.* Duke of Atholl, 1905, 8 F. 150.

[4] Blair *v.* Macfie, 1884, 11 R. 515; Scottish Rights-of-Way and Recreation Society *v.* Macpherson, 1886, 14 R. 7.

[5] Nairn *v.* Speedie, 1899, 1 F. 635. See also Fraser Tytler's Trs. *v.* Milton, 1890, 17 R. 670.

[6] Kinross County Council *v.* Archibald, 1899, 7 S. L. T. 305. See also Kinloch's Trs. *v.* Young, 1910, 47 S. L. R. 356, per Lord Salvesen (Ordinary).

[7] Annan District Committee *v.* Fergusson, 1899, 6 S. L. T. 260.

[8] Mags. of Rothesay *v.* M'Kechnie, 1865, 4 M. 214.

[9] Fraser Tytler's Trs. *v.* Milton, 1890, 17 R. 670.

[10] Jamieson *v.* Hartil, 1898, 25 R. 551; Glass *v.* Paisley Race Committee, 1902, 5 F. 14; Matthew *v.* Perthshire Cricket Club, 1904, 42 S. L. R. 327; Murphy *v.* Bladen & Co., Ltd., 1906, 14 S. L. T. 250; Burnside *v.* Corporation of Glasgow, 1909, 1 S. L. T. 98; Nelson *v.* Potter, 1910, 2 S. L. T. 72; Gibb *v.* Edinburgh and District Tramways Co., Ltd., 1912, S. C. 580.

[11] Adair *v.* Mags. of Paisley, 1904, 12 S. L. T. 105. See also Moffat *v.* North British Rly. Co., 1908, 16 S. L. T. 486.

[12] Stocks *v.* Holstein, 1907, 15 S. L. T. 339; Govan *v.* J. & W. M'Killop, 1907, 15 S. L. T. 658; Clelland *v.* East of Scotland Public-House Trust, Ltd., 1908, 16 S. L. T. 65.

[13] Rennett *v.* Great North of Scotland Rly. Co., 1909, 2 S. L. T. 328.

[14] Barclay *v.* M'Alpine & Sons, 1904, 12 S. L. T. 45.

[15] M'Feetridge *v.* Stewarts and Lloyds, Ltd., 1913, S. C. 773.

delicate questions of fact and law;[1] or where the jury is not likely to give a sum above £50,[2] a proof before a Judge alone has been held to be the proper mode of proof.

In ordinary circumstances an action of damages for assault, either by the defender himself, or by a person employed by him acting in the course of his employment, is sent to a jury.[3] Where, however, there is doubt as to the relevancy of the averments, a proof instead of a jury trial may be allowed,[4] or a proof before answer.[5]

(h) *Injury to Land.*—Ordinary actions of injury to land uncomplicated by questions of title are sent to a jury.[6] Where the construction of a lease was involved, the case was sent to a Judge alone.[7]

(i) *Reductions.*—Reductions of deeds on the ground of incapacity,[8] insanity,[9] or essential error[10] are usually sent to trial before a jury, even when in the latter case the error is induced by the defender.[11]

Where, however, the reduction is on the ground of forgery;[12] force and fear;[13] fraud;[14] want of statutory solemnities;[15] essential error in a marriage contract;[16] impetration from a facile person;[17] or on the combined grounds of incapacity, essential error, fraud and undue influence,[18] the case is usually sent to proof before a Judge alone.

(j) *Petition and Complaint.*—These petitions are sent to proof before a Judge alone.[19]

[1] Fowler *v.* North British Rly. Co., 1914, S. C. 866.

[2] See *Review, Removal, and Report*, Part ix. Chap. v. (1) (a) (iv.), *infra*. See also Grant *v.* John Fleming & Co., Ltd., 1914, S. C. 228, per Lord President Strathclyde.

[3] Bryce *v.* Glasgow Tramway Co., 1898, 6 S. L. T. 49; Maxwell *v.* Caledonian Rly. Co., 1898, 25 R. 550; Hanlon *v.* Glasgow and South-Western Rly. Co., 1899, 1 F. 559; Wood *v.* North British Rly. Co., 1899, 1 F. 562; Brown *v.* Anderson, 1900, 8 S. L. T. 113; Wilson *v.* Bennett, 1904, 6 F. 269; Cook *v.* Paxton, 1910, 48 S. L. R. 7.

[4] Hynds *v.* Singer Sewing Machine Co., Ltd., 1909, 2 S. L. T. 127.

[5] M'Graw *v.* Edinburgh Street Tramways Co., 1891, 28 S. L. R. 256.

[6] Bicket *v.* Morris, 1866, 4 M. (H. L.) 44.

[7] Cadzow *v.* Lockhart, 1875, 2 R. 928.

[8] Clark *v.* Young, 1885, 13 R. 313; Williams *v.* Philip, 1907, 15 S. L. T. 396.

[9] Bowman *v.* Mackinnon, 1893, 30 S. L. R. 414; Hope *v.* Hope's Trs., 1898, 6 S. L. T. 164, 238.

[10] M'Caig *v.* Glasgow University Court, 1904, 6 F. 918.

[11] Watson *v.* Caledonian Banking Co., 1904, 11 S. L. T. 550.

[12] Campbell's Trs. *v.* Lloyd, 1897, 5 S. L. T. 73.

[13] Young *v.* Healy, 1909, S. C. 687.

[14] Life Association of Scotland *v.* Foster, 1873, 11 M. 351; Scottish Widows' Fund *v.* Buist, 1876, 3 R. 1078 (both policies of insurance).

[15] Young *v.* Paton, 1908, 16 S. L. T. 482.

[16] Motherwell *v.* Motherwell's Trs., 1906, 13 S. L. T. 888.

[17] M'Kechnie *v.* White, 1906, 14 S. L. T. 140.

[18] Fearn *v.* Cowpar, 1899, 1 F. 751.

[19] Dudgeon *v.* Thomson and Donaldson, 1876, 3 R. 974.

(k) *Collision at Sea or other Maritime Matter.*—Actions arising out of the collision of vessels usually involve the application of the Regulations for Preventing Collisions at Sea, and are sent to proof before a Judge with a nautical assessor.[1]

(l) *Pedigree.*—General questions of pedigree are sent to trial by jury.[2] This rule is not absolute,[3] and where cases are unsuitable from the peculiar nature of the questions involved they may be decided by proof on commission, or by a Judge without a jury.[4]

(m) *Legitimacy.*—Cases of legitimacy are not included among the causes enumerated for jury trial, nor are they excluded. It is therefore in the discretion of the Lord Ordinary to say whether they are to be sent to a jury or not. They are, as a matter of practice, never sent to a jury, but tried before a Judge alone or by proof on commission.[5] Since 1866[6] the latter mode of proof would only be allowed of consent or on special cause shown.

(n) *Patent Cases.*—Actions for infringement or revocation of a patent are tried without a jury unless the Court otherwise directs;[7] and the Court may, if it think fit, and shall, on the request of either of the parties, call in the aid of an assessor specially qualified.[8]

(4) Particular Cases where Proof on Commission has been Granted or Refused.—There can be no proof on commission in any of the causes specially appropriated for jury trial by the Court of Session Act, 1850, sec. 49.[9] It is quite competent, however, to have proof on commission in causes enumerated for jury trial by the Judicature Act, 1825, sec. 28, so long as they do not fall within the causes specially appropriated for jury trial by the Court of Session Act, 1850, sec. 49.[10] It must, however, be of consent of parties or on special cause shown.[6]

Previous to the Evidence (Scotland) Act, 1866, where both parties to a cause concurred, and the amount at issue was small, the Court

[1] M'Lean *v.* Johnstone, 1906, 8 F. 836; Kerr, etc. *v.* The Screw Collier Co., Ltd., 1907, 15 S. L. T. 444; Leadbetter *v.* Dublin and Glasgow Steam Packet Co., 1907, S. C. 538; Rodger *v.* Glen-Coats, 1913, 1 S. L. T. 434.

[2] Mackintosh *v.* Ross, 1873, 11 M. 636.

[3] More, Petr., 1870, 7 S. L. R. 623.

[4] Fenton *v.* Livingstone, 1853, 16 D. 104; 1856, 18 D. 329; Campbell *v.* Campbell, 1866, 4 M. 867.

[5] Swinton *v.* Swinton, 1862, 24 D. 833, per Lord President M'Neill, pp. 836, 837.

[6] The Evidence (Scotland) Act, 1866, sec. 2.

[7] Patents and Designs Act, 1907 (7 Edw. VII. cap. 29), secs. 31 (1), 94 (1) (3).

[8] Ibid., sec. 31 (1).

[9] Nicol *v.* Britten and Owden, 1872, 10 M. 351. See also Kerr *v.* Blair, 1837, 15 S. 784.

[10] Livingstone *v.* Matthew, 1852, 14 D. 456.

appointed proof by commission,[1] but since that date the Court has refused to recognise the smallness of the amount at stake alone as special cause.[2] (See *Proof before a Commissioner, supra*, pp. 541 and 555; and *Commission and Diligence, infra*, Part x.)

Of course the examination of havers can still be taken on commission, as also the examination of witnesses resident outwith the United Kingdom, and witnesses who are aged, sick, and infirm, or about to leave the country, either after a proof has been fixed, or previous to that date, in order that the deposition may lie *in retentis*.[3] (See *Commission and Diligence, infra*, Part x.) A proof in a divorce action may be wholly taken on commission where any of the latter conditions are present.[4]

[1] Livingstone *v.* Matthew, 1852, 14 D. 456.
[2] Mackenzie *v.* The British Linen Co., 1879, 17 S. L. R. 241.
[3] The Evidence (Scotland) Act, 1866, sec. 2.
[4] A. B. *v.* C. B., 1911, 1 S. L. T. 264.

CHAPTER IV

MODES OF PROOF AND ONUS

As has already been pointed out, it sometimes happens that although the parties in a cause are agreed that there must be proof, and are also agreed upon the tribunal before which proof must be led, they are at variance upon the mode of proof. In such an event the cause is appointed to be enrolled in the Procedure Roll, and, after hearing parties on that roll, the Lord Ordinary decides upon the particular mode.[1]

There are several modes of proof:—

(1) Proof Prout de Jure.—This is proof quite unrestricted, and accordingly every kind of legal proof may be led—parole, documentary, and oath of party. This is the mode of proof where the interlocutor allows parties a proof without any qualifying words.[2]

(2) Proof by Writ or Oath.—There are certain kinds of action which can only be proved by the writ or oath of the defender, such as an action founded on a debt which is prescribed;[3] actions founded on loan,[4] or trust,[5] or innominate contracts of an extraordinary and unusual character.[6] (See *Motion for Reference to Oath, supra*, p. 523.)

(3) Proof Habili Modo.—This mode is appropriate when it appears that some parts of a cause may competently be proved *prout de jure* and others only by writ or oath. It does not mean that parole proof is competent, but leaves the question with the Judge to decide during the course of the proof which method is admissible.[7]

(4) Proof "Before Answer."—The meaning of proof "before answer" has been much canvassed. In a number of cases the interpretation given to such an allowance of proof was, that both parole and documentary evidence were allowed to be led, with a right to the

[1] A. S., 10th March 1870, sec. 1 (3); C. A. S., C, ii. 4 (*c*); Simpson *v.* Stewart, 1875, 2 R. 673.

[2] Erskine's Inst. iv. 2. 1; Simpson *v.* Stewart, 1875, 2 R. 673.

[3] Dickson on Evidence, secs. 413 (5) and 415.

[4] Ibid., sec. 594.

[5] Ibid., sec. 575 *et seq.*; Act 1696, cap. 25.

[6] Edmonston *v.* Edmonston, 1861, 23 D. 995; Forbes *v.* Caird, 1877, 4 R. 1141; Copeland *v.* Wimborne, 1912, S. C. 355, per Lord Guthrie (Ordinary).

[7] Paterson *v.* Paterson, 1897, 25 R. 144; Gill *v.* Gill, 1907, S. C. 532; Smith's Trs *v.* Smith, 1911, S. C. 653.

Lord Ordinary or the Court, at the end of the proof, to decide whether parole proof was competent in the circumstances, and also whether proof of all the averments on record entitled the pursuer to the decree he asked for, *i.e.* that the competency of the mode of proof as well as the relevancy of the action was reserved.[1]

The true meaning, however, seems to be that what is reserved in an allowance of proof "before answer" is only the question of law and relevancy,[2] and that if the competency of the mode of proof is desired to be reserved, such reservation should be expressly included in the interlocutor.[3] An opinion, however, has been expressed that it is improper to grant a proof "before answer," reserving a plea that the only proof competent is by writ or oath;[4] and it is only in very exceptional circumstances that a plea of "no jurisdiction" based on matters of fact will be reserved until the merits of the case have been ascertained.[5] Accordingly, an interlocutor allowing a proof "before answer" means a proof *habili modo* before answer as to relevancy.

The appropriate occasion for granting proof "before answer" is where there is difficulty, from a mere perusal of the averments of the pursuer and the admissions of the defender, in appreciating the true question at issue. In such an event the Judge without a proof of the facts might apply the law to an entirely supposititious state of matters, and it is in order to obviate such an occurrence that proof "before answer" is allowed.[6]

Proof "before answer" should not be allowed of all averments on record where some are obviously irrelevant; the irrelevant averments should be excepted from the proof.[7]

Proof "before answer" does not authorise the proof of any matter in a manner contrary to the rules of evidence.[8]

Besides being allowed in a proof before a Judge alone, proof "before

[1] Lord Advocate *v.* M'Neill, 1864, 2 M. 626; Bryce *v.* Young's Exrs., 1866, 4 M. 312; Muir *v.* Ross' Exrs., 1866, 4 M. 820; Morris *v.* Riddick, 1867, 5 M. 1036; Robertson *v.* Murphy, 1867, 6 M. 114, per Lord Deas, p. 116; Macvean *v.* Maclean, 1873, 11 M. 506, per Lord Justice-Clerk Moncreiff, p. 509.

[2] Robertson *v.* Murphy, 1867, 6 M. 114, per Lord President Inglis, Lords Curriehill and Ardmillan; Haldane *v.* Speirs, 1872, 10 M. 537, per Lords Benholme and Neaves; Macvean *v.* Maclean, 1873, 11 M. 506, per Lord Neaves, p. 509.

[3] Robertson *v.* Murphy, 1867, 6 M. 114, per Lord Ardmillan, p. 117; Stuart *v.* Stuart, 1869, 7 M. 366, per Lord President Inglis, p. 367.

[4] Thomson *v.* Fraser, 1868, 7 M. 39, per Lord Cowan, p. 41.

[5] M'Leod *v.* Tancred, Arrol & Co., 1890, 17 R. 514.

[6] Davie *v.* Stark, 1876, 3 R. 1114, at p. 1116.

[7] Inglis *v.* National Bank of Scotland, Ltd., 1909, S. C. 1038.

[8] Robertson *v.* Murphy, 1867, 6 M. 114.

answer" may be granted in a jury trial[1] or in a proof before a commissioner,[2] but the present practice is always to decide the question of relevancy before allowing issues.

Where the Inner House allowed proof "before answer" instead of a jury trial, and the competency of the proof was not impugned, the Court refused leave to appeal to the House of Lords.[3]

For remit "before answer," see *Motion for a Judicial Reference*, *supra*, p. 502 *et seq.*

(5) Onus.—In an ordinary case the *onus* lies on the pursuer to prove his averments, and consequently if nothing is said in the interlocutor allowing proof, the pursuer must lead. There may be circumstances, however, in which it is proper that the defender should lead. Accordingly, this matter should be disposed of on the Procedure Roll, and if the ordinary rule is to be departed from, the interlocutor allowing proof should contain a finding to that effect.[4] A person who proposes to put in force a written instrument which is not in itself probative must prove it to be genuine if its genuineness is disputed.[5] A pursuer in an action for declarator and for payment of a casualty has the *onus* of proving the death of the last-entered vassal.[6]

[1] Dobbie *v.* Johnston, 1859, 21 D. 624, per Lord Justice-Clerk Inglis, p. 631.
[2] Priestnell *v.* Hutcheson, 1857, 19 D. 495; Swinton *v.* Swinton, 1862, 24 D. 833.
[3] Pringle *v.* Dunsmure, 1877, 14 S. L. R. 498.
[4] Gibson *v.* Adams, 1875, 3 R. 144.
[5] M'Intyre *v.* National Bank of Scotland, Ltd., 1910, S. C. 150, per Lord Kinnear.
[6] Marquess of Bute's Trs. *v.* Crawford, 1914, S. C. 459.

CHAPTER V

PROCEDURE IN PROOF BEFORE A COMMISSIONER

THE procedure is similar to the procedure in a proof before a Judge alone (*see next Chapter*), except that the Commissioner has no power to grant warrant for letters of second diligence or decide finally upon questions of competency of evidence. (See *Commission and Diligence, infra*, Part x.)

CHAPTER VI

PROCEDURE IN PROOF BEFORE A JUDGE ALONE

It being settled, either by agreement of parties or by the Lord Ordinary after discussion on the Procedure Roll, that proof is necessary, and that the proper tribunal for trying the cause is before a Judge alone, and, moreover, the mode of proof and *onus* being also determined and the diet of proof fixed, the subsequent procedure claims our notice.

(1) Prior to Diet of Proof.—(a) *Precognitions.*—Precognitions are not taken upon oath nor are they signed by the witnesses. They are taken simply for the convenience of counsel and agents in the case. Accordingly, it has been held that a precognition which has been signed cannot be used to contradict a statement made by the same person at the trial;[1] and if the person who gave the precognition has died prior to the trial, his precognition cannot be used as evidence.[2] The Court will not grant an order upon a party in a cause to give facilities for the precognition generally of his servants.[3] The Court may, however, order a party to deliver up the name and address of a person put forward by that party as representing him in the matter whereon the question turns.[4] If, however, a party refuses facilities for the precognition of his servants, he may be found liable in expenses even though he should succeed in the action.[5]

An employer is not entitled to be present by himself or his agent when his employees are being precognosced by the opposite side.[6]

(b) *Witnesses.*—(i.) *Generally.*—Formerly there were disabilities which precluded certain witnesses from giving evidence, such as consanguinity, interest, agency, etc., but these disabilities have now been entirely removed.[7] There is no limit by statute or common law upon

[1] Emslie *v.* Alexander, 1862, 1 M. 209.

[2] Graham *v.* Western Bank, 1865, 3 M. 617; Stevenson *v.* Stevenson and Fairie, 1893, 31 S. L. R. 129.

[3] Henderson *v.* Patrick Thomson, Ltd., 1911, S. C. 246.

[4] Ibid., per Lord President Dunedin, pp. 249, 250; M'Phee *v.* Corporation of Glasgow, 1910, 1 S. L. T. 380; Clarke *v.* Edinburgh and District Tramways Co., Ltd., 1914, S. C. 775.

[5] Barrie *v.* Caledonian Rly. Co., 1902, 5 F. 30.

[6] M'Phee *v.* Corporation of Glasgow, 1910, 1 S. L. T. 380.

[7] Evidence (Scotland) Act, 1840 (3 & 4 Vict. cap. 59); Evidence (Scotland) Act, 1852 (15 Vict. cap. 27); Evidence (Scotland) Act, 1853 (16 Vict. cap. 20).

the age of witnesses, and accordingly young children who can understand and speak intelligently may be precognosced and examined. Witnesses must be able to speak articulately.[1] Where deaf and dumb, they may be examined if their language or gestures can be interpreted to the Court.[2] An insane witness will not be allowed, but the fact that witness was at one time an inmate of a lunatic asylum is not sufficient to exclude him as a witness.[3] An epileptic may be examined, but his evidence must be received with caution.[4]

For Remuneration of Witnesses, see Maclaren on Expenses, p. 468.

(ii.) *Witnesses whose Evidence may be Lost.*—See *Commission and Diligence, infra*, Part x.

(iii.) *Witnesses who Reside Outwith the Jurisdiction.*—See *Commission and Diligence, infra*, Part x.

(iv.) *Witnesses who are Unable to Attend the Proof Owing to Age, Infirmity, or Sickness.*—See *Commission and Diligence, infra*, Part x.

(v.) *Citation of Scottish Witnesses.*—Having determined upon and precognosced the witnesses, it remains for the agent in the cause to see that they attend the diet of proof. Citation of a witness is not a necessary preliminary to his examination, as he may appear at the trial quite voluntarily, and if present in Court can be examined.[5] It is a wise precaution, however, to cite every witness required. As regards witnesses who are not likely to come unless compelled to do so, it is as well to take out letters of first and second diligence. (See *Citation of Witnesses, supra*, p. 342.)

(vi.) *Citation of Witnesses Outwith the Jurisdiction.*—See *Citation of Witnesses, supra*, p. 345.

(c) *Productions.*—Before as well as after the closing of the record parties are entitled to obtain a commission and diligence to recover writings either in the hands of the opposite party or third parties, but such a diligence will only be granted prior to the closing of the record on special cause shown.[6] (See *Commission and Diligence, infra*, Part x.)

[1] Lord Advocate *v.* O'Neil and Gollan, 1858, 3 Irv. 93.

[2] Lord Advocate *v.* Montgomery, 1855, 2 Irv. 222; Lord Advocate *v.* Howison, 1871, 2 Couper, 153.

[3] Lord Advocate *v.* Sheriff and Mitchell, 1866, 5 Irv. 226; Lord Advocate *v.* M'Kenzie or M'Kenna, 1869, 1 Couper, 244.

[4] Lord Advocate *v.* Stott, 1894, 1 Adam, 386.

[5] Watson *v.* Livingstone, 1902, 5 F. 171, per Lord Kinnear, p. 176.

[6] Henderson *v.* Patrick Thomson, Ltd., 1911, S. C. 246, per Lord President Dunedin, p. 248.

All documents, plans, maps, models, and other productions must be lodged with the Clerk of Court on or before the *fourth* day prior to the day appointed for the proof.[1] (See *Productions, supra,* p. 408 *et seq.*)

(d) *Transmission for Production of Original Documents from Public Records.*—See *Productions, supra,* p. 411.

(e) *Transmission of Process from Another Court.*[2]

(f) *Inspection.*—Prior to the diet of proof a motion may be made for the inspection of works, processes, books, or anything that forms the subject of the litigation. (See *Motion for Leave to Inspect, supra,* p. 520.)

(2) At the Diet of Proof.—(a) *The Diet of Proof*—The diet may be fixed for any time during vacation or session;[3] and all causes ready for trial by a proof before any of the Lords Ordinary, under the Conjugal Rights (Scotland) Amendment Act, 1861,[4] and the Evidence (Scotland) Act, 1866,[5] at the end of the Winter and Summer Sessions of the Court respectively, shall be tried at sittings to be held by the Lord Ordinary before whom the cause depends, or by some other Judge acting for him at his request, during the ensuing vacation, at such time as may be fixed by the Lord Ordinary.[6]

(b) *Failure to Appear at Diet Fixed.*—If either party fail to attend at the diet fixed, the opposite party is entitled to decree by default.[7]

(c) *Enclosure of Witnesses.*—(i.) It is the duty of agents to see that all witnesses are enclosed under the charge of the macers of Court in one of the witness-rooms provided for that purpose.

(ii.) Each agent, before the examination of his witnesses commences, shall give, in duplicate, to the macer a numbered list of his witnesses in the order in which it is proposed to call them.

(iii.) No witness shall leave the witness-room, except with the permission of the Clerk of Court, until called by the macer to be in readiness for being examined. Witnesses are not allowed to walk about the passages or enter any of the Court rooms (except when called) until after examination, or until dismissed by the macer by order of the Court.

(iv.) After a witness has been enclosed by the macer, no person, other than the agent of the party citing the witness, shall have access

[1] A. S., 31st May 1902; C. A. S., B, ii. 1.
[2] C. A. S., B, ii. 5.
[3] 29 & 30 Vict. cap. 112, sec. 1.
[4] 24 & 25 Vict. cap. 86.
[5] 29 & 30 Vict. cap. 112.
[6] Court of Session Act, 1868 (31 & 32 Vict. cap. 100), sec. 33.
[7] Morrison *v.* Smith, 1876, 4 R. 9.

to him, nor shall any person interfere with the macers in regard to such witness.

(v.) The macers shall enforce the foregoing, and report to the Court if any person, agent or other, shall endeavour to transgress the same.[1]

(d) *Mode of Leading Evidence.*—There is no opening statement to the Judge by the pursuer or his counsel, but the examination of the first witness is at once proceeded with. Witnesses are sworn, examined, cross-examined, and re-examined in the same way as in a jury trial.[2] (See *Procedure in Jury Trial, infra,* Chap. ix.) No adjournment is allowed except on special cause stated in an interlocutor, and the evidence is summed up by one counsel on each side at the conclusion of the examination of the witnesses, as in jury trials.[3] There s no inflexible rule, however, which will prevent the Lord Ordinary from taking a different course in exceptional circumstances. If the case is complex, or the proof is of such a nature that it would be difficult for the Lord Ordinary or counsel to digest it on the spot, it may be for the interest of parties, and conducive to the ends of justice, that an adjournment should take place.[4] In addressing the Lord Ordinary at the conclusion of an *ordinary* proof, therefore, counsel require to rely upon their own notes and recollection. In exceptional cases, however, where an adjournment has been given, it has become the practice to furnish counsel with a copy of the shorthand writer's notes of the evidence, and the expense of these notes has been allowed against an unsuccessful party.[5]

(e) *Mode of Recording Oral Evidence.*—There are several methods of recording the oral evidence at a proof set forth in the Conjugal Rights (Scotland) Amendment Act, 1861, and the Evidence (Scotland) Act, 1866. Thus, the Lord Ordinary may himself take and either write down with his own hand the oral evidence, in which case it shall be read over to the witness by the Judge in open Court, and shall be signed by the witness, if he can write; *or* the Lord Ordinary may record the evidence by dictating it to a clerk, in which case it shall also be read over to and signed by the witness; *or* the Lord Ordinary may cause the evidence to be taken down and recorded in shorthand by a writer skilled in shorthand writing, to whom the oath *de fideli adminis-*

[1] C. A. S., B, ii. 7.

[2] Birrell *v.* Beveridge, 1868, 6 M. 421; Steuart *v.* Steuart, 1870, 8 M. 821.

[3] Court of Session Act, 1868, sec. 32; Evidence (Scotland) Act, 1866, sec. 1.

[4] Birrell *v.* Beveridge, 1868, 6 M. 421, per Lord President Inglis.

[5] Powrie *v.* Louis, 1881, 8 R. 803; Gunn *v.* Muirhead, 1899, 2 F. 10. See also Girvan, Roper & Co. *v.* Monteith, 1895, 3 S. L. T. 192; Coppack *v.* Miller, 1911, 2 S. L. T. 65; Smith *v.* Watson, 1912, S. C. 553.

tratione officii shall be administered; and the Lord Ordinary may, if he think fit, dictate to the shorthand writer the evidence which he is to record; and the shorthand writer shall afterwards write out the evidence so taken by him; and the extended notes of such shorthand writer, certified by the presiding Judge to be correct, shall be the record of the oral evidence in the cause.[1]

The method almost universally adopted of recording the evidence is by means of a shorthand writer.

Where a Judge died before certifying the shorthand writer's notes, a minute signed by both parties consenting to the proof taken to be the proof in the cause and equivalent in all respects to the said proof as if it had been certified as a correct record of the oral evidence, was given effect to.[2] Where the notes of evidence were lost, the evidence was ordered to be taken again.[3]

(f) *Mode of Recording Documentary Evidence.*—Although all the documents required at the proof should be lodged *four* days before the diet, it by no means follows that all these documents will be adduced as evidence. Accordingly, the Lord Ordinary is empowered himself to dictate to his clerk or shorthand writer a note of the documents adduced.[4] In practice, however, each party at the close of the proof makes up and lodges in process an inventory of the documents or other productions which have been put to witnesses, or admitted of consent, on which he founds as part of his proof, and these documents or other productions alone may be referred to at the hearing on evidence.[5]

(g) *Ruling by Lord Ordinary regarding Evidence*—(i.) *Generally.*—Any evidence, whether oral or written, which is tendered and rejected, with the ground of such rejection,[6] and any objection to the admission of evidence, must be noted; and any ruling in reference to the admission or rejection of evidence may be recalled or altered by the Inner House on a reclaiming note against the final judgment of the Lord Ordinary disposing of the cause.[7]

(ii.) *Unstamped Documents.*—Where any document founded on is chargeable with stamp duty, and is not stamped or insufficiently stamped, and objection is taken to it, the document will either be rejected altogether or some delay will be given to enable it to be

[1] Evidence (Scotland) Act, 1866, sec. 1. See also Conjugal Rights (Scotland) Amendment Act, 1861, sec. 13.

[2] Walker *v.* Walker, 1870, 8 M. 385.

[3] Yates *v.* Robertson, 1891, 18 R. 1206.

[4] 29 & 30 Vict. cap. 112, sec. 1. See also 24 & 25 Vict. cap. 86, sec. 13.

[5] Neill's Tr. *v.* British Linen Co., 1897, 5 S. L. T. 164.

[6] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 13.

[7] Ibid.; Evidence (Scotland) Act, 1866, sec. 1.

stamped, so that it may be put in evidence.[1] It is *pars judicis* to take notice of such omission or insufficiency of the stamp.[2] If the instrument is one which may be legally stamped after the execution thereof, it may, on payment to the Clerk of Court of the amount of the unpaid duty and the penalty payable on stamping the same and of a further sum of £1, be received in evidence, saving all just exceptions on other grounds.[3] The deliverance of the Judge that the stamp is sufficient or not is final.[4]

The person who founds upon an unstamped document must, in the first instance, be at the expense of the stamp and penalty.[5]

For further discussion of expense of after-stamping, see Maclaren on Expenses, p. 483 *et seq.*

(iii.) *Banker's Books.*—A copy of any entry in a banker's book is received in all legal proceedings as *primâ facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded.[6] It must first be proved, however, that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual course of business; and the proof may be taken orally or by an affidavit.[7] The copy of the entry must also be proved to be correct by some person who has examined the copy with the original entry, and this evidence may also be given orally or by affidavit.[8] If in the legal proceeding the bank is not a party, a banker or officer of the bank cannot be compelled to produce any banker's book the contents of which can be provable as aforesaid, or to appear as a witness to prove the matters therein recorded unless by order of a Judge made for special cause.[9] (See *Motion for Leave to Inspect, supra*, p. 520.)

(iv.) *Government Proclamations, etc.*—There are certain documents which, although not probative, may be put in evidence without being spoken to by any witness. Thus, *primâ facie* evidence of any Government proclamation, order, or regulation is given by the production of the *Gazette* purporting to contain them; *or* by the production of a copy of such proclamation, etc., purporting to be printed by the Government printer; *or* by production of a copy or extract purporting to be certified to be true by the proper certifying officer of such proclamation, etc.;

[1] Neil *v.* Leslie, 1867, 5 M. 634; 54 & 55 Vict. cap. 39, sec. 14.
[2] 54 & 55 Vict. cap. 39, sec. 14 (1).
[3] Ibid.; Francesco *v.* De Meo, 1907, 15 S. L. T. 387, per Lord Ardwall.
[4] Court of Session Act, 1868, sec. 41, as amended by 33 & 34 Vict. cap. 99.
[5] Stewart *v.* Stewart, 12th February 1817, F. C.; Grant *v.* Walker, Grant & Co., 1837, 16 S. 246; Neil *v.* Leslie, 1867, 5 M. 634; M'Douall *v.* Caird, 1870, 8 M. 1012.
[6] Bankers' Books Evidence Act, 1879 (42 Vict. cap. 11), sec. 3.
[7] Ibid., sec. 4. [8] Ibid., sec. 5. [9] Ibid., sec. 6.

and no proof is required of the handwriting or official position of any person certifying to the truth of any such copy of or extract from any proclamation, order, or regulation.[1] Regulations for the Territorial Force do not require to be proved by witnesses.[2]

(h) *Proof in Replication.*—Where something comes out in the defender's proof which the pursuer could not reasonably anticipate, a proof in replication may, in the discretion of the Judge, be granted.[3] If granted, the interlocutor allowing such proof should exactly specify the particular matters of fact to which it is to be directed.[4]

(i) *Additional Evidence.*—The proof will not be allowed to be opened up and additional evidence led unless on very strong grounds. It is not a good reason for opening up the proof and allowing the re-examination of a witness that he has been suborned to give false evidence.[5] If the party is willing to admit a charge of subornation of perjury the case would be different.[6] The Court will not open up a proof in order to examine a witness who could have been called but was not called;[7] or to hear evidence regarding a part of the case which has been forgotten to be proved;[8] or to show that certain witnesses had made different statements on a certain occasion from what they had deponed to in evidence.[9]

It has been allowed where there was surprise[10] and where plans were discovered after the proof had been closed.[11] Moreover, the Court has allowed an amendment of *res noviter*, which will lead to additional proof being led.[12]

Where the parties have agreed to make certain admissions and to renounce probation, no proof will be allowed.[13]

In consistorial causes additional proof has been allowed before

[1] Documentary Evidence Act, 1868 (31 & 32 Vict. cap. 37), sec. 2.

[2] Todd *v.* Anderson, 1912, S. C. (J.) 105.

[3] Mags. of Edinburgh *v.* Warrender, 1862, 1 M. 13; Richardson *v.* Fleming, 1867, 5 M. 586; Rankine *v.* Roberts, 1873, 1 R. 225; Gairdner *v.* Young, 1874, 2 R. 173; Dick and Stevenson *v.* Mackay, 1880, 7 R. 778, per Lord Shand.

[4] Strang *v.* Steuart, 1862, 24 D. 955, per Lord Justice-Clerk Inglis.

[5] Brown *v.* Gordon, 1870, 8 M. 432.

[6] Ibid., per Lord President Inglis, p. 433.

[7] Mabon *v.* Cairns, 1875, 3 R. 47; Allan *v.* Stott, 1893, 20 R. 804.

[8] Cruickshank & Co. *v.* Caledonian Rly. Co., 1876, 3 R. 484; Glengarnock Iron and Steel Co., Ltd. *v.* Cooper & Co., 1895, 22 R. 672.

[9] Taylor *v.*. Provan, 1864, 2 M. 1226.

[10] Mackie *v.* Pratt, 1870, 42 Jur. 273.

[11] Reid *v.* Haldane's Trs., 1891, 18 R. 744; Coul *v.* Northern District Committee of Ayr County Council, 1909, 1 S. L. T. 144.

[12] Johnston *v.* Johnston, 1903, 40 S. L. R. 499.

[13] Picken *v.* Arundale & Co., 1872, 10 M. 987; Carswell & Son *v.* Finlay, 1887, 24 S. L. R. 643. See, however, Howie *v.* Howie, 1850, 22 Jur. 360.

judgment;[1] after judgment it is not usual to do so unless in exceptional cases.[2] In cases of *status*, the Court may, *ex proprio motu*, order additional proof where it considers further investigation into the facts necessary.[3]

(j) *Recall of Witness.*—It is competent to the presiding Judge, on the motion of either party, to permit any witness who shall have been examined in the course of the proof to be recalled.[4] This has been done in order to see whether the witness had made on a specific occasion prior to examination statements different from those given in evidence.[5]

(k) *Witness Present in Court during Proof.*—It is not imperative on the Court to reject a witness who has been present in Court without the permission of the Court and without the consent of the party objecting, but it is competent to admit the witness if the Court is satisfied that the presence of the witness was not the consequence of criminal negligence or criminal intent, and that the witness has not been unduly instructed or influenced by what took place during his or her presence, and that injustice will not be done by his or her examination.[6] This does not apply to proceedings in a Burgh Police Court.[7]

(l) *Reference to Oath.*—As a last resort, a party may refer the matter at issue to his opponent's oath. Where such a reference is made and sustained, either by the Lord Ordinary before whom the cause depends, or by one of the Divisions of the Court, the deposition is taken in the manner set forth in the Evidence (Scotland) Act, 1866.[8] (See *Motion for a Reference to Oath, supra*, p. 523.)

(m) *Proof Ordered by the Inner House.*—Where proof is ordered by one of the Divisions of the Court, such proof is taken before one of the Judges of said Division to whom the Court may think fit to remit in one or other of the modes provided for in sec. 1 of the Evidence (Scotland) Act, 1866, and his rulings upon the admissibility of evidence in the course of making such proof is subject to review by the Division of the Court in the discussion of the report of the proof;

[1] Forbes *v.* Forbes, 1861, 24 D. 145; Lacy *v.* Lacy, 1869, 7 M. 369.

[2] Gray *v.* Gray, 1867, 5 M. 355, per Lord Neaves, p. 358; Forster *v.* Forster, 1869, 7 M. 797. See, however, Fleming *v.* Corbet, 1858, 21 D. 179.

[3] Elder *v.* M'Lean, 1829, 8 S. 56.

[4] Evidence (Scotland) Act, 1852 (15 Vict. cap. 27), sec. 4.

[5] Robertson *v.* Steuart, 1874, 1 R. 532, at pp. 594, 595; Hoey *v.* Hoey, 1884, 11 R. 578. See, however, Begg *v.* Begg, 1887, 14 R. 497.

[6] Evidence (Scotland) Act, 1840 (3 & 4 Vict. cap. 59), sec. 3.

[7] Docherty and Graham *v.* M'Lennan, 1912, S. C. (J.) 102.

[8] 29 & 30 Vict. cap. 112, sec. 3.

and when the Court alters any finding of the Judge directing evidence, it may remit to have such evidence taken.[1] The place of a Judge of the Inner House to whom a remit to hear proof has been made may be taken by one of the Lords Ordinary called in for that occasion.[2]

[1] 29 & 30 Vict. cap. 112, sec. 3, as amended by sec. 62 of the Court of Session Act, 1868.

[2] Court of Session Act, 1868, sec. 62.

CHAPTER VII

PROCEDURE IN JURY TRIAL—ISSUES AND COUNTER ISSUES

I. Adjustment of Issues and Counter Issues.—It has already been shown[1] that, at the closing of the record, if the pursuer is of opinion that a cause should be tried before a jury, he makes a motion that the record be closed and issues ordered to be lodged on a day not later than *eight* days thereafter. This motion is usually granted as a matter of course. The fact that the defender does not oppose such a motion will not preclude him from pleading at the adjustment of issues that the cause is irrelevant, or should be dismissed in respect of any other preliminary plea, or that the cause is unsuitable for jury trial. The issues and counter issues, if any, having been lodged two days before the day so fixed, the parties are heard on the Adjustment Roll, when the cause is either dismissed, or held to be unsuitable for jury trial, or a preliminary proof is granted of disputed facts connected with a preliminary plea, or issues and counter issues, if any, are adjusted for the trial of the cause and an interlocutor granted approving of the same, and the issues are signed and authenticated by the Judge as relative thereto.

II. Issues.—1. Generally.—(1) *General Issue.*—It is now the practice of the Court to send a cause to trial upon all its facts without determining which of the averments are sufficient in themselves, or deciding upon the relevancy of each averment stated separately, so long as there is a single relevant averment. Accordingly, where there are no separate and separable grounds on which the pursuer rests his case, the cause is sent to a jury on a general issue.[2] A general issue is an issue quite specific as regards time and place but general as to the other facts. The following is an example of a general issue:—

"Whether, on or about the 15th day of February, 1896, and at or near the Queen's Dock, Glasgow, the pursuer was injured in his

[1] See *Adjustment of Issues*, *supra*, p. 356.

[2] Ireland *v.* North British Rly. Co., 1882, 10 R. 53; Haughton *v.* North British Rly. Co., 1892, 20 R. 113; Hanlon *v.* Glasgow and South-Western Rly. Co., 1899, 1 F. 559. See also Brownlie *v.* Tennant & Co., 1854, 16 D. 998; Fairley *v.* O'Halloran, 1855, 18 D. 78.

person through the fault of the defenders, to his loss, injury, and damage?"

It is, of course, necessary that relevant averments should be proved before the pursuer can obtain a verdict.[1]

(2) *Particular Issues.*—A particular issue is usually required—

(i.) *Where there is a Negligent Exercise of Statutory Powers.*—Thus where it was averred that a railway company, in carrying out a private Act of Parliament, had unskilfully constructed a sewer with the result that the pursuer's property had been damaged, these averments were put into the issue.[2]

(ii.) *Where the Pursuer Founds upon a Special Averment.*—Thus where a pursuer averred that he was at a railway station "for the purpose of meeting a passenger" when he was hurt, he was required to put these words in the issue.[3]

(iii.) *Where the Defender puts forward the Defence which a General Issue of the Pursuer will not Disclose.*—Thus where a railway company averred that the pursuer was injured whilst he was travelling without a ticket, the pursuer was compelled to put into the issue the fact that he was travelling as a passenger;[4] where a defender denied the authority of his servant to do a thing which resulted in loss to the pursuer, the latter was required to put into the issue words which sharply raised the question of the scope of the employment of the defender's servant;[5] and where the defender was successful in showing that the action was founded on breach of contract and not on fault, the fact that it was in breach of contract required to be brought to the notice of the jury in the issue.[6]

(3) Plurality of Parties.—(a) *Several Pursuers.*—Separate individuals having community of interest may sue in one action,[7] but they must take separate issues.[8] Where, however, several pursuers sue in one action in respect of the death of a relative,[9] while they must sue

[1] Crannie *v.* Glengarnock Iron and Steel Co., Ltd., 1908, 16 S. L. T. 646.

[2] M'Bride *v.* Caledonian Rly. Co., 1894, 21 R. 620.

[3] Wilson *v.* North British Rly. Co., 1873, 1 R. 172. See also Conroy *v.* A. & J. Inglis, 1895, 3 S. L. T. 25; Scott's Trs. *v.* Moss, 1889, 17 R. 32; Shaw *v.* Burns, 1911, S. C. 537.

[4] Hamilton *v.* Caledonian Rly. Co., 1856, 18 D. 999; Little *v.* North British Rly. Co., 1877, 15 S. L. R. 12. See also Scoullars *v.* Crawford and Fulton, 1868, 6 M. 1128.

[5] Maxwell *v.* Caledonian Rly. Co., 1898, 25 R. 550; Wood *v.* North British Rly. Co., 1899, 1 F. 562; Ellis *v.* National Free Labour Association, 1905, 7 F. 629.

[6] Dickie *v.* Amicable Property Investment Building Society, 1911, S. C. 1079.

[7] Killin *v.* Weir, 1905, 7 F. 526.

[8] Harkes *v.* Mowat, 1862, 24 D. 701; Mitchell *v.* Grierson, 1894, 21 R. 367.

[9] Smith *v.* Wilsons and Clyde Coal Co., 1893, 21 R. 162; Pollok *v.* Workman, 1900, 2 F. 354.

each for a separate sum,[1] the case can be tried on a single issue, with separate schedules corresponding to the several conclusions.[2]

Where parties pursuing are only nominally more than one, as where a sole partner of a firm sues on behalf of his firm and on his own behalf, one issue is all that is required.[3]

(b) *Several Defenders.*—If several defenders are sued on the ground of the same delict or *quasi*-delict, one general issue against all is sufficient.[4] If, however, there is a doubt regarding the liability of any of several defenders, a single general issue against all the defenders may be taken with the addition of "or one or other and which of them."[5] Where an agent and his client are sued in one action for damages for the wrongous use of diligence, separate issues should be taken against each, and the full amount of damages is inserted in each schedule.[6]

(c) *Several Pursuers and Defenders.*—Where an action of reduction of an assignation was brought by a married woman and her husband against two parties, an issue was allowed in the following terms:—"Whether the said document was obtained from the pursuers, or one or other, and which of them, through fraudulent misrepresentation on the part of the defenders, or either of them, in regard to the nature and purpose thereof?"[7]

(4) SCHEDULES.—(a) *Schedule of Damages.*—This is a statement at the end of the issue or issues of the amount of the damages claimed by a pursuer, either stated as a lump sum or split up into portions. A pursuer may have a single schedule or more according to circumstances. In the ordinary case where a pursuer sues in respect of a single wrong there is one schedule, and the amount therein corresponds to the amount sued for. A pursuer may, however, sue in respect of separate wrongs done by the same defender, and may thus have several issues and a schedule of damages in respect of each issue corresponding to the

[1] Gray *v.* Caledonian Rly. Co., 1912, S. C. 339.

[2] M'Phail *v.* Caledonian Rly. Co., 1903, 5 F. 306.

[3] Smith & Co. *v.* Taylor, 1882, 10 R. 291.

[4] M'Cosh *v.* M'Cosh, 1832, 10 S. 579; Palmer *v.* Wick, etc., S.S. Co., Ltd., 1894, 21 R. (H. L.) 39, at p. 42.

[5] Rattray *v.* Tayport Patent Slip Co., 1866, 4 M. 499; Jack *v.* Fleming, 1891, 19 R. 1; Murdison *v.* Scottish Football Union, 1896, 23 R. 449; M'Innes *v.* Ayr Harbour Trs., 1902, 5 F. 20; Goodall *v.* Forbes, 1909, S. C. 1300. See, however, Adie *v.* Gowans and Ferguson, 1847, 9 D. 495; Cooper *v.* Brown and The Rosebank Foundry Co., 1893, 1 S. L. T. 44; Dakers *v.* Tharsis, etc., Co., 1889, 27 S. L. R. 230; Wick, etc., S.S. Co. *v.* Palmer, 1893, 20 R. 275.

[6] Inglis *v.* M'Intyre, 1861, 23 D. 1240; Smith & Co. *v.* Taylor, 1882, 10 R. 291, per Lord President Inglis, p. 299.

[7] M'Whinnie *v.* Johnston and Morrison, 1864, 2 M. 668.

separate conclusions in his summons.[1] He may again sue for a lump sum in respect of several wrongs done him at the same time, as by several slanders in the same letter. In such a case he has separate issues corresponding to the separate wrongs, but he may put in a single schedule containing the lump sum, and the jury may award him the whole of that sum in respect of one of the issues.[2]

There may be *two schedules* in respect of *one wrong*, as where a pursuer sues under an Act of Parliament or alternatively at common law, the sums which he claims under statute or common law respectively being put in different schedules.[3]

It has been held, however, that in an action at common law or alternatively under the Employers' Liability Act, the pursuer may put in a single schedule containing the larger sum to which he might be found entitled.[4] An action under the last-mentioned Act is now incompetent in the Court of Session.

Sometimes in the schedule appear the items of which the sum-total of damages is made up.[5]

(b) *Schedule of Reference.*—Where the subject of the inquiry relates to a lengthy document or documents which require to be particularly founded on in the issue or issues, it is usual, instead of embodying them in the issue or issues, to append them in the form of a schedule. Thus—"Whether the defender wrote and sent to the pursuer a letter in the terms contained in the schedule hereto annexed," etc.[6]

(5) *Privilege.*—Where a defence of privilege is set up in any action of damages the inclusion or non-inclusion of the words "maliciously and without probable cause" in the issue depends upon the averments and admissions of the pursuer. If it is clear from the latter's averments and admissions that the occasion is privileged, malice and want of probable cause must be put in the issue.[7] If they do not disclose privilege, these words are omitted; but if privilege emerges at the trial the pursuer will require to prove malice and want of probable cause,[8] that is, if he has properly averred them on record, but not otherwise.[9]

[1] Douglas *v.* Main, 1893, 20 R. 793.

[2] Falconer *v.* Docherty, 1893, 20 R. 765.

[3] M'Sorley *v.* Steel Co. of Scotland, 1893, 20 R. 722; Goudie *v.* Paul & Sons, 1894, 22 R. 1.

[4] Henderson *v.* John Watson, Ltd., 1892, 19 R. 954.

[5] Broadwood *v.* Hunter, 1855, 17 D. 1139; Hill *v.* Kinloch, 1856, 18 D. 722.

[6] Mackay *v.* M'Cankie, 1883, 10 R. 537.

[7] Dundas *v.* Livingstone & Co., 1900, 3 F. 37.

[8] Reid *v.* Coyle, 1892, 19 R. 775; Milne *v.* Smiths, 1892, 20 R. 95, per Lord M'Laren, p. 100; M'Callum *v.* M'Diarmid & Co., 1900, 2 F. 357.

[9] Ingram *v.* Russell, 1893, 20 R. 771, per Lord President Robertson, p. 777, and Lord M'Laren, p. 778; Buchanan *v.* Corporation of Glasgow, 1905, 7 F. 1001.

"Want of probable cause" are not appropriate words in a simple action of slander.[1] They are appropriate, however, where the cause of action is giving false information to the police.[2]

(6) *Innuendo.*—Statements not defamatory in themselves may be innuendoed to have a sinister meaning. If so, the innuendo must not only be condescended on in the record but also put in the issue.[3] The issue may be put in the form of a single question, thus—Whether the defender said or wrote . . . meaning thereby . . .?[4] or, as two questions, thus—Whether the defender said or wrote . . .? and, Whether said statement falsely and calumniously meant . . .?[5] Alternative innuendoes may be allowed, if quite distinct and kept separate,[6] but each innuendo must amount to defamation, otherwise the whole issue will be disallowed.[7] Two innuendoes founded on the same statement may go into an issue.[8] A pursuer may innuendo certain points of a defamatory statement, and put these alone to the jury, but the defender is entitled to insist upon the whole statement being put to the jury so that they may judge of it as a whole.[9]

It is only the innuendo condescended on that is allowed to be put in issue.[10]

(7) *Conjoined Actions.*—Where the same pursuer is suing different defenders in separate actions for the same wrong, and the actions are conjoined, only one issue is necessary—"Whether, etc. . . . the pursuer was injured in her person through the fault of the defenders, or either and which of them?" etc.[11]

(8) *Where Liability is Admitted.*—The pursuer is entitled in such a case to a general issue in the ordinary form.[12]

[1] Marianski *v.* Henderson, 1841, 3 D. 1036; Webster *v.* Paterson & Sons, 1910, S. C. 459, per Lord President Dunedin.

[2] Milne *v.* Smiths, 1892, 20 R. 95, per Lord M'Laren, p. 100.

[3] Scoullar *v.* Gunn, 1852, 14 D. 920; Stephen *v.* Paterson, 1865, 3 M. 571; Milne *v.* Smiths, 1892, 20 R. 95; James *v.* Baird, 1915, S. C. 23.

[4] Williamson *v.* M'Cann, 1908, 16 S. L. T. 221. See also Ingram *v.* Russell, 1893, 20 R. 771.

[5] Stewart *v.* Hannah, 1905, 8 F. 107. See also Crabbe and Robertson *v.* Stubbs, Ltd., 1895, 22 R. 860, at p. 866.

[6] M'Culloch *v.* Litt, 1850, 13 D. 334.

[7] M'Laren *v.* Robertson, 1859, 21 D. 183, at p. 186.

[8] Oliver *v.* Laidlaw, 1895, 3 S. L. T. 142.

[9] Powell *v.* Long, 1896, 23 R. 534; Crabbe and Robertson *v.* Stubbs, Ltd., 1895, 22 R. 860; Costa *v.* Lumley, 1907, 15 S. L. T. 230; Smith *v.* Walker, 1912, S. C. 224, per Lord President Dunedin, p. 227.

[10] James *v.* Baird, 1915, S. C. 23.

[11] Neil *v.* The Edinburgh and Leith Tramways Co. and John Player, 1903, 10 S. L. T. 524.

[12] Hillcoat *v.* Glasgow and South-Western Rly. Co., 1907, 15 S. L. T. 433; Black *v.* North British Rly. Co., 1908, S. C. 444.

(9) "*In Consequence of*."—It is not in every case that the consequence of the act of the defender will be allowed to be set forth in the issue, as the consequence may be of quite an unlooked-for character, in which case the defender would not be liable.[1]

(10) *Number of Issues*.—Where there are separate pursuers with regard to the same wrong each must take a separate issue,[2] except where they are suing in respect of the death of a relative.[3]

The same pursuer cannot take separate issues in an action of damages for slander and for a subsequent false charge to the police.[4] If, however, there has been a repetition of the slander to members of the public, he may take a separate issue.[5] Where a pursuer sues at common law or alternatively under the Employers' Liability Act, he only takes one issue.[6] An action under the last-mentioned Act is now incompetent in the Court of Session.

Where a pursuer sues in the same action in respect of separate wrongs done by the same defender, he takes a separate issue for each wrong.[5] Thus a pursuer may have separate issues in an action of breach of promise and seduction;[7] in an action arising out of separate slanders in the same letter;[8] and in respect of illegal seizure and reception, and of illegal detention in an asylum.[9]

A pursuer suing several defenders for the same wrong may take one issue.[10]

2. Issues in Particular Cases.—(1) *Apprehension and Detention*.

(a) *By Police Constables*.—

Whether, on or about , the said James M'Corriston and Malcolm M'Phee, maliciously and without probable cause, apprehended the pursuer at or near the house of her mother at , and conveyed her to the Cranstonhill Police Office in Glasgow, to the loss, etc.[11]

Where police constables "wrongfully and with unnecessary force

[1] Shaw *v.* Burns, 1911, S. C. 537.

[2] Harkes *v.* Mowat, 1862, 24 D. 701; Mitchell *v.* Grierson, 1894, 21 R. 367.

[3] M'Phail *v.* Caledonian Rly. Co., 1903, 5 F. 306.

[4] M'Meekin *v.* Russell and Tudhope, 1881, 8 R. 587; Gray *v.* Maitland, 1896, 4 S. L. T. 38.

[5] Douglas *v.* Main, 1893, 20 R. 793.

[6] M'Sorley *v.* Steel Co. of Scotland, 1893, 20 R. 722; Goudie *v.* Paul & Sons, 894, 22 R. 1.

[7] Paton *v.* Brodie, 1857, 20 D. 258; Forbes *v.* Wilson, 1868, 6 M. 770.

[8] Falconer *v.* Docherty, 1893, 20 R. 765.

[9] Mackintosh *v.* Smith and Lowe, 1864, 2 M. 389.

[10] M'Cosh *v.* M'Cosh, 1832, 10 S. 579; Goodall *v.* Forbes, 1909, S. C. 1300.

[11] Young *v.* Glasgow Mags., 1891, 18 R. 825, at p. 830. See also Leask *v.* Burt, 1893, 21 R. 32.

and violence" apprehended the pursuer, these words were substituted for "maliciously and without probable cause."[1]

Where the averments of the pursuer disclosed a case of such wrongful and unreasonable conduct on the part of the defenders that their actings could not be held to be privileged, the Court held it unnecessary to insert malice and want of probable cause.[2]

For form of issue where apprehension made under the powers of the Glasgow Police Act, 1866.[3]

(b) *By Defender's Servant.*—

Whether, on or about , the pursuer was wrongfully, maliciously, and without probable cause arrested and placed in irons by the defenders' servants, acting within the scope of their employment, etc.[4]; or,

Whether, on or about , the defender, or his manager acting within the scope of his authority, wrongfully and illegally detained the pursuer as a prisoner for three hours or thereby, etc.[5]; or, preferably,

Whether, on or about , the defender, by his general manager, etc.[6]

(c) *In Meditatione Fugæ.*—

Whether, on or about , the pursuer was wrongfully apprehended at or near Coatbridge on an application at the instance of the defender Robert Russell against him as *in meditatione fugæ*, and was thereafter brought before the Sheriff-Substitute of Lanarkshire at Airdrie, under the said application, and wrongfully incarcerated in the prison of Airdrie on said , and detained there as a prisoner till the following day by virtue of a warrant granted by the said Sheriff-Substitute, to the loss, injury, and damage of the pursuer?[7]

(2) *Assault.*—Where the assault is by the defender himself:—

Whether, on or about , in or near , the defender assaulted the pursuer, to the loss, injury, etc.[8]

Where the assault is by the defender's servant:—

Whether, on or about , and in or near , the pursuer's

[1] M'Gilvray *v.* Main, 1901, 3 F. 397.

[2] Harvey *v.* Sturgeon, 1912, S. C. 974.

[3] Shields *v.* Shearer, 1913, S. C. 1012; affd. 1914, S. C. (H. L.) 33.

[4] Coutts and Park *v.* MacBrayne, 1910, S. C. 386. See also Hill *v.* North British Rly. Co., 1903, 11 S. L. T. 103; *cp.* Wood *v.* North British Rly. Co., 1899, 1 F. 562.

[5] Mackenzie *v.* Young, 1902, 10 S. L. T. 231. See also Mackenzie *v.* Cluny Hill Hydropathic Co., Ltd., 1908, S. C. 200.

[6] Ellis *v.* National Free Labour Association, 1905, 7 F. 629, per Lord President Dunedin, p. 632.

[7] M'Meekin *v.* Russell and Tudhope, 1881, 8 R. 587.

[8] Wilson *v.* Bennett, 1904, 6 F. 269. See also M'Laren *v.* Robertson, 1859, 21 D. 183.

son received injuries, from the effect of which he died, through the fault of the defenders, to the loss, injury, etc.;[1] or

Whether, on or about , and in or near , the pursuer was assaulted by and another servant of the defender, whose name is unknown to the pursuer, while acting in the course of their employment by the defender, to the loss, injury, etc.[2]; or,

Whether, on or about , and on or near , the defender, by his servant, assaulted the pursuer, etc.[3]

(3) *Asylum, Detention in.*—

Whether the defenders, or either and which of them, did wrongfully and illegally detain the pursuer in the private madhouse kept by them at Saughton Hall, in the parish of St. Cuthbert's and county of Edinburgh, from until , or during any part of said period, to the loss, etc.[4]

The pursuer is also entitled to a separate issue for illegal seizure and reception, but such an issue must be tried in the same case as the former issue.[4]

(4) *Bankruptcy Proceedings.—Sequestration.*—

Whether during the months of August, September, and October 1881 the defenders wrongfully, maliciously, and without probable cause applied for, procured, and maintained sequestration of the estates of , to the loss, etc.[5]

Where the petition is quite regular, the issue is as above; where it is irregular, "maliciously and without probable cause" may be omitted.[5]

(5) *Breach of Promise of Marriage and Seduction.*—A pursuer averring breach of promise of marriage and seduction and suing for a lump sum of damages is entitled to an issue on each head with a separate schedule of damages attached to each.[6]

(a) *Breach of Promise.*—

Whether between the month of July 1895 and the month of January 1900, both inclusive, the defender courted the pursuer for his wife, and promised and engaged to marry her and whether the defender has wrongfully failed to implement the said promise, etc.[7]

[1] Hanlon *v.* Glasgow and South-Western Rly. Co., 1899, 1 F. 559.

[2] Cook *v.* Paxton, 1910, 48 S. L. R. 7.

[3] Ellis *v.* National Free Labour Association, 1905, 7 F. 629, per Lord President Dunedin, p. 632.

[4] Mackintosh *v.* Smith and Lowe, 1864, 2 M. 389.

[5] J. & W. Kinnes *v.* Adam & Sons, 1882, 9 R. 698.

[6] Paton *v.* Brodie, 1857, 20 D. 258; Forbes *v.* Wilson, 1868, 6 M. 770.

[7] Stirling *v.* Colquhoun, 1900, 8 S. L. T. 17. See also Colvin *v.* Johnstone, 1890, 18 R. 115.

(b) *Seduction by Promise of Marriage.*—

Whether between the months of January and May 1904 the defender courted the pursuer and proposed intention to marry her, and whether by means of these professions the defender, in or about the month of April 1904, seduced the pursuer and prevailed upon her to permit him to have carnal intercourse with her, etc.[1]

(c) *Seduction by an Employer.*—

Whether between October 1897 and March 1901 the defender seduced the pursuer and prevailed upon her to permit him to have carnal connection with her?[2]

This issue would not now be considered to be in proper form, and it would be necessary to put into the issue the methods employed by the defender to induce the pursuer's consent.[3]

(d) *Seduction of a Married Woman.*—

Whether between the 14th December 1853 and April 1855 the defender did seduce and commit adultery with , then the wife of the pursuer, in the house at Irvine occupied by her, and did maintain an adulterous connection with her in said house, or elsewhere in Irvine, or in the neighbourhood thereof, to the loss, etc.[4]

(6) *Diligence and Abuse of Process.*—(a) *Interdict.*—

Whether the defenders, by means of an interdict obtained by them against the pursuer on or about , wrongfully prevented the pursuer from proceeding with building operations then in course of being executed by him on his premises in or near , to the loss, etc.[5]

An averment of malice and want of probable cause is not necessary in cases of ill-founded interdicts.[5]

(b) *Poinding.*—

Whether, on or about , the defender, Robert M'Intyre, wrongfully caused a poinding to be executed of effects belonging to the pursuer, and a warrant of sale thereof to be issued, notwithstanding a due tender by the pursuer of payment of the debt, for recovery of which the diligence was used, to the loss, etc.[6]

[1] Cathcart *v.* Brown, 1905, 7 F. 951. See also Walker *v.* M'Isaac, 1857, 19 D. 340; Forbes *v.* Wilson, 1868, 6 M. 770; Gray *v.* Brown, 1878, 5 R. 971.

[2] Gray *v.* Miller, 1901, 39 S. L. R. 256.

[3] Brown *v.* Harvey, 1907, S. C. 588.

[4] Glover *v.* Sampson, 1856, 18 D. 609. See also Macdonald *v.* Macdonald, 1885, 12 R. 1327.

[5] Kennedy *v.* Police Commissioners of Fort-William, 1877, 5 R. 302.

[6] Inglis *v.* M'Intyre, 1861, 23 D. 1240. There was also an issue against the law agent.

(c) *Arrestment.*—

Whether, on or about , the defender, maliciously and without probable cause, used, or caused to be used, against the pursuer an arrestment in the hands of for the sum of £ , and caused the same to be continued until on or about , to the loss, etc.[1]

(d) *Sequestration for Rent.*—

Whether, on or about , the defender wrongfully sequestrated the effects, or a portion thereof, belonging to the pursuer in the house occupied by him at in security of the rent of said house for the half year from to , to the loss, etc.[2]

Whether, on or about , the defender wrongfully procured from the Sheriff-Substitute presiding in the Small Debt Court at Dunblane a warrant to search for and carry back from premises belonging to the pursuer at Gartmore to premises belonging to the defender in Thornhill the furniture, goods, and effects of the pursuer, and particularly [*detail goods*] all the property of the pursuer; and whether the defender wrongfully caused said warrant to be executed, to the loss, etc.[3]

(e) *Taking Decree after Debt Paid.*—

Whether, on or about , the defenders wrongfully and maliciously caused a decree in absence at the instance of for the sum of £ and expenses to be taken against the pursuer in the Court at Glasgow, to the loss, etc.[4]

(f) *Breach of Undertaking not to Proceed.*—(i.) *Taking Decree.*—

Whether, on or about , the defenders wrongously, and in breach of their agreement with the pursuers not to do so, took decree in absence against the pursuers in the Debts Recovery Court at Edinburgh, to the loss, etc.[5]

(ii.) *Charging upon Decree.*—

Whether defenders, having on or about obtained a decree against the pursuer for the sum of £28, 10s. 7d., on or about wrongfully and in breach of an agreement, the terms of which are contained in the letter printed in the schedule hereunto annexed, charged the pursuer to make payment of the sums contained in said decree, to the loss, etc.[6]

[1] Gordon *v.* British and Foreign Metaline Co., 1886, 14 R. 75.

[2] Watson *v.* M'Culloch, 1878, 5 R. 843. See also Gilmour *v.* Craig, 1908, 45 S. L. R. 362.

[3] Jack *v.* Black, 1911, S. C. 691, at p. 694 (note).

[4] Rhind *v.* Kemp & Co., 1893, 21 R. 275. This was an action against debt collectors.

[5] Gibson & Co. *v.* Anderson & Co., 1897, 24 R. 556. See also Gray *v.* Mackintosh & Co., 1906, 14 S. L. T. 403.

[6] Sturrock *v.* Welsh and Forbes, 1890, 18 R. 109, at p. 115.

(7) *Dismissal.*—

Whether, on or about 8th June 1896, the defender wrongfully dismissed the pursuer from his employment, to the loss, etc.[1]

(8) *Negligence.*—(a) *Personal Injury.*—(i.) *Ordinary Case.*—In the ordinary case of personal injury to a stranger, where the defender does not raise any special point in defence, the form of issue is a general issue, as follows:—

Whether, on or about , and at or near , the pursuer was injured in his person through the fault of the defender, to the loss, injury, and damage of the pursuer?

Damages laid at £ .

This form of issue has been held sufficient for the trial, *inter alia*, of the following actions:—

(*a*) Action in respect of nervous shock.[2]

(*b*) Action against an owner of property in respect of its defective repair,[3] faulty construction,[4] and faulty management.[5]

(*c*) Where liability is admitted.[6]

(*d*) Railway cases, where there has been invitation to alight,[7] and a crowded platform.[8]

(ii.) *Master and Servant.—At Common Law.*—

Whether, on or about , and at or near , the pursuer, while in the employment of the defenders, was injured in his person through the fault of the defenders, to the loss, injury, and damage of the pursuer?[9]

(iii.) *Landlord and Tenant.*—

Whether, on or about , the pursuer, while tenant under the defenders of the dwelling-house , was injured in his person by falling down the stair in said dwelling-house through the fault of the defenders, to the loss, etc.[10]

[1] Campbell *v.* M'Lachlan, 1896, 4 S. L. T. 143.

[2] Gilligan *v.* Robb, 1910, S. C. 856. See also Cooper *v.* Caledonian Rly. Co., 1902, 4 F. 880; Wallace *v.* Kennedy, 1908, 16 S. L. T. 485.

[3] Mathieson's Tutor *v.* Aikman's Trs., 1910, S. C. 11.

[4] Gibb *v.* Edinburgh and District Tramways Co., Ltd., 1912, S. C. 580.

[5] Bett *v.* Dalmeny Oil Co., 1905, 7 F. 787.

[6] Black v. North British Rly. Co., 1908, S. C. 444; Hillcoats *v.* Glasgow and South-Western Rly. Co., 1907, 15 S. L. T. 433.

[7] Neilson *v.* North British Rly. Co., 1907, S. C. 272.

[8] Macgregor *v.* Glasgow District Subway, 1901, 5 F. 1131.

[9] Robertson *v.* Primrose & Co., 1910, S. C. 111, at p. 112; Conroy *v.* A. & J. Inglis, 1895, 3 S. L. T. 25.

[10] Dickie *v.* Amicable Property Investment Building Society, 1911, S. C. 1079, at p. 1086.

(iv.) *Medical Man and Patient.*—

Whether the defender, in violation of his duty to the pursuer, negligently failed to give sufficient and proper attention and care to the pursuer as his patient, in consequence of which the pursuer's finger had to be amputated, to the loss, etc.[1]

(v.) *Custodier.*—

Whether, on or about , the pursuer was bitten by a dog which had been placed in the defenders' custody for transit from Kelso to Perth, or elsewhere, through the fault of the defenders, to his loss, etc.[2]

(vi.) *Public Authority Removing Patient to Hospital.*—

Whether, on or about , the defenders wrongfully removed , the pursuer's son now deceased, from the pursuer's house in , to his loss, etc.[3]

(b) *Damage to Property.*—

Whether the operations of the defenders on the ground belonging to them and abutting on or near the Fleshmarket Close, carried on in or about , damaged the heritable subjects situated at , to the loss, etc.[4]

Whether, on or about the period from 1st January to 10th May 1890, the defenders carried on operations for the construction of a sewer in M'Alpine Street, Glasgow, opposite the pursuer's property there, in an unskilful and negligent manner, in consequence of which the pursuer's property was injured, to his loss, injury, and damage?[5]

The last-mentioned issue was adjusted where the defenders had statutory powers to construct the sewer in question.

(9) *Nuisance.*—(a) *Smoke, etc.*—

Whether during the years 1860, 1861, and 1862, or part thereof, there were thrown off from the defenders' works near Portobello, for converting or hardening iron rails, smoke, dust, and gaseous discharges, by which the pursuers' house and grounds at Baileyfield, near Portobello, and in the vicinity of said works, were deteriorated, and the comfort of their occupation impaired, to the nuisance of the pursuers, and to their loss, etc.[6]

[1] Farquhar *v.* Murray, 1901, 3 F. 859. See also Edgar *v.* Lamont, 1914, S. C. 277.

[2] Gray *v.* North British Rly. Co., 1890, 18 R. 76.

[3] Mitchell *v.* Mags. of Aberdeen, 1893, 20 R. 253.

[4] Edinburgh Railway Access and Property Co. *v.* John Ritchie & Co., 1903, 5 F. 299.

[5] M'Bride *v.* Caledonian Rly. Co., 1894, 21 R. 620.

[6] Cooper and Wood *v.* North British Rly. Co., 1863, 1 M. 499, at p. 500; 2 M. 116. See also Gardner *v.* Fraser, 1860, 22 D. 1501.

(b) *Pollution of River.*—

Whether between and the defenders, the first-mentioned firm of , did by discharging refuse or impure matter at or near their mills of Bank Mill, Valleyfield Mill, and Low Mill, or any of them, pollute the water of the stream or river called the North Esk, to the nuisance of the pursuers or their authors as proprietors of their respective lands aforesaid, or of one or more of them?[1]

There were separate issues against each defender.

(c) *Under the Locomotive Act,* 1865.—

Whether, on or about, etc., the defender's locomotive and trucks as used by him constituted a nuisance on the public highway, and were a source of danger to persons lawfully using the same; and whether, by and through the use by the defender, or those for whom he is responsible, of his said engine and trucks, the pursuer was injured in his person and property, to his loss, etc.[2]

(10) *Prescriptive Possession.*—(a) *Public Right-of-Way.*—

Whether for forty years and upwards, or from time immemorial prior to 1892, there has been a public road or right-of-way for carts, horses, cattle, and foot passengers, or any and which of them, leading from Culter in the county of Lanark, in a south-westerly direction past Birthwood to Lamington, in said county, as shown and coloured red on the plan No. 36 of process herewith produced, and marked thereon with the letters, etc.[3]

(b) *Servitude Road.*—

Whether for forty years prior to the year 1892, or from time immemorial, the pursuers in the issues, as proprietors of part of the lands and estate of Lamington, and their predecessors and authors in the said lands, have by themselves, and their tenants, servants, and occupants, possessed a road for carting, driving cattle and horses, and walking, or any and which of these purposes, in or near the line coloured red on the plan No. 37 of process herewith produced, etc.[4]

(c) *Heritable Property.*—

Whether, for forty years or upwards prior to January 1842, the pursuer, his predecessor, and authors, have possessed as their property the angular piece of ground marked A, B, C, D, F, on the plan No. 168 of process, or any part thereof?[5]

[1] Duke of Buccleuch *v.* Cowan, 1866, 4 M. 475, at p. 481. See also Ewen *v.* Turnbull's Trs., 1857, 19 D. 513; Earl of Southesk *v.* Inch Bleaching Co., 1881, 8 R. 573.

[2] Hay *v.* Waldegrave Leslie, 1896, 4 S. L. T. 124.

[3] Paterson *v.* Airdrie and Coatbridge Water Co., 1893, 20 R. 370. See also Robertson *v.* Duke of Atholl, 1905, 8 F. 150, at p. 156 (note).

[4] Malcolm *v.* Lloyd, 1885, 12 R. 843; Paterson *v.* Airdrie and Coatbridge Water Co., 1893, 20 R. 370.

[5] Mushet *v.* Duke of Buccleuch, 1856, 18 D. 322.

(11) *Public Odium and Contempt.*—

Whether, on the occasions aftermentioned, or on one or other of them, viz.: (1) on or about , at a meeting of the School Board of St. Andrews, held in the Town Hall of St. Andrews, in the presence and hearing of and others; and (2) on or about , in the Town Hall of St. Andrews, and in the presence and hearing of and others, the defender stated that the pursuer, at a recent meeting of the Governors of Madras College, St. Andrews, had stated that the pupils from the Board School or the working men's children from the Burgh School of St. Andrews, if admitted to Madras College, would contaminate the genteel children who were there, or made statements of similar import and effect; whether the said statements are false, and were made with the design of exposing, and did expose, the pursuer to public hatred and contempt, to his loss, injury, and damage?[1]

It being admitted [*here follow newspaper articles with the dates of publication*]; whether the said articles, passages, and verses are of and concerning the pursuer; and were published in pursuance of an intention to expose, and did calumniously and injuriously expose, the pursuer to public hatred, contempt, and ridicule, to his loss and damage?[2]

(12) *Reduction.*—(a) *Total Incapacity of the Granter of a Deed.*—

Whether the [*describe deed and No. of process*] is not the deed of the said [*name of granter*]?[3]

Whether the pretended trust disposition and settlement and pretended codicil are not the deeds of the late William Martin?[4]

(b) *Essential Error.*—

Whether the pursuers, in granting the disposition dated on or about the 12th day of November 1874, of which No. of process is an extract, were under essential error as to the substance and effect of said deed?[5]

(c) *Essential Error induced by Misrepresentation.*—

Whether the pursuer signed the [*describe deed*] under essential error as to a material part of the contract, induced by the representations of the defender?[6]

(d) *Fraudulent Representation.*—

Whether the pursuers, or any of them, were induced to execute the

[1] Paterson *v.* Welch, 1893, 20 R. 744.

[2] Cunningham *v.* Phillips, 1868, 6 M. 926. See also Waddell *v.* Roxburgh, 1894, 21 R. 883; M'Laughlan *v.* Orr, Pollock & Co., 1894, 22 R. 38; Lever Bros., Ltd. *v.* *The Daily Record*, Glasgow, Ltd., 1909, S. C. 1004.

[3] Morrison *v.* Maclean's Trs., 1862, 24 D. 625, at p. 627; Munro *v.* Strain, 1874, 1 R. 522; Rooney *v.* Cormack, 1895, 22 R. 761; Williams *v.* Philip, 1907, 15 S. L. T. 396.

[4] Spring *v.* Martin's Trs., 1910, S. C. 1087.

[5] M'Laurin *v.* Stafford, 1875, 3 R. 265. See also Collie *v.* Pyper, 1891, 18 R. 419.

[6] Hart *v.* Fraser, 1907, S. C. 50.

lease dated, etc., by fraudulent representations made by the defender, or by his son, George Gardner, writer in Glasgow, on his behalf?[1]

(e) *Facility—Impetration.*—

Whether at the date of the deed No. of process the said Mrs. Robina Jarvie or White was weak and facile in mind and easily imposed upon; and whether the defender Alexander White, taking advantage of said weakness and facility, did by fraud or circumvention impetrate and obtain the said deed from the said Robina Jarvie or White, to her lesion?[2]

(f) *Force and Fear.*—

Whether the bill of exchange No. 6 of process was obtained by Madame Lynch . . . from the said William Stewart by force and fear without his having received any value therefor?[3]

(g) *Where the Granter of a Deed did not Subscribe before, or Acknowledge his Subscription to, Witnesses.*—

Whether Malcolm M'Lean and John Gordon, the alleged witnesses to the said trust disposition and settlement, or either of them, did not see the said William Skeoch subscribe the same, and did not hear him acknowledge his subscription?[4]

(13) *Slander by Defender Himself.*—(a) *Ordinary Spoken Slander.*—(i.) *Words Set Forth in Issue.*—

Whether, on or about , in or near in the presence and hearing of , , , and , or one or more of them, the defender, , falsely and calumniously said of and concerning the pursuer, that he was "a noted blackguard," "a low scamp," and "that he went after every good-looking girl for the purpose of seducing her," or did use words of a like import and effect of and concerning the pursuer, to his loss, injury, and damage?[5]

(ii.) *Words Set Forth in Schedule.*—

Whether the defender, in a speech which she made or read at a meeting of the contributors of the Royal Infirmary held in Edinburgh on the , did, in the presence and hearing of , , , , and others, use and utter the words and sentences set forth in the schedule hereto annexed, or part thereof, or words and

[1] Beresford's Trs. *v.* Gardner, 1877, 4 R. 363. See also Hart *v.* Fraser, 1907, S. C. 50.

[2] Jarvie *v.* White, 1877, 14 S. L. R. 666. See also M'Callum *v.* Graham, 1894. 21 R. 824; Rooney *v.* Cormack, 1895, 22 R. 761; Williams *v.* Philip, 1907, 15 S. L. T. 396; Spring *v.* Martin's Trs., 1910, S. C. 1087.

[3] Gelot *v.* Stewart, 1870, 8 M. 649, at p. 651; Young *v.* Healy, 1909, S. C. 687, at p. 688.

[4] Cumming *v.* Skeoch's Trs., 1879, 6 R. 540.

[5] Milne *v.* Smiths, 1892, 20 R. 95, at p. 97. See also A. B. *v.* C. D., 1904, 7 F. 27; Dinnie *v.* Hengler, 1910, S. C. 4.

sentences to that effect; and whether the said words and sentences are, in whole or in part, of and concerning the pursuer, and are false and calumnious, to the loss, injury, and damage of the pursuer?[1]

(iii.) *Slander in a Foreign Language.*—Where words complained of are spoken in a foreign language, not only must they be set forth in the record as having been spoken in that language but their English equivalent must be set forth in the same way as an innuendo is set forth.[2]

(b) *Ordinary Written Slander.*—

Whether, on or about , the defender caused to be written and sent to , a letter in the terms set forth in the appendix hereto, marked A, which letter was received by the said ? Whether the same is of and concerning the pursuer, and is false and calumnious, to the loss, injury, and damage of the pursuer?[3]

Whether the letter contained in the schedule was written and sent by the defenders to Mr. John Shaw, therein designed, and whether said letter is of and concerning the pursuer, and falsely and calumniously charges the pursuer with deliberately and maliciously stabbing defender's horse with a knife, to the loss, injury, and damage of the pursuer?[4]

It is not necessary as a condition of an issue being allowed in an action for written slander that the writing complained of should be produced by the pursuer.[5]

(c) *Where an Innuendo is Required.*—(i.) *Verbal Slander.*—

Whether on one or more occasions during the months of November and December 1888 and January 1889, and in or near the shop then occupied by the defender in and the defender's house at , or in one or other of them, and in the presence and hearing of , the defender falsely and calumniously stated that the defender was an informer, thereby representing that the pursuer was a man who, for the sake of reward, and from sinister and disreputable motives, had betrayed his fellows, and disclosed secrets or given information to the Crown or its Executive against Irishmen and others, to the loss, injury, and damage of the pursuer?[6]

Whether, on or about , and in the pursuer's house at , the defender stated to the pursuer as follows:—"The Company are in no respect liable to you under the policy. I know that it was not an accident in your case at all, and that you fell and sustained your injuries because you

[1] Craig *v.* Jex-Blake, 1871, 9 M. 973.
[2] Bernhardt *v.* Abrahams, 1912, S. C. 748.
[3] Macrae *v.* Sutherland, 1889, 16 R. 476.
[4] M'Callum *v.* M'Diarmid & Co., 1900, 2 F. 357.
[5] Ellis *v.* National Free Labour Association, 1905, 7 F. 629.
[6] Winn *v.* Quillan, 1899, 2 F. 322. See also Jack *v.* Fleming, 1891, 19 R. 1; Leitch *v.* Lyal, 1903, 11 S. L. T. 394; Chisholm *v.* Grant, 1914, S. C. 239; Suzor *v.* Buckingham, 1914, S. C. 299.

were tipsy at the time," or did use words of the like import and effect? Whether said statements or part thereof are of and concerning the pursuer, and falsely and calumniously represent (1) that he had put forward an unfounded claim under said policy with the view of defrauding said Insurance Company; and (2) that, on or about 21st December 1894, he had drunk alcoholic liquor to excess, in consequence of which he fell and sustained injuries, to the loss, injury, and damage of the pursuer?[1]

(ii.) *Written Slander.*—

It being admitted that the defender caused the letters printed in the Appendix, Nos. 1 and 2, to be written and sent to the pursuer and Messrs. A. G. Barr & Co. respectively, whether said letters falsely and calumniously represent that the pursuer, as architect under a contract between the defender and the said Messrs. A. G. Barr & Co., had condemned the defender's work, not because he conscientiously believed it to be disconform to contract, but because of personal spite he entertained towards the defender, to the loss, injury, and damage of the pursuer?[2]

Whether the defender wrote and sent to Dr. Ferguson a letter in the terms contained in the schedule hereto annexed, and whether said letter is of and concerning the pursuer, and falsely and calumniously represents that the pursuer was guilty of gross professional negligence and unskilfulness in his treatment of Mrs. Finlay, to the loss, injury, and damage of the pursuer?[3]

(d) *Privileged Occasion.*—(i.) *Verbal Slander.*—

Whether, on or about , and at or near , the defender, in the presence and hearing of , , and , or one or other of them, did falsely, calumniously, and maliciously say of and concerning the pursuer , or did use words of like import and effect of and concerning the pursuer, to his loss, injury and damage?[4]

(ii.) *Written Slander.*—

Whether, in or about February or March 1900, the defenders wrote and sent to Messrs. Gatti a report in the terms set forth in the schedule hereto; and whether the said report, or part thereof, is of and concerning the pursuer, and is false, calumnious, and malicious, to the loss, injury, and damage of the pursuer?[5]

(e) *Privileged Occasion with Innuendo.*—(i.) *Verbal Slander.*—

Whether, on or about , and in , the defender, in presence and hearing of , , and , mentioned

[1] Oliver *v.* Laidlaw, 1895, 3 S. L. T. 142. See also Mitchell *v.* Grierson, 1894, 21 R. 367.

[2] Crawford *v.* Adams, 1900, 2 F. 987.

[3] Simmers *v.* Morton, 1900, 8 S. L. T. 285. See also Mackay *v.* M'Cankie, 1883, 10 R. 537; R. *v.* S. 1914, S. C., 193.

[4] Neill *v.* Henderson, 1901, 3 F. 387.

[5] Bayne and Thomson *v.* Stubbs, Ltd., 1901, 3 F. 408.

on record, and other members of the Broxburn Co-operative Society, Ltd., or any one or more of them, falsely, calumniously, and maliciously said of and concerning the pursuer, that the pursuer , or used words of the like import and effect, meaning thereby that the pursuer, etc., , to the loss, injury, and damage of the pursuer?[1]

(ii.) *Written Slander.*—

Whether, on or about , the defender wrote and dispatched the letter printed in Schedule II. hereto annexed—whether the statements in said letter are of and concerning the pursuer, and falsely, maliciously, and calumniously represent that the pursuer would dishonestly appropriate money that did not belong to him, to the pursuer's loss, injury, and damage?[2]

(f) *Judicial Slander.*—

It being admitted that the defender, on or about , presented a petition for interdict and damages against the pursuer in the Sheriff Court at Glasgow, and that the condescendence annexed to the petition contains the following statements ; whether the said statements, or part thereof, are of and concerning the pursuer, and false and calumnious, and were maliciously inserted, or caused to be inserted in the said condescendence by the defenders, to the loss, injury, and damage of the pursuer?[3]

Whether, on or about , the defenders maliciously *and without probable cause* presented to the Second Division of the Court a petition for the judicial liquidation of the pursuers, to the loss, injury, and damage of the pursuers? Whether the statements contained in the schedule hereto appended are of and concerning the pursuers, and falsely, calumniously, and maliciously state that the pursuers are insolvent and unable to pay their debts, to the loss, injury, and damage of the pursuers?[4]

It being admitted that the defenders raised an action of damages for £500 in the Sheriff Court of Forfarshire at Dundee at their instance against the pursuer on or about the 18th day of December 1885, and that a record was made up and completed in said action, and it being further admitted that the condescendence annexed to the petition in said Sheriff Court action contains the following passages:— ; whether the said statements, or part thereof, are of and concerning the pursuer, and are false and calumnious, and were maliciously inserted, or caused to be inserted, in the said condescendence, to the loss, injury, and damage of the pursuer?[5]

[1] Williamson *v.* M'Cann, 1908, 16 S. L. T. 221; Suzor *v.* M'Lachlan, 1914, S. C. 306.

[2] Stewart *v.* Hannah, 1905, 8 F. 107. See also James *v.* Baird, 1915, S. C. 23.

[3] Webster *v.* Paterson & Sons, 1910, S. C. 459. In this case Lord President Dunedin observed that the words "want of probable cause" have no relation to an action of slander. See also Marianski *v.* Henderson, 1841, 3 D. 1036. They are appropriate, however, where a person is sued for damages for giving false information to the public authorities. See Milne *v.* Smiths, 1892, 20 R. 95, per Lord M'Laren at p. 100.

[4] The "Seaspray" Steamship Co., Ltd. *v.* Tenant, 1908, 15 S. L. T. 874. See above, *re* "*without probable cause.*"

[5] Gordon *v.* British and Foreign Metaline Co., 1886, 14 R. 75.

It being admitted that and presented a petition to the Court of Session for the appointment of a *curator bonis* to ; it being further admitted that , Esq., Advocate, acted as counsel, and the defender as agent for the said petitioners, and that the petition depended before Lord ; whether, on or about , and within the Parliament House, the said as counsel for the petitioners, in conformity with the instructions of the defender maliciously given, did, in the presence of a great number of persons then in the Court-room, and, among others, in presence and hearing of , , , Esqs., Advocates, or one or more of them, make to the Lord Ordinary a false and calumnious statement, that the pursuer had procured the indorsation of , a lunatic, to a deposit-receipt, etc., to the loss, injury, and damage of the pursuer?[1]

In such cases there must be facts and circumstances averred from which malice can be inferred.[2]

(g) *False Information to the Police.*—

Whether, on or about , the defender maliciously, and without probable cause, caused the pursuer to be apprehended on a charge of theft, and searched by a police officer at Tain, to the loss, etc.[3]

Whether the defenders, on or about , falsely, maliciously, and without probable cause, lodged, or caused to be lodged with the Procurator-Fiscal at Glasgow, a charge or charges of the theft by pursuer of certain gauges, jigs, or other articles which were the property of the defenders, etc.[4]

Whether, on or about , the defender falsely, calumniously, and without probable cause, informed, or caused information to be given to, the Chief Constable of the city of Edinburgh, or one of his subordinate officers, accusing the pursuer of having loitered in or near with the object of doing personal injury to the defender, in consequence of which the pursuer, while standing in or near , was accosted on said date by two police constables and ordered to move on, to the loss, etc.[5]

(h) *Newspaper.*—(i.) *False Notice of Birth.*—

Whether the pursuers were married on 12th July 1901, and whether the defenders, in the issue of the *Scotsman* of 15th August 1901, and in the issue of the *Weekly Scotsman* of 17th August, 1901, printed and published the notice of birth printed in the First Schedule hereto; whether the said notice is of and concerning the pursuer, the said George Morrison, and is false and calumnious, to the loss, injury, and damage of the said pursuer?[6]

[1] Bayne *v.* Macgregor, 1862, 24 D. 1126.

[2] Beaton *v.* Ivory, 1887, 14 R. 1057; Watson *v.* M'Ewan, 1905, 7 F. (H. L.) 109; Campbell *v.* Cochrane, 1905, 8 F. 205.

[3] Urquhart *v.* M'Kenzie, 1886, 14 R. 18. See also Douglas *v.* Main, 1893, 20 R. 793.

[4] Mills *v.* Kelvin and James White, Ltd., 1913, S. C. 521, at p. 522.

[5] Shaw *v.* Burns, 1911, S. C. 537. See also Peffers *v.* Countess of Lindsay, 1894, 22 R. 84, where no criminal charge was made, but a request given to a police constable to arrest the pursuer.

[6] Morrison *v.* Ritchie & Co., 1902, 4 F. 645.

There was a similar issue regarding a subsequent advertisement, and also similar issues by the said pursuer's wife.

(ii.) *Undisclosed Anonymous Correspondent.*—

It being admitted that the defender published in the *Oban Times* of date the 17th October 1891 the letter set forth in the annexed schedule, whether the said letter is of and concerning the pursuer, and falsely and calumniously represents that the pursuer was unfit for his post as teacher of a public school, and that it was the duty of the School Board, in the interest of the ratepayers, to dismiss him from it, to the loss, injury, and damage of the pursuer?[1]

(iii.) *Unfair Report of Judicial Proceedings.*—

Whether, on or about , the defenders published in the *Glasgow Herald* an article or paragraph in the terms of the schedule hereunto annexed; whether the statements therein set forth are of and concerning the pursuers, and falsely and calumniously represent that the pursuers had been or were in financial difficulties and had been or were being financed by means of accommodation bills and advances of money by a person named Smyth, to the loss, injury, and damage of the pursuers?[2]

It being admitted that the defenders printed and published in the *Glasgow Weekly Herald* newspaper of 9th November 1907 the headlines and paragraph contained in the schedule hereto annexed; whether the statements and representations contained in said headlines and paragraph are of and concerning the pursuer, and falsely and calumniously represent that the pursuer had committed adultery with a married woman, to the loss, injury, and damage of the pursuer?[3]

There is no privilege in publishing a fair summary of a closed record which has not been discussed in open Court;[4] nor in publishing a summons which has only been called in Court.[5]

(iv.) *Articles imputing Dishonesty.*—

It being admitted that the defenders printed and published in the issues of the *Daily Record and Mail* newspaper between 6th October and 3rd December 1906, and in the issues of the *Scottish Weekly Record*, between 27th October and 24th November 1906, the matters contained in the schedule hereto annexed, on the respective dates set forth in the said schedule:—Whether the statements therein contained are in whole or in part of and concerning the pursuers, and falsely and calumniously represent that the pursuers, by themselves or in company with others, had been guilty of deceiving the public and traders by dishonest methods and practices in business, to the loss, injury, and damage of the pursuers?[6]

[1] M'Kerchar *v.* Cameron, 1892, 19 R. 383. See also Lumsden *v.* West Lothian Printing and Publishing Co., Ltd., 1905, 7 F. 1006.

[2] Wright and Greig *v.* Outram & Co., 1889, 16 R. 1004; 1890, 17 R. 596.

[3] Pope *v.* Outram & Co., Ltd., 1909, S. C. 230.

[4] Macleod *v.* Lewis Justices of the Peace, 1892, 20 R. 218.

[5] Richardson *v.* Wilson, 1879, 7 R. 237.

[6] Lever Bros., Ltd. *v. The Daily Record*, Glasgow, Ltd., 1909, S. C. 1004. See also Webster *v.* Paterson & Sons, 1910, S. C. 459.

(v.) "*Black List.*"—

Whether, on or about , the defenders wrongfully published in a publication known as *Stubbs' Weekly Gazette* a statement in the terms set forth in the schedule appended hereto? Whether the said statement, in whole or in part, is of and concerning the pursuers, and falsely and calumniously represented that the pursuers were unable to pay their debts, to their loss, injury, and damage?[1]

(vi.) *Injury to Business.*—

Whether in the *Glasgow Evening News and Star* of 10th August 1885 the defender falsely and calumniously printed and published a paragraph of and concerning the Albany Hotel, Glasgow, of which the pursuer was the lessee, in the terms set forth in the schedule hereto annexed, to the loss, injury, and damage of the pursuer?[2]

(vii.) *Slander of Property.*—

It being admitted that the defenders printed and published in the *Glasgow Evening News* of 18th October 1897 a paragraph in the terms set forth in the schedule hereto annexed of and concerning a building in New City Road, Glasgow, belonging to the pursuer; whether the said paragraph was false and calumnious, to the loss, injury, and damage of the pursuer?[3]

(14) *Slander by Defender's Servant.*—

Whether, on or about and in or near , the defenders, by their general secretary and manager, etc.[4]

III. COUNTER ISSUES.—(1) *Generally.*—Formerly counter issues were allowed in a variety of cases, but except in a few exceptional instances a counter issue is only now allowed in order to enable a defender to prove *veritas* in an action of damages for slander. Thus, in defences of contributory negligence;[5] probable cause;[6] privilege;[7] *compensatio injuriarum;*[8] palliation;[9] waiver by apology;[10] or any other defence arising out of the *res gestæ* of the case but not amounting

[1] Hunter & Co. *v.* Stubbs, Ltd., 1903, 5 F. 920. See also Crabbe and Robertson *v.* Stubbs, Ltd., 1895, 22 R. 860; Rarity *v.* Stubbs & Co., 1893, 1 S. L. T. 74.

[2] Macrae *v.* Wicks, 1886, 13 R. 732.

[3] Bruce *v.* J. M. Smith, Ltd., 1898, 1 F. 327.

[4] Ellis *v.* National Free Labour Association, 1905, 7 F. 629; Handasyde *v.* J. Hepworth & Son, Ltd., 1907, 15 S. L. T. 180; Finburgh *v.* Moss' Empires, Ltd., 1908, S. C. 928; Riddell *v.* Glasgow Corporation, 1910, S. C. 693; Adams *v.* James Templeton & Co., 1913, 2 S. L. T. 241; Cumming *v.* Great North of Scotland Rly. Co., 1916, 1 S. L. T. 181.

[5] Donald *v.* Clyde Navigation Trs., 1875, 2 R. 813.

[6] Keay *v.* Wilson, 1843, 5 D. 407; Holehouse *v.* Walker, 1853, 15 D. 665.

[7] Torrance *v.* Leaf, 1834, 13 S. 72; Wright and Greig *v.* Outram & Co., 1889, 6 R. 1004.

[8] Tullis *v.* Makgill-Crichton, 1850, 12 D. 867; Bertram *v.* Pace, 1885, 12 R. 798.

[9] Lowe *v.* Taylor, 1844, 7 D. 117, per Lord Jeffrey, p. 124.

[10] Campbell *v.* Menzies, 1855, 17 D. 1132.

to *veritas*,[1] counter issues are either not required or not allowed. Further, a counter issue will not be granted to instruct the defence that by the law of the country where the alleged wrong took place no action will be allowed.[2]

In a comparatively recent case a counter issue was allowed where a defender pleaded that the pursuer had accepted compensation under the Workmen's Compensation Act,[3] but since that decision the practice has been to dispose of such a plea by a preliminary proof.[4]

A counter issue has been allowed in a case where the defenders pleaded that the pursuer was aware of the conditions on a ticket which he purchased in order to travel, and that these conditions excluded the possibility of his recovering damages for personal injury.[5]

A counter issue of *veritas* has been allowed although the defender on a former occasion wrote a letter of apology admitting that similar statements then made by her were false, and undertaking not to repeat them.[6]

(2) *Counter Issues of Veritas.*—A counter issue must be taken if the defender seeks to justify the statement complained of,[7] or of any material and separable part thereof,[8] by pleading *veritas*.

If the statement complained of is a specific attack upon the pursuer, the defender's counter issue must ask whether the pursuer did the thing of which he is accused. If what is complained of is a general accusation against the pursuer, the defender requires to aver in his defences certain specified instances of the pursuer's conduct, and he may take a general issue, the proof of which, however, is limited to the specific instances on record.[9]

A counter issue of *veritas* may be taken although the defender denies having used the words complained of.[10]

[1] Paul *v.* Jackson, 1884, 11 R. 460, per Lord President Inglis, pp. 463, 464; Shaw *v.* Morgan, 1888, 15 R. 865, per Lord Young, p. 871.

[2] M'Larty *v.* Steele, 1881, 8 R. 435.

[3] Campbell *v.* Caledonian Rly. Co., 1899, 1 F. 887.

[4] Hunter *v.* Darngavil Coal Co., 1900, 3 F. 10; Sinclair *v.* Lochgelly Iron and Coal Co., Ltd., 1905, 13 S. L. T. 103; Buchanan *v.* Alexander Cross & Sons, Ltd. 1911, 2 S. L. T. 33.

[5] Grieve *v.* The Turbine Steamers, Ltd., 1903, 11 S. L. T. 379; Caird *v.* Adam, 1907, 15 S. L. T. 543.

[6] R. *v.* S., 1914, S. C. 193.

[7] Fenton *v.* Currie, 1843, 5 D. 705, per Lord Justice-Clerk Hope, p. 714; Torrance *v.* Weddel, 1868, 7 M. 243.

[8] M'Neill *v.* Rorison, 1847, 10 D. 15, per Lord Moncreiff.

[9] Hunter *v.* MacNaughton, 1894, 21 R. 850; Goodall *v.* Forbes, 1909, S. C. 1300.

[10] Burnet *v.* Gow, 1896, 24 R. 156. See also Mason *v.* Tait, 1851, 13 D. 1347.

(3) *Requisites of a Counter Issue.*—A counter issue must completely meet the whole or a distinct part of the pursuer's issue.[1] If the pursuer does not put in issue all his averments on record, but limits his issue, the defender's counter issue must be similarly limited.[2]

Where there is a general accusation against the pursuer, the specific instances upon which a general counter issue will be granted must have specific reference to the time and place alluded to in the general accusation. Thus a counter issue, that in the year 1851 the pursuer was a poacher, was held incompetent to meet a general accusation that in 1857 the pursuer was a blackguard;[3] and a counter issue that the pursuer a month or two before the statement complained of was uttered had been convicted of a breach of certificate for licensed premises was held incompetent to meet an accusation against the pursuer that "if he was as well known in Edinburgh as I know him, or the people of Dunfermline, he would have been kicked out of the town long ago."[4]

If the statement complained of makes general reference to an occasion when the pursuer did or said something, the defender must particularly condescend in the issue upon a time and place when the pursuer did or said the thing which is the subject of the slander.[5] If, however, the statement complained of referred to a period of time during which the pursuer did or said certain things, a counter issue in equally general terms will be allowed, although in the record specific instances have been given.[6]

Where an innuendo is necessary to enable the pursuer to obtain an issue, the defender must justify the innuendo that the pursuer puts upon the statement complained of.[7] He need not, however, absolutely meet the innuendo in all its terms; and accordingly he need not justify any consequence which the pursuer may put into the innuendo. Thus where the innuendo put upon the words complained of was that they represented the pursuer as being unfit for his post as teacher of a public school, and the pursuer added that as a consequence it was the duty of the School Board to dismiss him, the counter issue did not require to

[1] Lowe *v.* Taylor, 1844, 7 D. 117, per Lord President Boyle; Rankin *v.* Simpson, 1859, 21 D. 1057; Milne *v.* Walker, 1893, 21 R. 155; Burnet *v.* Gow, 1896, 24 R. 156; British Workman's and General Assurance Co. *v.* Stewart, 1897, 24 R. 624.

[2] Brownlie *v.* Thomson, 1859, 21 D. 480; Powell *v.* Long, 1896, 23 R. 534.

[3] Brownlie *v.* Thomson, 1859, 21 D. 480.

[4] M'Donald *v.* Begg, 1862, 24 D. 685. See also Fletcher *v.* Wilson, 1885, 12 R. 683.

[5] Mason *v.* Tait, 1851, 13 D. 1347; Balfour *v.* Wallace, 1853, 15 D. 913.

[6] Aird *v.* Kennedy, 1851, 13 D. 775; Hunter *v.* MacNaughton, 1894, 21 R. 850.

[7] Harkes *v.* Mowat, 1862, 24 D. 701, per Lord Justice-Clerk Inglis.

contain the last statement.[1] If the innuendo put upon the statement complained of does not completely exhaust the said statement, the defender in his counter issue does not require to meet more than the statement as innuendoed.[2]

Where a defender does not plead *veritas* of the innuendo, but admits the statement was made and denies the innuendo, he may prove the truth of the words used without their innuendo.[3]

[1] M'Kerchar *v.* Cameron, 1892, 19 R. 383. See also Ogilvie *v.* Paul, 1873, 11 M. 776; M'Iver *v.* M'Neill, 1873, 11 M. 777. See, however, Blasquez *v.* Lothians Racing Club, 1889, 16 R. 893.

[2] Christie *v.* Craik, 1900, 2 F. 380.

[3] Henderson *v.* Russell, 1895, 23 R. 25.

CHAPTER VIII

PROCEDURE IN JURY TRIAL (*continued*)—AFTER ADJUSTMENT OF ISSUES AND BEFORE TRIAL

(1) Motions.—In jury causes all motions, except motions to vary issues and motions for new trial, shall be competent upon thirty-six hours' written intimation in common form by the party enrolling to the opposite party in place of the formal notice of motion hitherto required.[1]

In all cases where notices of motions are directed to be given under Codifying Act of Sederunt, F, iv., the principal notice, signed by the agent, shall be lodged in process, and a copy served at the same time upon the agent for the opposite party; and where the motion is to be made before the Division, a copy of the notice must also be lodged with the Keeper of the Rolls of the Division; and in all cases in which any number of days' notice is required to be given for business to be done, the days are to be computed by excluding the day on which the notice is given, and including the day on which the business is to be done.[2]

In all causes set down for trial either in Edinburgh or on the circuit, all motions necessary to the trying such causes, which are made *during vacation*, shall be heard before the Judge who is to preside at the trial, if in Edinburgh, or by a Judge who is appointed to be on the circuit on which the cause is to be tried, if the trial is to be on circuit, and in case of the absence of either of them respectively, by the Lord Ordinary on the Bills, it being shown to the satisfaction of the Judge before whom the motion is made that it could not have been made during the session.[3]

(2) Pursuer in the Issue.—In the usual case the pursuer in the cause is also pursuer in the issue. Owing to admissions or averments made by the defender, however, the *onus* may shift from the pursuer to the defender, and the defender may require to become pursuer in the issue. Questions of such a nature should be decided at the time of the adjustment of issues, but it would seem that it is competent for the Court to decide such questions at any time before the day of trying the cause.[4]

[1] C. A. S., F, iv. 6. [2] C. A. S., F, iv. 3. [3] C. A. S., F, i. 11.
[4] A. S., 29th November 1825, sec. 14 (now repealed).

Where the pursuer in the cause is also pursuer in the issues the heading of the issues should be "Issues in which A. B. is pursuer," and not "Issues in the cause in which A. B. is pursuer."[1]

Where the defender is made pursuer in the issue the designation of the parties as pursuer and defender respectively is sometimes changed.[2]

Where the defender takes a counter issue he is called defender in the words of the counter issue, in the same way as in the action.[3]

(3) Amendment of Issues.—An amendment of issues may be made at any time, even in the course of the trial, for the purpose of determining the real question in controversy between the parties,[4] and the sum of damages may now be increased.[5]

The rules as to the amendment of issues are the same as govern amendments of the record. (See *Motion for Leave to Amend, supra*, p. 449.)

(4) Review of Interlocutor Approving Issues.—(a) *Motion to Vary Issues.*—When an interlocutor has been pronounced by a Lord Ordinary approving of an issue or issues, it shall not be necessary nor competent to reclaim against the said interlocutor, if the party aggrieved thereby desires only to obtain a variation of the terms of the issue or issues, and does not desire to have such issue or issues, or one or more of such issues, disallowed *in toto;* but in every such case the party shall apply by motion to the Inner House within *six* days from the date of said interlocutor in terms of sec. 28 of the Court of Session Act, 1868, specifying precisely in his notice of motion the particular variation or variations which he desires should be made on the said issue or issues, and at the same time box copies of the record.[6]

Where a motion to vary was lodged within *six* days of the Lord Ordinary's interlocutor but not moved until after *six* days, it was held to be timeous.[7]

Where a defender moved the Court to vary an issue after the issue was adjusted by one interlocutor, and after a day was fixed for the trial

[1] Gordon *v.* British and Foreign Metaline Co., 1886, 14 R. 75, at p. 87; Paterson *v.* Airdrie and Coatbridge Water Co., 1893, 20 R. 370, at p. 374.

[2] Currie *v.* Macdonald, 1834, 12 S. 568.

[3] Powell *v.* Long, 1896, 23 R. 534.

[4] M'Garvey *v.* Boyle, 1893, 1 S. L. T. 291; M'Keand *v.* Maxwell, 1896, 3 S. L. T. 321; Kane *v.* Stephen and Sons, 1900, 2 F. 739; Hughes *v.* Edinburgh Town Council, 1905, 13 S. L. T. 672, at p. 678; A. S., 20th March 1907, sec. 2 (3); C. A. S., B, i. 7.

[5] M'Donald *v.* Caledonian Rly. Co., 1909, 2 S. L. T. 20.

[6] A. S., 14th October 1868, sec. 6; C. A. S., F, i. 2.

[7] Dingwall *v.* Fisher, 1909, S. C. 745.

of the cause by a second interlocutor, it was held that he was barred from insisting on the motion.[1] Where, however, a day was fixed for the trial of the cause by the same interlocutor which adjusted the issues, a motion to vary was held not to be incompetent.[2]

Where the motion is not for a mere variation, but asks for an issue radically different, a reclaiming note is the proper procedure.[3] Thus upon a motion to vary the terms of an issue it was held incompetent either (1) for a party to propose a new issue resting upon an entirely separate ground of action, or (2) for the Court to disallow altogether the issue whose terms were sought to be varied, and dismiss the action as irrelevant.[4]

(b) *Reclaiming Note.*—If the Lord Ordinary disallows an issue or an issue is objected to *in toto*, a reclaiming note may be presented against his interlocutor without leave in ordinary form within six days.[5]

Where a pursuer presented a reclaiming note against an interlocutor holding certain issues as adjusted and settled, and maintained that no issue should have been allowed, it was held incompetent under the reclaiming note to move the Court to vary the issues.[6]

(5) Place and Time of Trial.—*In session* the trial is held in Edinburgh.[7] *In vacation or recess* the trial may be at the sittings in Edinburgh,[8] or at such circuit towns as the circumstances of the case may require.[9] Where the trial is fixed for a circuit town it must be a circuit town within whose jurisdiction the subject-matter of the cause belongs.[10]

Whenever issues are adjusted the Lord Ordinary may fix a day for the trial of the cause.[11] If the day appointed for the trial is later than the next ensuing vacation of the Court, or Christmas recess as the case may be, it shall be in the power of any party to the cause at any time prior to a day three weeks before the said ensuing vacation or recess to enrol the cause before the Lord Ordinary, and to give notice to the

[1] Craig *v.* Jex-Blake, 1871, 9 M. 715.

[2] Croucher *v.* Inglis, 1889, 16 R. 774.

[3] Rintoul & Co. *v.* The Port Eglinton Storage Co., 1869, 7 S. L. R. 199.

[4] Burns *v.* Diamond, 1896, 23 R. 507.

[5] Court of Session Act, 1868, sec. 28; Hare *v.* Hopes, 1870, 8 S. L. R. 189; Mason *v.* Stewart, 1877, 4 R. 513; Little *v.* North British Rly. Co., 1877, 4 R. 980.

[6] Ross' Factor *v.* Ballantyne, 1871, 8 S. L. R. 499.

[7] Jury Trials (Scotland) Act, 1815 (55 Geo. III. cap. 42), sec. 15.

[8] Ibid.; 11 Geo. IV. and 1 Will. IV. cap. 69, sec. 9.

[9] Jury Trials (Scotland) Act, 1815, sec. 15; Makin *v.* North British Rly. Co., 1885, 22 S. L. R. 775; Laing *v.* Hay, 1905, 42 S. L. R. 464.

[10] Bremner, 1847, 19 Jur. 692; Mackintosh *v.* Moir, 1871, 9 M. 698.

[11] Court of Session Act, 1850, sec. 40, as amended by 10 Edw. VII. and 1 Geo. V. cap. 31, sec. 1; A. S., 19th November 1910, sec. 1; C. A. S., F, i. 3.

other party that he wishes the cause tried at the sittings in the said vacation or recess; and after hearing parties the Lord Ordinary shall decide whether the trial shall proceed at such sittings or before himself on the day already fixed, or on another day, and shall pronounce an interlocutor accordingly.[1] The motion that the party desires to go to the sittings must not only be lodged prior to a day three weeks before the vacation or recess, but must be made prior to such a day.[2] After the motion is granted the process must be forthwith transmitted by the agent of the party giving such notice to the Clerk of the Division to which the case is marked.[3] The Keeper of the Rolls of the Division to which the case is marked thereafter puts a notice in the daily Rolls of Court intimating the latest date on which a copy of the Lord Ordinary's interlocutor allowing the trial to proceed at the sittings along with a print of the closed record and of the adjusted issues must be lodged by the agent of the party desiring to go to the sittings. Where these papers are not lodged in time, the Court will not grant authority to the Keeper to receive them, but will discharge the order for trial and remit to the Lord Ordinary to proceed.[4]

Where the Lord Ordinary sends the cause to the sittings, very strong grounds must be shown for interfering with his decision.[5]

In a recent case where the Lord Ordinary on pursuer's motion discharged the diet and appointed the case to be tried at the sittings, the pursuer failed timeously to transmit the process to the Inner House. He therefore presented a note to the Inner House to discharge the order for the sittings and remit the process to the Lord Ordinary, but the Court refused the note as there was no process in the Inner House. The pursuer then enrolled the case before the Lord Ordinary, who of new appointed the issue to be tried before a jury and fixed a diet.[6]

If a party desires to go to trial at a circuit town in vacation or recess it was formerly the practice that he should give notice on or before *the second last day of the session* immediately preceding the Circuit at which the cause was to be tried;[7] and if the opposite party wished to have the place of trial changed, he required within *four* days from the receipt of such notice to make a motion to the Division to which the cause belonged for that purpose.[8] These provisions have been

[1] A. S., 19th November 1910, sec. 2; C. A. S., F, i. 4.
[2] Meades *v.* Wm. Beardmore & Co., Ltd., 1913, 2 S. L. T. 171.
[3] C. A. S., F, i. 5.
[4] Campbell *v.* Osborne and Hunter, 1913, S. C. 758.
[5] Carey *v.* Carey, 1912, S. C. 1325.
[6] Robertson *v.* Hamilton, 1915, 2 S. L. T. 195.
[7] A. S., 16th February 1841, sec. 12.
[8] Ibid., sec. 13.

omitted from the Codifying Act of Sederunt, but as they do not seem to be inconsistent with anything therein contained, they may be taken as still in force.

Applications for a civil jury trial at a circuit town are granted [1] or refused [2] according to circumstances.

It is incompetent to hold a civil jury trial at Glasgow Christmas Circuit.[3] It is doubtful whether it is competent to hold a civil jury trial on Circuit when there are no criminal cases.[4]

(6) Transmission of Process from Outer to Inner House.—If the cause is to be tried at the sittings, the process shall forthwith be transmitted by the agent of the party giving such notice to the Clerk of the Division to which the cause is marked. A copy of the Lord Ordinary's interlocutor allowing the trial to proceed at the sittings, along with a print of the closed record and of the adjusted issues, shall also be handed to the Keeper of the Rolls of such Division.[5] (See Para. (5), *supra*, p. 591.)

(7) Jury Cause Roll.—The Keepers of the Rolls of the First and Second Divisions of the Court respectively shall keep a separate roll to be entitled "Jury Cause Roll," in which shall be entered all causes originating in the Sheriff Court, in which issues have been adjusted by the Division, unless at the time of the adjustment of issues the Court has remitted the cause to the "Outer House," and all causes originating in the Court of Session in which orders appointing the same to be tried at the jury sittings have been pronounced, and the process transmitted to the Inner House in terms thereof.[6]

(8) Precognitions.—See *supra*, p. 556.

(9) Witnesses.—See *supra*, p. 556.

(10) Citation of Witnesses.—See *supra*, p. 342 *et seq.*

(11) Abandonment of Suit.—(a) *Absolute Abandonment.*—See *Motion for Leave to Abandon, supra*, p. 443.

(b) *Abandonment under Reservation.*—

(i.) Generally.

[1] Mackin *v.* North British Rly. Co., 1885, 22 S. L. R. 775; Laing *v.* Hay, 1905, 42 S. L. R. 464.

[2] Cunningham *v.* Speirs & Co., 1866, 2 S. L. R. 206; Fraser *v.* Macnee, 1868, 5 S. L. R. 365; Macpherson *v.* Caledonian Rly. Co., 1881, 8 R. 901; Rankin *v.* Campbell, 1881, 9 R. 166; M'Gregor *v.* Caledonian Rly. Co., 1882, 9 R. 659; Thorburn *v.* Caledonian Rly. Co., 1882, 19 S. L. R. 631.

[3] Campbell *v.* Caledonian Rly. Co., 1881, 9 R. 251.

[4] Malcolm *v.* Lloyd, 1885, 12 R. 843.

[5] A. S., 19th March 1910, sec. 3; C. A. S., F, i. 5; Campbell *v.* Osborne and Hunter, 1913, S. C. 758.

[6] A. S., 29th June 1905; C. A. S., F, i. 1.

(ii.) Prior to closing the record.

(iii.) After closing the record. (See *Motion for Leave to Abandon, supra*, p. 443 *et seq.*)

(c) *Not Proceeding to Trial within Twelve Months.*—If it shall be made to appear to the Lord Ordinary or the Division respectively that a party has abandoned his suit, or if the pursuer, or the party appointed to stand as pursuer, shall not proceed to trial within twelve months after issues have been finally approved, the Court shall proceed therein as in cases in which parties are held as confessed, unless sufficient cause be shown for the delay to the satisfaction of the Court.[1]

Where parties are held as confessed, the opposite party is entitled to absolvitor, with expenses.[2]

Thirty-six hours' notice of a motion for absolvitor must be given to the opposite agent;[3] and it has been held not to be necessary to give personal intimation to the pursuer where intimation had been given to his agent, although the Court was informed that a change of agency had taken place.[4]

The foregoing statement of law and practice applies to new trials as well as to first trials.[5]

In cases under a similar Act of Sederunt, *sufficient cause was held to have been shown* where the delay was occasioned by the engagements of the Lord Ordinary;[6] by agreement between the parties regarding the trial;[7] by the poverty of the pursuer in special circumstances;[8] by the delay occasioned by a defender in changing his agents;[9] and by the delay of the defenders in executing a commission.[10]

Delay occasioned by the notour bankruptcy of the defender is *not a sufficient cause* to excuse the pursuer from proceeding.[11] Neither is the inability of the pursuer to raise funds to pay the expenses of an

[1] A. S., 16th February 1841, sec. 46; C. A. S., F, iv. 4.

[2] Bett *v.* Aberdein, 1853, 16 D. 322; Kerr *v.* Boswell's Reps., 1858, 20 D. 959; Stewart *v.* Burt, 1859, 21 D. 510; Hampton *v.* Mitchell, 1885, 12 R. 969; Russell *v.* M'Knight's Tr., 1900, 2 F. 520.

[3] Farr *v.* Williams & Son, 1846, 8 D. 710; C. A. S., F, iv. 6.

[4] Nimmo *v.* M'Caul, 1855, 17 D. 751.

[5] A. S., 16th February 1841, sec. 41; C. A. S., F, iv. 1.

[6] Baird *v.* Cornelius, 1881, 8 R. 982.

[7] Angus *v.* Grier, 1853, 16 D. 303; Blair *v.* Blair, 1860, 22 D. 1271; Cullen *v.* Johnstone, 1862, 24 D. 800.

[8] Sassen *v.* Campbell, 1830, 8 S. 707.

[9] Stobie *v.* Melvin, 1865, 1 S. L. R. 52.

[10] Rayner *v.* Scott, 1868, 5 S. L. R. 613.

[11] Hampton *v.* Mitchell, 1885, 12 R. 969. See also Batters *v.* Macdonald, 1860, 22 D. 986.

amendment which he has made and payment of which is made a condition precedent of his being allowed to proceed,[1] nor the absence abroad of a material witness whom the pursuer was now willing should be examined on commission.[2]

Where notice of motion for the trial of the cause is made by the pursuer within twelve months of adjusting issues although the trial cannot take place within that time, it has been held that this is proceeding to trial within that period, and the motion for absolvitor has been refused.[3]

If the defender satisfies the Court that the pursuer has abandoned his case, he is entitled to absolvitor. Thus where a pursuer in a jury trial,[4] and in a proof,[5] abandoned in terms of the Judicature Act and failed to pay expenses, it was held that under the Act of Sederunt, 16th February 1841, he had manifestly abandoned his action and decree of absolvitor was granted; and where the pursuer's counsel and agents withdrew from the case and the diet for trial was discharged,[6] and where the pursuer failed to pay the fee fund dues necessary to obtain a precept for citation of a jury,[7] it was held that the pursuer had abandoned his action and absolvitor was granted.

It is competent, after notice has been given for decree of absolvitor in respect of failure to proceed to trial within twelve months, to abandon under the Judicature Act.[8]

(12) Admissions by Parties.—When parties intend to make admissions in regard to matters of fact, or to admit the authenticity of writings, a minute of the admissions shall be made in writing, signed by the party or his counsel, and lodged in process; and all admissions so made may be used and read in evidence at the trial, if otherwise competent.[9]

(13) Return of Processes before Trial.—All processes and productions borrowed must be delivered back to the Clerk of Court, in the Register House, two days before the trial, if the cause is to be tried in

[1] Smith *v.* William Dixon, Ltd., 1910, S. C. 230.

[2] Kerr *v.* Boswell's Reps., 1858, 20 D. 959.

[3] Maclaren *v.* Robertson, 1859, 22 D. 278; Couston *v.* Miller, 1863, 1 M. 508; Wilson *v.* Haggart, 1863, 1 M. 1115, per Lord Justice-Clerk Inglis, at p. 1116.

[4] Ross *v.* Mackenzie, 1889, 16 R. 871.

[5] Donnelly *v.* Morrison, 1895, 2 S. L. T. 582.

[6] Gilhooly *v.* M'Hardy, 1897, 24 R. 1185.

[7] Mooney *v.* Wm. Dixon, Ltd., 1897, 24 R. 1187; M'Millan v. North British Rly. Co., 1914, 2 S. L. T. 309. See, however, Cullen *v.* Mags. of Edinburgh, 1903, 40 S. L. R. 348.

[8] Exrs. of A. B. *v.* Scottish Widows' Fund, 1858, 20 D. 1073.

[9] C. A. S., F, i. 12.

Edinburgh, and six days before the trial if the cause is to be tried on Circuit.[1]

(14) Commission and Diligence to Recover Writings.—When any application is to be made in jury causes for a diligence to recover documentary evidence, after the issues have been adjusted the party requiring the same shall lodge at the office in the Register House with the Clerk of Court a list describing the documents required under the said diligence, with a notice of motion for such diligence, thirty-six hours before it is to be moved for; and a copy of which notice and list shall be served on the agent for the opposite party.[2]

See *Commission and Diligence, infra*, Part x.

(15) Commission to Examine Witnesses. — See *Commission and Diligence, infra*, Part x.

(16) Lodging of Documents, Plans, Maps, Models, etc.—All plans, maps, models, or other such productions proposed to be used at the trial of a cause, and all writings which are meant to be put in evidence, must be lodged *eight* days before the trial with the Clerk of Court, at his office in the Register House, if the trial is to be in Edinburgh; and either with the said Clerk, or with the Sheriff-Clerk of the county town where the trial is to be held if the cause is to be tried on the Circuit; and the lodging thereof shall be at the same time intimated in writing to the opposite agent; and no other productions shall be allowed to be used at the trial, unless of consent of parties, or by permission of the Court, on its being made out on oath, to the satisfaction of the Court, that such productions could not be lodged eight days before the trial, nor before the period at which they are actually produced or exhibited to the opposite party, and that notice to the opposite party had been given of the particular item proposed in such case to be produced.[3]

In computing the eight days the day of trial is counted as one day but the day of lodging productions is excluded.[4]

The Act of Sederunt is imperative,[5] and where there is no reason why productions could not have been lodged eight days before the trial the productions will not be received in evidence.[6]

[1] C. A. S., F, i. 13.
[2] A. S., 16th February, 1841, sec. 9; C. A. S., F, iv. 3; C. A. S., F, iv. 6.
[3] A. S., 16th February 1841, secs. 18 and 19; C. A. S., F, i. 10.
[4] C. A. S., F, iv. 3.
[5] Smith *v.* Kemp, 1828, 4 Murray, 400, at p. 402.
[6] O'Reilly *v.* Innes, 1821, 2 Murray, 414, at p. 419; Gall *v.* Watt, 1827, 4 Murray, 317, at p. 320; Mason *v.* Merry, 1830, 5 Murray, 306, at p. 308; Whitehaven and Furness Junction Rly. Co. *v.* Macfadyen, 1849, 11 D. 846.

Exceptions.—It is not an inflexible rule that productions to be founded on at a jury trial must be lodged eight days before the trial. The rule does not apply to public registers, and unless the ends of justice absolutely require it, extracts are sufficient for the purpose of lodging. The actual register or deed from the register will be transmitted, if required, for production at the trial.[1] This rule was extended to a case where a haver refused to allow a volume containing the original scrolls of all the deeds prepared in his office to be recovered, but allowed excerpts at the sight of the commissioner.[2] Where, however, a register of a company was not lodged in process eight days before the trial, but a notice was given that it was then to be produced, and excerpts from entries therein were lodged in process in time, the excerpts were refused to be allowed in evidence;[3] and in similar circumstances the original volume produced at the trial was refused.[4] (See *Productions, supra,* p. 408.)

(17) Transmission for Production of Original Documents from Public Records.—See *Productions, supra,* p. 411.

(18) Transmission of Process from Another Court.[5]

(19) View.—In some cases it is expedient that the jurors who are to try the cause should have an opportunity of personally inspecting the object to which the dispute relates. Such a personal inspection is called a "view."

Where either party intends to apply for a view, thirty-six hours' intimation of a motion for that purpose must be given to the opposite party, and such motion must be made before the Lord Ordinary or the Division at least *ten* days previous to the trial.[6] If the motion is granted two persons are named in the interlocutor, usually at the suggestion of the parties, to show the jurors the matter in question. Six of the jurors named in the common jury list, or summoned as special jurors, or more of consent, are selected to view the matters in question; and if the parties cannot agree upon the selection, the first six on the list are taken. The expense is equally borne by all the parties, and no evidence can be given at the time the view is taken.[7]

[1] Cochrane *v.* Ferrier, 1859, 21 D. 749; Maclean *v.* Maclean's Trs., 1861, 23 D. 1262; C. A. S., B, ii. 4.

[2] Wilson *v.* Glasgow and South-Western Rly. Co., 1851, 14 D. 1.

[3] Carricks *v.* Saunders, 1850, 12 D. 922.

[4] Great Northern Rly. Co. *v.* Inglis, 1850, 12 D. 1194; 1852 (H. L.), 24 Jur. 434.

C. A. S., B, ii. 5.

A. S., 16th February 1841, sec. 16; C. A. S., F, i. 9.

[7] Jury Trials (Scotland), Act, 1815 (55 Geo. III. cap. 42), sec. 29.

There are special provisions where the places to be viewed are in the counties of Sutherland, Caithness, and Orkney.[1]

Great care should be exercised in granting a view, as although a view is sometimes essential in other cases the jury may form wrong impressions beforehand of the case.[2]

There should be no discussion at the view, and the explanations should be made by the showers alone. Accordingly there is no reason why any of the law agents should be present, and their expenses are not allowed.[3]

The jurors selected to view are to be taken from the first twelve of the jurors returned for the county where] the property is situated, although lists for other counties belonging to the same circuit may have been delivered.[4]

(20) INSPECTION.—Besides a view by the jury, either party may make an application for an inspection of the works, processes, books, etc., or anything that forms the subject of the litigation. (See *Motion for Leave to Inspect, supra*, p. 520.)

(21) ORDINARY JURY.—(a) *Qualification of Ordinary Juror.*—Every man between the ages of twenty-one and sixty years, except as hereinafter excepted, who, at the time of the trial on which he may be required to serve, having and being seised in his own right, or in the right of his wife, of lands or tenements, of an estate of inheritance, or for his or her life, within the county or shire, city or place, from whence the jury is to come, of the *yearly value of five pounds* at the least, or shall then be worth in goods, chattels, and personal estate *the sum of two hundred pounds sterling*, shall be qualified and shall be liable to serve on juries in Scotland, before any Court there, civil or criminal, competent to try causes by jury.[5]

(b) *Exemptions.*—All Peers, Judges of the Supreme Courts, Sheriffs of Counties, Magistrates of Royal Burghs, Ministers of the Established Church, and all other ministers of religion, who shall have duly taken and subscribed the oaths and declaration required by law, and whose place of meeting shall be duly registered, parochial schoolmasters, Advocates practising as members of the Faculty of Advocates, Writers to the Signet practising as such, Solicitors practising before any of the Supreme Courts, Procurators practising before any inferior Court,

[1] Jury Trials (Scotland) Act, 1819 (59 Geo. III. cap. 35), sec. 35.

[2] Arrott *v.* Whyte, 1826, 4 Murray, 149 (note).

[3] Henderson *v.* Gardyne, 1820, 2 Murray, 333, at p. 339; Brown *v.* Stewart, 1824 3 Murray, 444, at p. 449.

[4] M'Kenzie *v.* Ross, 1822, 1 Shaw's App. 99.

[5] Jurors (Scotland) Act, 1825 (6 Geo. IV. cap. 22), sec. 1.

having annually taken out their annual certificates, clerks or other officers of any Court of Justice actually exercising the duties of their offices, gaolers or keepers of houses of correction, professors in any university, physicians and surgeons duly qualified as such and actually practising, officers in His Majesty's Navy or Army in full pay, officers of Customs or Excise, messengers-at-arms, and other officers of the law, are freed and exempted from being returned and from serving upon juries.[1] All exemptions created by Acts subsequent to the Jurors (Scotland) Act, 1825, were abolished by the Court of Session Act, 1868, sec. 43. Since the last Act, however, lighthouse keepers and their assistants have been allowed exemption,[2] as have also registered dentists;[3] soldiers, pensioners, and Volunteers acting with the regular army and subject to military law;[4] commissioners and other officers of the Inland Revenue;[5] officers of the Post Office;[6] and officers and men of the Territorial Forces.[7]

(c) *Precept for Summoning Jury.*—In order that a jury may be summoned a precept signed by the Clerk of Session who is to act at the trial of the cause or his assistant must be issued to the Sheriff not later than ten days previous to the date fixed for the trial, and fee stamps to the value of £2 require to be affixed to the precept before transmission.[8] If the pursuer fails to affix the stamps, he is held to have abandoned his action.[9]

(d) *Jury List.*—Immediately upon the receipt of a precept a list of jurors for the trial of the cause at Edinburgh or at any circuit town is returned by the Sheriff of Edinburgh, or of any other county or counties as provided for by the Act 6 Geo. IV. cap. 22, the number of jurors being such as is specified by the Act 55 Geo. III. cap. 42, but so that one third of the number of jurors required, or, if the number required cannot be divided equally into thirds, a number as near as may be, more or less, at the discretion of the Sheriff, shall be persons qualified as special jurors, and shall be distinguished in the return accordingly;

[1] Jurors (Scotland) Act, 1825, sec. 2.

[2] Juries (Lighthouse Keepers Exemption) Act, 1869 (32 & 33 Vict. cap. 36), sec. 1.

[3] 41 & 42 Vict. cap. 33, sec. 30.

[4] 44 & 45 Vict. cap. 58, secs. 147, 175, 176, 178.

[5] 53 & 54 Vict. cap. 21, sec. 8.

[6] 54 & 55 Vict. cap. 46, sec. 9.

[7] 7 Edw. VII. cap. 8, sec. 23 (4).

[8] Jury Trials (Scotland) Act, 1815, sec. 20; Court of Session Act, 1850, sec. 42; C. A. S., K, ii., Table of Fees — Inner House, 23 (5) and note, and Outer House, 23.

[9] Mooney *v.* Wm. Dixon, Ltd., 1897, 24 R. 1187; Cullen *v.* Mags. of Edinburgh, 1903, 40 S. L. R. 348.

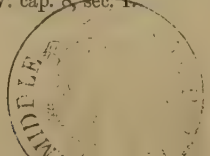
provided that in the event of the list to be taken from the General Jury Book, as provided in the said Act, not being found to contain the said proportion of special jurors, the deficiency shall be supplied by names to be taken from the Special Jury Book.[1] The General Jury Book is made up in terms of 6 Geo. IV. cap. 22, sec. 3, and the Special Jury Book in terms of 55 Geo. III. cap. 42, sec. 25, and 7 Geo. IV. cap. 8, sec. 2.

Where a cause is to be tried at a circuit town and no special diet is fixed for such trial, it is not necessary that a separate list of jurors should be returned for the trial thereof, but the jury may be chosen from the list of jurors summoned to attend the Circuit Court of Justiciary, who are bound by the citation to serve, if required, at the trial of all civil causes for which no special diet has been appointed.[2]

(e) *Citation of Jurors.*—The present mode of citing jurors for the trial of civil causes is for the Sheriff-Clerk of the county of Edinburgh, where the trial is to take place at Edinburgh, or the Sheriff-Clerk of the county in which any juror is to be cited, where the citation is for a trial at a circuit town, or his depute, to fill up and sign a proper citation addressed to each such juror, and to cause the same to be transmitted to him in a registered post letter, directed to him at his place of residence as stated in the roll of jurors; and a certificate under the hand of such Sheriff-Clerk or his depute of the citation of any jurors or juror in manner herein provided, has the like force and effect as an execution of citation according to the former law and practice.[3] There is no fixed period of *induciæ* for the citation of jurors in Scotland, but in the general case six days' notice is given.

(22) Special Jury.—(a) *Application for.*—Either of the parties to a cause which has been set apart for jury trial may make application for a special jury.[4] The qualification of a special juror is that he pays cess in the county, city, town, or place from which such jury shall be taken upon £100 of valued rent, or is paying assessed taxes to the Crown on a house of the rent of £30 sterling by the year;[5] or is infeft in lands or heritages in any part of Scotland yielding the sum of £100 sterling of real rent *per annum*, or is resident in any county or stewartry in Scotland and is possessed of personal property to the amount of £1000 sterling.[6] The application is in the discretion of the

[1] Court of Session Act, 1868, sec. 45.
[2] Ibid., sec. 46. [3] Ibid., sec. 47.
[4] Jury Trials (Scotland) Act, 1815 (55 Geo. III. cap. 42), sec. 24; Court of Session Act, 1850, sec. 42.
[5] 55 Geo. III. cap. 42, sec. 24.
[6] 7 Geo. IV. cap. 8, sec. 1.



Court. It has been granted in cases where the Court has set aside a verdict and granted a new trial.[1] It has also been granted where the question of exclusive possession from time immemorial of the fishing of mussels was involved;[2] where the defender in an action of damages for slander involving the financial position of an insurance company lodged elaborate states upon which he founded his plea of *veritas;*[3] and in an action of damages for slander where the evidence was of a complex nature and the amount of damages involved was very large.[4]

It was *refused* in an ordinary action of damages for personal injury against a railway company where no special reason was given.[5]

Where on the day of trial by a special jury a sufficient number of jurors failed to attend, the Court postponed the trial on the motion of the defenders without any award of expenses, and held that in the case of a special jury the Court had no power to grant a *tales.*[6]

(b) *Procedure.*—Where either party intends to apply for a special jury, intimation of motion for that purpose must be given to the opposite party or agent within *four* days of the interlocutor fixing a diet or appointing the trial to proceed at the sittings, and such intimation must be made thirty-six hours before the motion is moved in Court. If a special jury is ordered, the Clerk of Court signs and issues a precept to the Sheriff-Clerk of the county or counties from which the special jury is to come, requiring him forthwith to return the names of thirty-six persons qualified to be special jurymen.[7] The said Clerk of Court, as soon as he receives the return of the thirty-six names, out of which twenty special jurors are to be selected, gives forty-eight hours' notice to the parties' agents to attend him at the office in the Register House, at a time to be specified, to reduce the jury. After the jury is thus reduced to twenty, a precept is issued for summoning the jury; the name of each juryman is written on paper, and put, rolled up, into the ballot box; and the jury consists of the twelve jurymen whose names are first drawn from the box at the trial.[8]

[1] Mags. of Elgin *v.* Robertson, 1862, 24 D. 788; Jenkins *v.* Murray, 1866, 5 M. 39.

[2] Lindsay *v.* Robertson, 1868, 6 M. 889.

[3] The British Workman's and General Assurance Co., Ltd. *v.* Stewart, 1897, 24 R. 624, at p. 626.

[4] Ogston and Tennant, Ltd. *v. The Daily Record*, Glasgow, 1910, 2 S. L. T. 230.

[5] Dempsey *v.* Edinburgh and Glasgow Rly. Co., 1866, 2 S. L. R. 169.

[6] Milligan *v.* M'Lachlan's Trs., 1836, 15 S. 30.

[7] A. S., 16th February 1841, sec. 14; C. A. S., F, i. 7; Jury Trials (Scotland) Act, 1815, secs. 26 and 27.

[8] A. S., 16th February 1841, sec. 15; C. A. S., F, i. 8.

(23) *Falling Asleep.*—No cause shall fall asleep after the issue or issues have been finally adjusted and signed, though no step shall have been taken therein within year and day.[1]

(24) *Postponement of Trial.*—Until the jury is empanelled and sworn to try a cause, it shall be competent to apply to put off the trial on account of the unavoidable absence or sickness of a material witness, or for other sufficient cause proved to the satisfaction of the Court or the presiding Judge, and supported by oath or affidavit, if the presiding Judge shall so require; or, *in vacation*, by the Judge before whom motions are to be heard; and upon payment of such expenses as shall have been incurred by the opposite party in consequence of the delay of the trial; but if the inability of a material witness to attend at a trial, or any other cause for putting it off, becomes known to the party during the session, the motion to put off the trial must be made, if practicable, in the session, after intimation to the opposite party.[2]

The witness must be a material witness[3] and the cause of absence temporary.[4]

It was considered a sufficient cause for postponement that there was a change of agency in the pursuer's case, the pursuer being incarcerated and the new agent being of opinion that the materials for the trial were insufficient;[5] that the pursuer was ill and was the principal witness for himself;[6] and that there was a very short period between the adjustment of issues and the trial at the sittings.[7]

In a case where on the morning of the day appointed for a jury trial counsel for the pursuer asked for a postponement on the ground that the pursuer had met with an accident, the Court postponed the trial and found the pursuer liable in the expenses of the postponement, and the pursuer, having paid the expenses as taxed, was allowed to proceed.[8]

It is *not a sufficient cause* for postponement of a trial that a defender

[1] A. S., 16th February 1841, sec. 47; C. A. S., F, iv. 5.

[2] A. S., 16th February 1841, secs. 21 and 25; A. S., 22nd June 1859; C. A. S., F, i. 6; ibid., F, i. 11; ibid., F, i. 14.

[3] Mackintosh *v.* Fraser, 1859, 21 D. 783; Leadhills Mining Co. *v.* Scots Mines Co., 1860, 22 D. 989; Wylie and Lochhead *v.* Times Fire Insurance Co., 1860, 22 D. 1498.

[4] Leadhills Mining Co. *v.* Scots Mines Co., 1860, 22 D. 989; Wylie and Lochhead *v.* Times Fire Insurance Co., 1860, 22 D. 1498.

[5] Scott *v.* Christie's Trs., 1856, 19 D. 195.

[6] Mackintosh *v.* Fraser, 1859, 21 D. 783.

[7] Robertson *v.* Hall, 1901, 3 F. 637.

[8] Nixon *v.* Houston, 1898, 35 S. L. R. 926; 1 F. 78.

wishes to examine on commission a witness resident abroad,[1] or wishes to await the result of a commission[2] where the defender has not been reasonably diligent in his proceedings; or that a material witness is abroad and the address of another could not be ascertained.[3] A motion by a defender to postpone a trial in order that the pursuer, a foreigner, might be present and examined, was refused, but a commission was granted to examine the pursuer on adjusted interrogatories.[4] Where, however, a pursuer desired a commission to examine a medical man in Aberdeen in respect that he could not attend the trial owing to the serious illness of his wife, the Court postponed the trial in order that he might be present.[5] Poverty which has not supervened since raising an action is no reason for postponement.[6]

Where defenders lodged written states eight days before a trial, the Court refused to postpone the trial to enable the pursuers to obtain expert evidence to rebut the states.[7]

[1] Conacher *v.* Conacher, 1859, 21 D. 597; National Exchange Co. *v.* Drew and Dick, 1861, 23 D. 1278.
[2] Simmies *v.* Burnet and Reid, 1875, 12 S. L. R. 622.
[3] Carey *v.* Carey, 1912, S. C. 1325.
[4] Donnar *v.* Paterson, 1859, 21 D. 1301.
[5] Dobbie *v.* Aberdeen Rly. Co., 1856, 19 D. 195.
[6] Gordon *v.* Davidson, 1865, 3 M. 595.
[7] British Workman's and General Assurance Co. *v.* Stewart, 1897, 24 R. 624.

CHAPTER IX

PROCEDURE IN JURY TRIAL (*continued*)—AT TRIAL

(1) Presiding Judge.—Where the trial takes place in session the Judge before whom the cause depends presides at the trial.[1] Where it takes place at the sittings in vacation or recess, a Judge of the Inner House presides.[2] Where the cause is tried at a circuit town either of the Judges presiding at the sittings of the Circuit Court of Justiciary in such circuit town may preside, or any other Judge of the Court of Session.[3]

(2) Failure to Appear at Trial.—In case either party shall not appear at the trial of a cause, if the party appearing be the pursuer in the issue, he shall be entitled to lead evidence, and go to the jury for a verdict; and if the party appearing be the defender in the issue, he shall be entitled to obtain a verdict in his favour without leading evidence; but if the party appearing shall decline to proceed in this manner, then, in cases set down for trial at the sittings, the Judge presiding at the trial shall certify to the Division the fact of the other party not appearing, and the Division shall thereupon proceed, and in cases set down for trial by the Lord Ordinary he shall proceed, as in cases in which parties are held as confessed, unless it shall be shown to the satisfaction of the Court or the Lord Ordinary that the failure of the party to appear at the trial was occasioned by some sufficient cause.[4]

(3) Enclosure of Witnesses.—See *supra*, p. 558.

(4) Constitution of Ordinary Jury.—By the Jury Trials (Scotland) Act, 1815, sec. 21, which is now repealed,[5] the number of jurors in an ordinary civil jury was fixed at twelve. According to the heading of sec. 44 of the Court of Session Act, 1868, juries in civil causes are to consist of eight common and four special jurors, and

[1] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 41.

[2] 11 Geo. IV. and 1 Will. IV. cap. 69, sec. 3.

[3] Court of Session Act, 1868, sec. 46.

[4] A. S., 16th February 1841, sec. 46; C. A. S., F, iv. 4; Ritchie *v.* Aitchison, 1848, 10 D. 454.

[5] 36 & 37 Vict. cap. 91.

the practice of the Court has since that time been in conformity with such heading.

(5) Balloting of Jury.—When the Court meets on the day fixed for the trial the names of the whole of the jurors summoned are called over by the Clerk of Court, and any juror duly cited who fails to answer to his name, after being openly called three times, may be fined in a sum not exceeding £5 and not less than 40s., unless some reasonable cause of absence be proved by oath or affidavit to the satisfaction of the presiding Judge.[1] Thereafter, the jurors for the trial of the cause are chosen in open Court by ballot from the list of jurors summoned; "and for that purpose the Clerk of Court shall cause the name and designation of each juror to be written on a separate piece of paper or parchment, all the pieces being of the same size, and shall cause the pieces to be rolled up as nearly as may be in the same shape, and the names of the special jurors shall be put together into one box or glass, and the remainder into another; and being respectively mixed, the Clerk shall draw out the said pieces of paper or parchment one by one from both boxes or glasses in the proportion of one from the box containing the names of special jurors, and two from the other box; and if any of the persons whose names shall be so drawn shall not appear, or shall be challenged with or without cause assigned and be set aside, then such further number shall be drawn until the number required for the trial shall be made out; and the persons so drawn and appearing, and being sworn, shall be the jury to try the cause, and their names shall be taken down and recorded, according to the present law and practice; but providing that when challenges are made, and jurors set aside, their names shall be filled up with other names, by drawing by ballot as aforesaid from the box or glass containing the description of jurors challenged respectively."[2]

(6) Challenge of Jurors.—Each party has *four* challenges allowed without assigning any cause.[3] These challenges are commonly called *peremptory* challenges. Where there are more pursuers or defenders than one, each set of pursuers or defenders has respectively *four* peremptory challenges between them.[4] Whether this rule applies to special juries has not been decided.[5]

On cause shown, each party has an unlimited right of challenge.

[1] 55 Geo. III. cap. 42, sec. 22. See also 6 Geo. IV. cap. 22, sec. 19.
[2] Court of Session Act, 1868, sec. 44.
[3] 55 Geo. III. cap. 42, sec. 21.
[4] Dobbie *v.* Johnston and Russell, 1861, 23 D. 1139.
[5] Duke of Buccleuch *v.* Cowan, 1866, 5 M. 214.

The usual grounds of challenge are avowed enmity of a juror to the party challenging, or that the juror challenged has an interest in the cause. Challenges for cause assigned (if any) are first made.[1] If the ground of challenge is want of qualification, such objection can only be proved by the oath of the juror objected to.[2]

There can be no objection to a juror after he has been sworn to serve.[2]

If owing to the number of challenges on cause assigned, or from any other cause, it has been impossible to select a sufficient number of jurymen from the jurors summoned, provision is made by the addition of *tales* in terms of the Jury Trials (Scotland) Act, 1815, sec. 28.

(7) Oath or Affirmation Administered to Jury.—After the jury has been selected, the Clerk of Court administers to the jury collectively the following oath:—

"You swear by God, as you will answer to God at the Great Day of Judgment, that you shall well and truly try (*as the case may be*) these issues (*or* this issue), and a true verdict give according to the evidence."[3]

If any juryman objects to be sworn, and states as the ground of such objection either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, he may make a solemn affirmation instead of taking an oath, which affirmation shall be of the same force and effect as if he had taken the oath.[4]

The form of affirmation is as follows:—

"I, *A. B.*, do solemnly, sincerely, and truly declare and affirm, that I will well and truly try these issues (*or* this issue, *as the case may be*), and a true verdict give according to the evidence."

(8) Remuneration of Jurors.—The remuneration to jurors empanelled at the trial by jury of any civil cause is at the rate of ten shillings to each juror for each day, or part of a day, during which such juror shall be empanelled upon such trial.[5] (See Maclaren on Expenses, pp. 104, 105, and 241.)

(9) Pleadings of Counsel in Opening the Case for the Pursuer and Defender, and in Reply.—As soon as the jury shall have been regularly empanelled and sworn for the trial of the issue or issues, one of the counsel for the pursuer in the issue shall open the case. The evidence for the pursuer, whether parole or documentary, or both, shall

[1] 55 Geo. III. cap. 42, sec. 21.
[2] 6 Geo. IV. cap. 22, sec. 16.
[3] 55 Geo. III. cap. 42, sec. 31.
[4] Oaths Act, 1888 (51 & 52 Vict. cap. 46), secs. 1 and 2.
[5] Court of Session Act, 1868, sec. 49.

then be produced. When the evidence for the pursuer is closed, one of the counsel for the defender in the issues shall open his case, and shall make his observations on the case of the pursuer. Then the evidence for the defender shall be produced; and when that is closed, one of the counsel for the pursuer in the issues may address the jury, and one counsel for the defender in the issues shall have a reply.[1] Formerly, if the defender neither called any witnesses, nor produced any written evidence, there was no right of reply on the part of the pursuer,[2] but now in every case one counsel for the pursuer and one counsel for the defender are heard in their order after the whole evidence in the cause is closed.[3]

In opening a case to a jury it should be opened briefly on parole but fully on the documentary evidence proposed to be adduced.[4]

(10) Oath or Affirmation Administered to Witnesses.—The usual oath is in theset erms:—

"I swear by Almighty God, and as I shall answer to God at the Great Day of Judgment, that I will tell the truth, the whole truth, and nothing but the truth";

but an oath may be administered in such form and with such ceremonies as a witness may declare to be binding.[5]

If a witness objects to be sworn, and states as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, he may make solemn affirmation instead of taking an oath.[6] The affirmation must be in the following terms:—

"I, *A. B.*, do solemnly, sincerely, and truly declare and affirm";

then follow the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.[7]

(11) Examination of Witnesses.—In examining the witnesses, the counsel of the parties shall take the examination of the witnesses in such order as they shall arrange; but the counsel who begins the examination of a witness shall continue that examination throughout,

[1] A. S., 16th February 1841, sec. 27; C. A. S., F, ii. 1. In opening the defender's case, the duty of the defender's counsel is to state as succinctly as possible the defender's case, and he should only refer to the pursuer's case where it is absolutely necessary to explain his own case. No reasoned attack on the pursuer's case should be made at this stage.

[2] A. S., 16th February, 1841, sec. 27.

[3] Court of Session Act, 1850, sec. 44.

[4] Dougall's Trs. *v.* Tay Ferry Trs., 1852, 1 Stuart, 301.

[5] Oaths Act, 1838 (1 & 2 Vict. cap. 105), sec. 1.

[6] Oaths Act, 1888 (51 & 52 Vict. cap. 46), sec. 1.

[7] Ibid., sec. 2.

without interruption from any quarter (unless when an objection is taken to the legality of the question) until he exhaust the examination. After this, a counsel on the opposite side may cross-examine without interruption, until he exhaust his cross-examination. Then the counsel who first examined in chief may re-examine, confining his re-examination strictly to such new matter as may have arisen in cross-examination, unless with permission of the presiding Judge.[1]

(12) Discussions on Points of Evidence.—In all questions as to the admissibility of evidence or other points occurring in the course of a trial, the general rule shall be, that one of the counsel for the party for whom the objection is made shall be first heard, then the opposite counsel, and then the same counsel in reply; but in cases of difficulty and moment, the presiding Judge may permit more counsel than one to be heard.[2] (See *supra*, p. 560.)

(13) Cross-Examination.—It shall be competent in all cases when witnesses are subjected to cross-examination for the counsel to examine such witnesses as to all pertinent facts and circumstances, and it shall not be an objection that the questions put on such examination are not cross to those put on the original examination.[3]

(14) Recall of Witness.—See *supra*, p. 563.

(15) Witness Present in Court During Trial.—See *supra*, p. 563.

(16) Exceptions in Course of Trial or in Judge's Charge.—Where the counsel for either party shall except to points of law laid down by the presiding Judge in the course of a trial, or in his charge to the jury, the counsel tendering such exception shall deliver in a Note thereof to the Judge at the time the exception is taken; and the same, if it shall state correctly what was decided or directed, or omitted by the Judge to be directed, shall be certified by the Judge at the time, by subscribing his name to such Note; and a Note of all such exceptions taken in the course of the trial, or to the charge of the Judge, shall be finally settled and certified, as aforesaid, before the jury is enclosed to consider their verdict.[4]

Such exception may be made the ground of an application to set aside the verdict, either by motion for a new trial or by bill of exceptions.[5]

The following are forms of Notes of Exception, which may be varied according to circumstances:—

[1] A. S., 16th February 1841, sec. 28; C. A. S., F, ii. 2.
[2] A. S., 16th February 1841, sec. 29; C. A. S., F, ii. 3.
[3] A. S., 16th February 1841, sec. 30; C. A. S., F, ii. 4.
[4] A. S., 16th February 1841, sec. 32; C. A. S., F, ii. 7.
[5] Court of Session Act, 1868, sec. 34.

(1) *Admission or Rejection of Evidence.*—

Note of Exceptions for the Pursuer

in the cause in which

A. B. [*designation*] is Pursuer

and

C. D. [*designation*] is Defender.

Whereas at the trial of the issue in this cause held at Edinburgh on the day of 19 before the Hon. Lord (*A*) the counsel for the pursuer adduced in evidence *inter alios E. F.* [*designation*], and tendered him as a witness to prove ; whereupon the counsel for the defender objected to the said evidence on the ground that ; and Lord , having heard counsel for and against the admissibility of the said proposed evidence, sustained the defender's objection thereto ; the counsel for the pursuer excepted, and hereby excepts, to the said ruling of the said Lord .

(2) *Judge's Refusal to give Direction.*—

Same as (1) down to (*A*)

the counsel for the pursuer requested the said Lord to direct the jury that , which direction the said Lord refused to give ; the counsel for the pursuer excepted, and hereby excepts, to said refusal.

(3) *Judge's Direction.*—

Same as (1) down to (*A*)

the said Lord , in charging the jury, *inter alia* directed them as follows :— ; whereupon the counsel for the pursuer excepted, and hereby excepts, to the said direction, and further requested the said Lord to give the following direction to the jury, viz. ; which direction his Lordship refused to give ; the counsel for the pursuer excepted, and hereby excepts, to the said refusal.[1]

(4) *Where the Judge Withdraws the Case from the Jury.*—

Same as (1) down to (*A*)

the counsel for the defender, upon the conclusion of the pursuer's evidence, moved the Court to direct the jury that the pursuer had adduced no evidence to maintain and prove his contention under the said issue ; whereupon the counsel for the pursuer objected and contended that evidence of had been adduced ; and Lord repelled the objections of the pursuer's counsel, and directed the jury that the pursuer had adduced no evidence in law sufficient to maintain and prove his contention under said issue, and that they should return a verdict for the defender ; the counsel for the pursuer excepted, and hereby excepts, to said direction.

(17) Abandonment of Action in Course of a Trial.—Any action

[1] Wilson *v.* Dick's Co-operative Institutions, Ltd., 1916, 1 S. L. T. 288. Not only must the direction be excepted to, but the Judge must be asked to give a certain direction.

may, with leave of the Judge, be abandoned on the conditions contained in the 10th section of the Act 6th George the Fourth, chapter 120, and relative Act of Sederunt, sec. 115, in the course of a trial at any time before the Judge has commenced to charge the jury, or, where there is no jury, at any time before the Judge has made avizandum with the evidence: Provided that such abandonment shall not be competent without the leave of the Judge, who shall be of opinion that it is just and proper in the circumstances: Provided further, that in granting such leave the Judge shall specify the time within which the expenses shall be paid to the defender; and if the expenses shall not be paid within such time, the defender shall be entitled to be assoilzied from the conclusions of the action, with expenses.[1] (See *Motion for Leave to Abandon, supra,* p. 443 *et seq.*)

(18) Withdrawal of Case from the Jury.—Although the withdrawal of a case by a Judge from the jury after the evidence of the pursuer's witnesses has been led has seldom been resorted to, and has not been encouraged in Scotland,[2] the right to do so is undoubted.[3] The usual grounds for withdrawal are, either that the facts proved at the trial are quite different from what appear on record and on the faith of which the pursuer obtained an issue,[4] or that the pursuer has failed to adduce legal evidence of the averments which he has made on record.[5]

(19) Settlement of Cause by Minute.—In cases in which the parties, instead of taking the verdict of a jury, agree to settle the cause either by compromise, judicial reference, or in any other way, a minute shall be given in, signed by the parties, or by their counsel, to which the Judge shall interpone his authority by subscribing the same.[6] If a case is compromised at the sittings of the Inner House, the joint minute does not require to be remitted to the Outer House in order to have authority interponed to it.[7]

(20) Evidence Taken in Shorthand.—Where the parties agree, the evidence at a jury trial taken in shorthand, and extended by the

[1] Court of Session Act, 1868, sec. 39.

[2] Gibson *v.* Nimmo & Co., 1895, 22 R. 491.

[3] Tully *v.* North British Rly. Co., 1907, 46 S. L. R. 715, per Lord President Dunedin; Mitchell *v.* Caledonian Rly. Co., 1910, S. C. 546, per Lord Johnston and Lord Justice-Clerk Macdonald; M'Caffery *v.* Lanarkshire Tramways Co., 1910, S. C. 797; Cook *v.* Paxton, 1910, 48 S. L. R. 7.

[4] Tully *v.* North British Rly. Co., 1907, 46 S. L. R. 715; Mitchell *v.* Caledonian Rly. Co., 1910, S. C. 546.

[5] M'Caffery *v.* Lanarkshire Tramways Co., 1910, S. C. 797; Cook *v.* Paxton, 1910, 48 S. L. R. 7.

[6] A. S., 16th February 1841, sec. 33; C. A. S., F, ii. 8.

[7] Bell *v.* Hamilton's Trs., 1890, 17 R. 811.

shorthand writer, may, with the consent of the Judge, be substituted for the Judge's notes of the evidence for all purposes; and in such cases it shall not be competent to ask for the Judge's notes of evidence.[1]

(21) Adjournment of Trial.—The presiding Judge has power to adjourn a trial where the circumstances of the case require it, but where possible to avoid it an adjournment will not be granted. An adjournment has been granted where a juryman could not go on with safety to himself;[2] but was refused where a party desired an opportunity of obtaining additional evidence.[3]

The Codifying Act of Sederunt throws no light upon this subject. It certainly contains a paragraph headed "Adjournment on cause shown,"[4] but instead of dealing with "adjournment," as it professes, this paragraph deals with "postponement"—a subject which is quite sufficiently dealt with in a later paragraph of that Act.[5]

(22) Inventory of Productions.—Each party at the close of his proof shall lodge with the Clerk of Court an inventory of the productions put in evidence and founded on by him.[6]

(23) Proof in Replication and Additional Evidence.—Whether evidence in replication is admissible or not is a matter entirely in the hands of the presiding Judge. His decision, however, is not final, as the discretion may be exercised so unjustly, or so as to produce a miscarriage so grave, as to require a remedy to be applied by the Court.[7]

Evidence in replication has been allowed in cases of surprise or to discredit the defender's witnesses.[8] Where allowed, the evidence must be confined to the particular points for which the proof in replication was allowed; and this applies to cross-examination also.[9]

See also *supra*, pp. 562, 563.

It has been held that sec. 27 of the Act of Sederunt, 16th February 1841 (which is in similar terms to C. A. S., F, ii. 1), is directory and not imperative, and that it is within the discretion of the presiding Judge to allow evidence omitted at the regular stage to be adduced after the party tendering it has closed his case and has addressed the jury on the evidence.[10]

[1] Court of Session Act, 1868, sec. 37.

[2] Millar *v.* Fraser, 1826, 4 Murray, 112, at p. 121; Arrott *v.* Whyte, 1826, 4 Murray, 149, at p. 150 (note).

[3] Clark *v.* Thomson, 1816, 1 Murray, 161, at p. 173.

[4] C. A. S., F, i. 6.

[5] C. A. S., F, i. 14.

[6] C. A. S., F, ii. 5.

[7] Rankine *v.* Roberts, 1873, 1 R. 225, per Lord President Inglis, p. 229.

[8] Chatto *v.* Pyper, 1827, 4 Murray, 351, at p. 356.

[9] Mackellar *v.* Lambert, 1828, 4 Murray, 541, at pp. 546, 547.

[10] Christie *v.* Thompson, 1859, 21 D. 337.

(24) Charge to Jury.—After the speeches of senior counsel on either side, it is the duty of the presiding Judge to charge the jury. In course of his charge he reviews the evidence which has been led and directs the jury with reference to the various possible views which may be taken of the facts, and while leaving the ultimate decision upon the facts entirely in the hands of the jury, he lays down, in clear and unambiguous terms, the law applicable to the case, which the jury must accept at his hands.[1] If the Judge makes any mistake in fact it should be instantly corrected. For exceptions to his direction in law, see pp. 608, 609.

(25) Verdict.—A jury may at any time, being not less than three hours after it has been enclosed, return a verdict by a majority of its number.[2] Of consent, it may return a verdict by a majority at any time.

The verdict is declared by the chancellor or foreman verbally in open Court, and taken down by the Clerk of Court in writing, and then the clerk reads to the jury what he has taken down and asks them if that is their verdict.[3] The chancellor or foreman of the jury is the juror chosen by the majority of the jurors after they are sworn, and in the case of an equality of votes the juror first sworn shall have a double vote.[4]

Where a jury returned a verdict for the pursuer, and in answer to a question put by the presiding Judge stated that the deceased person was in fault as well as the defenders, a verdict for the defenders was entered.[5] In another case, where the jury held that the defender was at fault in using a horse for certain work, but that the pursuer took the risk, a verdict was also entered for the defenders.[6]

The jury does not require to answer superseded questions.[7] Where a verdict was returned to the clerk in the absence of the Judge, and no objection was taken at the time by either party, it was held to be of consent of parties.[8]

(26) Special Verdict.—Where it appears from the facts elicited on the trial of a cause that the whole question turns upon a nice and difficult principle of law, requiring both argument and deliberation, the

[1] Gelot *v.* Stewart, 1871, 9 M. 957.
[2] Court of Session Act, 1868, sec. 48.
[3] Pirie *v.* Caledonian Rly. Co., 1890, 17 R. 1157, per Lord President Inglis, p. 1161.
[4] 55 Geo. III. cap. 42, sec. 33.
[5] King *v.* North British Rly. Co., 1874, 12 S. L. R. 53.
[6] Wilson *v.* Boyle, 1889, 17 R. 62.
[7] Campbell *v.* Scottish Educational News Co., Ltd., 1906, 8 F. 691.
[8] Brownlie *v.* Tennant, 1855, 17 D. 422.

proper course is for the jury, under the direction of the presiding Judge, to enter a special verdict on the facts alone, finding for neither party, and leaving the Court to apply the law and to enter up the verdict accordingly.[1] This may be done in several ways—(1) The Judge may state the different facts in detail to the jury and ask them how they find upon each of them; or (2) the Judge may dictate the facts to the Clerk of Court in hearing of the jury and counsel, and upon the latter being agreed as to the facts stated, the Judge may direct the jury to consider the proof and to find accordingly; or (3) the Judge may retire and draw up a verdict in writing and return to the Court and read it to the jury subject to the observation of the counsel in the case; or (4) the counsel in the case may themselves attempt to settle the findings in fact, and if there is anything upon which they cannot agree, the jury may be called in to decide it. Thereafter the Court, after argument and deliberation, decides the question of law.[2]

Where parties, by minute, asked the jury to assess the damages on the footing of the defender's liability, leaving the Court to enter a verdict for the pursuer for the damages so assessed, or for the defender according to the legal liability of the defenders on the record and notes of evidence, and the jury was asked for an opinion upon a certain matter of fact, it was held that the Court was not bound by the jury's opinion.[3]

(27) Settling a Special Verdict.—When a special verdict is to be found, such finding may, by consent of parties, be settled out of Court by the notes of the Judge who tried the issue, or otherwise; but if the parties do not consent to that mode of settling the special verdict, the different parts of the evidence shall be stated to the jury, in order that they may find the facts which are to constitute the special verdict.[4]

(28) Special Case may be Substituted for a Special Verdict.—It shall be lawful to substitute a special case signed by counsel for a special verdict, and thereupon to discharge the order for trial, or the jury, if one has been empanelled, without returning a verdict; and such special case shall have the like force and effect as a special verdict.[5] The only difference between a special verdict and a special case is, that the jury find the facts in the former, while the parties mutually agree

[1] Macfarlane's Jury Practice, p. 241; Cunningham *v.* Spence, 16th March 1824, mentioned in Appendix to Macfarlane's Jury Practice, p. 349; Macfarlane *v.* Morrison, 1865, 4 M. 257; Murray *v.* Arbuthnot, 1870, 9 M. 198, per Lord Benholme, p. 203.

[2] Macfarlane's Jury Practice, p. 242.

[3] Adams *v.* Glasgow and South-Western Rly. Co., 1875, 3 R. 215.

[4] A. S., 16th February 1841, sec. 31; C. A. S., F, ii. 6.

[5] Court of Session Act, 1868, sec. 38.

upon the facts set forth in the latter; both must find or set forth *facts* alone.[1]

(29) Verdict may be Taken Subject to the Opinion of the Court on a Point Reserved.—This verdict must be distinguished from a special verdict. In a special verdict the jury finds for neither party, but finds certain facts to which the Court has to apply the law, and to enter up the verdict accordingly. In this verdict the jury finds for one or other of the parties subject to the reservation on a point of law.[2] The provision for this kind of verdict is as follows:—"The Judge at the trial may direct the jury upon any matter of law (subject to the opinion of the Court upon such direction), and with liberty to either party to move the Court to enter the verdict for such party, although returned against him, if the Court should be of opinion that such direction was erroneous, and that such party was truly entitled to a verdict. The opinion of the Court upon any direction so given may be obtained upon motion to enter the verdict for the party moving; and if the Court shall be of opinion that the direction was erroneous, and that the party moving is truly entitled to the verdict in whole or in part, they shall direct the verdict to be entered for him in whole or in part, either absolutely, or on such terms as they may think fit; otherwise they shall refuse the motion, or they may, if necessary, set aside the verdict and order a new trial: Provided also, that in such applications, as well as in motions for a new trial, it shall not be necessary to print the notes of the evidence for the use of the Court, but the Judge's notes may be produced at any time, if required."[3]

(30) Agents at Jury Trial on Circuit.—At the trial of any civil cause at a circuit town, any agent qualified to practise in the Sheriff Court of any county comprised within such circuit may attend such trial as sole agent in the cause, and shall be allowed for his attendance, and for all necessary business performed by him in connection with such trial, the same fees as are allowed to agents in the Court of Session.[4]

(31) Reference to Oath.—See *Motion for a Reference to Oath, supra*, p. 523 *et seq.*

(32) Pro Forma Trial.—A jury trial may be tried *pro forma* in order to enable a bill of exceptions to be taken to the House of Lords.

[1] Macfarlane's Jury Practice, p. 241.

[2] Murray *v.* Arbuthnot, 1870, 9 M. 198, per Lord Benholme, p. 203.

[3] Court of Session Act, 1868, sec. 36. See Forbes' Exrs. *v.* Western Bank of Scotland, 1854, 16 D. 807; Kerr *v.* Clark & Co., 1868, 7 M. 51; Murray *v.* Arbuthnot, 1870, 9 M. 198.

[4] Court of Session Act, 1868, sec. 50; Anderson *v.* Edmond, 1869, 7 M. 1050.

Thus, where upon a first trial a bill of exceptions and a rule were taken, and the Court, while disallowing the bill of exceptions, granted a new trial in respect that the verdict was contrary to evidence, the second trial was only proceeded with *pro forma*, the Judge's notes of evidence being accepted as the record of the evidence in the new trial, and a bill of exceptions was taken which enabled the case to be appealed to the House of Lords.[1]

[1] Harrisons *v.* Anderston Foundry Co., 1876, 3 R. 386.

CHAPTER X

PROCEDURE IN JURY TRIAL (*continued*)—AFTER TRIAL

I. Applying the Verdict, and Entering up Judgment.—After a verdict has been returned by the jury, it shall be engrossed on the issue, and signed by the clerk who attended at the trial; and the verdict shall be applied by the Lord Ordinary or the Division respectively in time of session, and judgment entered up, upon a motion to be made by the party for whom the verdict has been found; such motion, in causes which have been tried at the sittings after the end of the session, or during the Christmas recess, or upon the Circuits, may be made at any time after the expiration of six days after the commencement of the next session after the trial; and in causes which have been tried during the session, or immediately before the sitting down of the session, such motion may be made at any time after the expiration of ten days after the trial.[1] A motion to apply a verdict is competent although the time for appeal to the House of Lords has not expired.[2]

After a verdict has been announced by the foreman of the jury and the clerk has read out to the jury the verdict which he has taken down, and has asked the jury if that is their verdict, and the jury has assented, it is incompetent to entertain any challenge of that verdict by the jurors themselves or by any others, as where it was averred that the jury had cast lots for their verdict,[3] or that the votes were incorrectly counted.[4] If, however, it turns out that the mode in which a verdict has been entered up does not express what the jury, upon the direction of the Judge, had intended to state, the verdict may be set right.[5] It may also be put right where there is an erroneous entry owing to the mistake and misprision of the clerk;[6] but the Court has no power to amend the substance of a verdict so as to make a new verdict for the jury.[7]

[1] C. A. S., F, iii. 1.

[2] M'Ilwaine *v.* Stewart's Trs., 1914, S. C. 934.

[3] Stewart *v.* Fraser, 1830, 5 Murray, 166.

[4] Pirie *v.* Caledonian Rly. Co., 1890, 17 R. 1157.

[5] Marianski *v.* Cairns, 1854, 1 Macq. 766, per Lord Chancellor Cranworth, p. 770.

[6] Morgan *v.* Morris, 1858, 3 Macq. 323, per Lord Chancellor Chelmsford, p. 333, and Lord Cranworth, p. 344. See also Kirk *v.* Guthrie, 1817, 1 Murray, 271, at p. 278.

[7] Morgan *v.* Morris, 1858, 3 Macq. 323; Simpson *v.* Glasgow Corporation, 1916, 1 S. L. T. 124.

The only course open, if the jury has returned an ambiguous verdict, is to grant a new trial.[1]

If there is any dispute about applying the verdict, all that the Court is entitled to look at are the issue and the verdict, but not the other pleadings.[2]

A defender is entitled to be assoilzied if the verdict is negative of the pursuer's case although not affirmative of his own case.[3] Where the issue contains an alternative it has been held that a general finding for the pursuer includes both parts.[4] Where, however, there were two alternative issues which were inconsistent, and the jury found for the pursuers on both issues, the Court granted a new trial.[5]

In an action of declarator of public right-of-way where there was a general issue, it was held competent for the jury to find (1) that the road was one for foot-passengers, and (2) that the road was not for horses, carts, or cattle; and the verdict was entered up for the pursuers on the first head and for the defenders on the second head.[6]

Where the question asked in the issue was whether the defender did in the presence and hearing of *C. M.* and others falsely and calumniously say . . . , and a verdict was returned that it was not proved that the defamatory words were uttered in the presence and hearing of *C. M.*, the verdict was entered up for the defender.[7]

Where the verdict does not answer the issue, a new trial must be granted.[8]

If the jury add a rider not inconsistent with their verdict,[9] or use words of surplusage,[10] the verdict will be entered up.

Where in an action against two defenders jointly and severally, or severally, for a lump sum of damages, the jury found against both defenders and apportioned the damages, it was held that as the issue contemplated a joint liability the apportionment was invalid, but that the Court had power to disregard the apportionment, and accord-

[1] Morgan *v.* Morris, 1858, 3 Macq. 323. See also Gourlay's Trs. *v.* Kerr, 1857, 19 D. 789; Florence *v.* Mann, 1890, 18 R. 247.

[2] Morgan *v.* Morris, 1858, 3 Macq. 323, per Lord Chancellor Chelmsford, p. 339. See also Leys, Masson & Co. *v.* Forbes, 1831, 5 W. & S. 384, at p. 403.

[3] Melrose *v.* Hastie, 1854, 17 D. (H. L.) 4; Campbell *v.* Scottish Educational News Co., Ltd., 1906, 8 F. 691, at p. 694.

[4] Cairns *v.* Marianski, 1852, 15 D. 268; M'Conechy *v.* M'Indoe, 1853, 16 D. 315; M'Whinnie *v.* Johnston and Morrison, 1864, 2 M. 668.

[5] Spring *v.* Martin's Trs., 1910, S. C. 1087.

[6] Macfarlane *v.* Morrison, 1865, 4 M. 257.

[7] Broomfield *v.* Greig, 1868, 6 M. 992.

[8] Advocate-General *v.* Lamont, 1856, 18 D. 374.

[9] Burns *v.* Steel Co. of Scotland, 1893, 21 R. 39.

[10] Kane *v.* Stephen & Sons, 1900, 2 F. 739.

ingly it applied the verdict by decerning against the defenders jointly and severally.[1]

Where the question put to the jury was whether "on or about 12th March 1912" the defender slandered the pursuer, and the jury found that the slander had been uttered in February 1912, Lord President Dunedin directed that the verdict should be entered for the defender.[2]

II. EXPENSES.—(1) *Expenses of Trial.*—Upon the verdict being applied the Court will either grant or refuse expenses; and, if granted, an account shall be ordered to be lodged, and remitted to the Auditor to be taxed, as in other causes before the Court of Session.[3]

Where the pursuer in any action of damages, not being an action for defamation or for libel, or an action which is competent only in the Court of Session, recovers by the verdict of a jury £5 or any sum above £5 but less than £50, he shall not be entitled to charge more than one-half of the taxed amount of his expenses, unless the Judge before whom the verdict is obtained shall certify that he shall be entitled to recover any larger proportion of his expenses, not exceeding two-third parts thereof.[4] (See Maclaren on Expenses, p. 93 *et seq.*)

The Table of Fees and Charges of Law Agents in Jury Trials is to be found in the Codifying Act of Sederunt, K, iv., Appendix I. v.

The Fee Fund Dues are to be found in the same Act, K, ii. (See Maclaren on Expenses.)

(2) *Expense of Printing Documents.*—There will be allowed under the conditions aftermentioned, to the successful party, the expense of printing the documents actually produced and used at a jury trial; but the Auditor shall examine such print, with a view to see whether deeds have been unnecessarily printed at length, or accounts and other papers unnecessarily printed, when nothing turned on the terms of the same: And further, the party who means to claim such expense, shall apply for, and obtain from the Judge trying the cause, a certificate as to the extent to which such print was necessary, and the Auditor shall tax the account according to such certificate, so far as he finds that it rules the matter.[5] (See Maclaren on Expenses, pp. 105, 106, 486 *et seq.*)

[1] M'Innes *v.* Ayr Harbour Trs., 1902, 5 F. 20. See, however, Simpson *v.* Glasgow Corporation, 1916, 1 S. L. T. 124.

[2] Smith *v.* Paton, 1913, S. C. 1203.

[3] A. S., 16th February 1841, sec. 35; C. A. S., F, iii. 2; 59 Geo. III. cap. 35, sec. 19.

[4] A. S., 20th March 1907, sec. 8; C. A. S., F, iii. 3.

[5] C. A. S., F, iii. 4.

(3) *Certificate for Skilled Witnesses.*—See Maclaren on Expenses, p. 473 *et seq.*

In a recent case it was held that the motion for a certificate should be made either at the end of the trial or subsequently by a motion in Court after due intimation to the opposite party, but that in the latter case no charge can be made against the opposite party for the enrolment.[1]

III. REVIEW OF VERDICT.—(1) *Generally.*—By the Jury Trials (Scotland) Act, 1815, sec. 6, it is provided that it shall be lawful and competent for the party who is dissatisfied with the verdict of a jury to apply to the Division of the Court to which the cause belongs for a new trial on the following grounds:—

(i.) The verdict being contrary to evidence.

(ii.) Misdirection of the Judge.

(iii.) Undue admission or rejection of evidence.

(iv.) Excess of damages.

(v.) *Res noviter veniens ad notitiam.*

(vi.) Such other cause as is essential to the justice of the case.

With regard to two of these grounds at least, viz. (1) Misdirection of the Judge, and (2) Undue admission or rejection of evidence, it will be observed that at the trial of the cause if the Judge misdirects the jury on a point of law, either by a misstatement of law applicable to the case or by an omission to state such law, or if the Judge unduly admits or rejects evidence tendered, it is open to the party dissatisfied to take exception to the Judge's ruling. At first this seems to have been overlooked and application for a new trial on any of the above grounds seems to have been competent irrespective of whether exception (where that was possible) had been taken at the trial or not to matters which subsequently formed the grounds of an application for a new trial.

In the year 1834, however, on a motion for a rule on the ground that certain evidence had been allowed at the trial which should have been disallowed, the Court agreed that as no exception had been taken at the trial, it was incompetent to consider it;[2] and it was decided later[3] that it was not competent to move for a new trial on the ground of the misdirection of the Judge in point of law, or omission to state law, no objection or exception thereanent having been taken at the trial.

[1] Davidson *v.* Scott, 1915, S. C. 1120.
[2] Campbell *v.* Campbell, 1834, 12 S. 870.
[3] M'Clelland *v.* Rodger & Co., 1842, 4 D. 646

Accordingly, the practice is now settled that while a motion for a rule to show cause why a new trial should not be granted may be made on the following grounds:—

(i.) The verdict being contrary to evidence.

(ii.) Excess of damages.

(iii.) *Res noviter veniens ad notitiam.*

(iv.) Such cause as is essential to the justice of the case,

it is only competent to raise the questions of

(i.) Misdirection of the Judge, and

(ii.) Undue admission or rejection of evidence,

where exception has been taken at the trial by an *informal* note of exceptions and the question is brought subsequently before the Court by means of a *formal* bill of exceptions lodged within a limited time after the verdict has been pronounced.[1]

(2) *Motion for a Rule to Show Cause why the Verdict should not be Set Aside and a New Trial Granted.*—(a) *Notice of Motion.*—Where a party who is dissatisfied with a verdict in a cause which has been tried at the sittings after the end of the session, or during the Christmas recess, or at the Circuits, proceeds by way of motion for a rule, notice must be given within six days after the commencement of the next session, or of the meeting of the Court after the Christmas recess, or ten days after the trial of the cause, if the cause has been tried during the session or immediately before the sitting down of the session.[2] The days are ordinary days and not sederunt days.[3] The "February week" falls to be treated on the same footing as the Christmas recess.[4]

The following is a form of notice:—

A. B., Pursuer. *C. D.*, Defender.

Take notice that on the day of the Division will be moved for a rule to show cause why the verdict in this case should not be set aside and a new trial granted; and, in the meantime, that all further proceedings be stayed [*dated, etc.*]. [*Signature and Address.*]

(b) *Procedure Thereafter.*—The principal notice, signed by the agent, is lodged in process, and a copy served at the same time upon the agent for the opposite party, and, as the motion is made before the

[1] Ritchie & Son *v.* Barton, 1883, 10 R. 813, per Lord President Inglis, pp. 815, 816. See also Barles *v.* Strathern and Douglas, 1860, 22 D. 851, per Lord Justice-Clerk Inglis, p. 869.

[2] A. S., 16th February 1841, sec. 36; C. A. S., F, iii. 5.

[3] Campbell *v.* Caledonian Rly. Co., 1899, 2 F. 25.

[4] Cockburn *v.* Hogg, 1897, 24 R. 529.

Division to which the cause belongs,[1] a copy is also lodged with the Keeper of the Rolls of the Division.[2] This rule is imperative.[3] The cause is then enrolled in the Single Bills, and, on being moved, is sent to the Summar Roll.[4] On the Summar Roll one counsel only is heard for the party moving; counsel for the other side is not heard. If a *primâ facie* case is made out, the rule is granted.

(c) *Judge's Notes of the Evidence.*—If the Judge presiding at the trial has been an Inner House Judge, an order upon him to furnish his notes of the evidence is asked for and granted, usually after the rule is granted.[5] If, however, the presiding Judge is a Lord Ordinary, the application should be made to him and not to the Division.[6] Before furnishing the notes to the Court the presiding Judge may correct any inaccuracies therein.[7]

(d) *Hearing on Rule.*—When the rule is set down for hearing, the party holding the verdict is first heard and afterwards the counsel for the party who has obtained the rule.[8]

(e) *Grounds upon which a Rule may be made Absolute.*—(i.) *Verdict Contrary to Evidence.*—The Court is not entitled to set aside the verdict of a jury as being against evidence unless it has become satisfied that it is a verdict which cannot, from any point of view, be reconciled with the weight of the evidence;[9] in fact, the jury must go "flagrantly wrong" before its verdict can be overturned.[10] Thus, it is not sufficient to overturn a verdict that the Court is of opinion that if it had been left to them they would have returned a different verdict,[11] or that the Judge who tried the case was of a different opinion from the jury.[12] Where, however, it was admitted by the defender that a newspaper article was intended to charge the pursuer with dishonesty and the

[1] Henderson *v.* Blackwood, 1852, 24 Jur. 183.

[2] A. S., 16th February 1841, sec. 44; C. A. S., F, iv. 3; C. A. S., F, iv. 6.

[3] Campbell *v.* Caledonian Rly. Co., 1899, 2 F. 25.

[4] A. S., 16th February 1841, sec. 39; C. A. S., F, iii. 7.

[5] A. S., 16th February 1841, sec. 36.

[6] Campbell *v.* M'Laren, 1863, 1 M. 216.

[7] Morrison *v.* Maclean's Trs., 1865, 3 M. (H. L.) 42.

[8] Rodgers *v.* Harvey, 1826, 4 Murray, 25, at p. 33.

[9] Kinnell *v.* Peebles, 1890, 17 R. 416, per Lord President Inglis, p. 424. See also Mags. of Elgin *v.* Robertson, 1862, 24 D. 301, per Lord Wood, p. 305.

[10] Ross *v.* M'Kittrick, 1886, 14 R. 255, per Lord President Inglis, p. 262. See also Robertson *v.* Ainslie's Trs., 1838, 16 S. 1239, per Lord Justice-Clerk Boyle, p. 1240; Mags. of Elgin *v.* Robertson, 1862, 24 D. 301, per Lord Wood, p. 305; Campbell *v.* Scottish Educational News Co., Ltd., 1906, 8 F. 691, per Lord Kinnear.

[11] M'Whir *v.* Maxwell, 1837, 15 S. 873; Robertson *v.* Ainslie's Trs., 1838, 16 S. 1239; Macaulay *v.* Buist & Co., 1846, 9 D. 245; Byres *v.* Forbes, 1866, 4 M. 388.

[12] Thorburn *v.* Thorburn, 1838, 16 S. 1113.

jury held that there was no slander;[1] and where the pursuer undertook to prove that a horse and van "belonging to the defenders" injured the pursuer, but failed to prove that the horse belonged to the defenders,[2] the Court overturned the verdict as being contrary to evidence.

Where there were two jury trials by the same pursuer against different defenders on the same facts, and in the first case the jury found for the pursuer and the Court refused to set aside the verdict as being contrary to evidence, and in the later case the jury found for the defenders, the Court paid no heed to the first verdict in dealing with a motion for a rule in the second case, and held that the verdict was not contrary to evidence and discharged the rule.[3]

In reviewing the verdict the opinion of the Judge who presided at the trial will have considerable weight,[4] but is not conclusive.[5]

A list of cases in which a new trial was *granted* in respect of the verdict being contrary to evidence is given below,[6] and a list of cases in which a new trial was *refused* is also given.[7]

The same rules apply where the case is of a *penal* nature.[8]

(ii.) *Excess of Damages.*—The question of damages is really a jury question, and the grounds for disturbing a verdict on account of an excessive award of damages ought to be much stronger than they are for disturbing a verdict as being contrary to evidence.[9] Accordingly,

[1] Ross *v.* M'Kittrick, 1886, 14 R. 255.

[2] Shiells *v.* Edinburgh and Glasgow Rly. Co., 1856, 18 D. 1199.

[3] Stone *v.* General Maritime Insurance Co., 1851, 13 D. 1288.

[4] Gavin *v.* Montgomerie, 1830, 9 S. 213, per Lord President Hope, p. 217; Donaldson *v.* M'Fee, 1834, 12 S. 644; M'Culloch *v.* North British Bank, 1849, 11 D. 1197; Frasers *v.* Edinburgh Street Tramways Co., 1882, 10 R. 264, per Lord Shand, p. 268.

[5] Gavin *v.* Montgomerie, 1830, 9 S. 213; Frasers *v.* Edinburgh Street Tramways Co., 1882, 10 R. 264; Ross *v.* M'Kittrick, 1886, 14 R. 255.

[6] Smith *v.* Gentle, 1844, 6 D. 565; Railton *v.* Mathews, 1845, 7 D. 748; Waddel *v.* Waddel's Trs., 1845, 7 D. 1017; Miller *v.* Geils, 1848, 10 D. 715; Stewart *v.* Macfarlane, 1856, 18 D. 786; Shiells *v.* Edinburgh and Glasgow Rly. Co., 1856, 18 D. 1199; Morrison *v.* Maclean's Trs., 1862, 24 D. 625; Cameron *v.* Menzies, 1868, 6 M. 279; Gelot *v.* Stewart, 1870, 8 M. 649; Ross *v.* M'Kittrick, 1886, 14 R. 255; Keenan *v.* Scottish Wholesale Co-operative Society, Ltd., 1914, S. C. 959.

[7] Macaulay *v.* Buist & Co., 1846, 9 D. 245; Scott's Trs. *v.* Bannerman, 1848, 10 D. 353; M'Culloch *v.* North British Bank, 1849, 11 D. 1197; Whitelaw *v.* Moffat, 1849, 12 D. 434; Stone *v.* General Maritime Insurance Co., 1851, 13 D. 1288; Mackintosh *v.* Fraser, 1860, 22 D. 421; Gardner *v.* Anderson, 1862, 24 D. 315; Beattie *v.* Mackay and Paterson, 1863, 1 M. 279, at p. 283; M'Lachlans *v.* Gardner, 1866, 3 S. L. R. 6; Byres *v.* Forbes, 1866, 4 M. 388; Kerr *v.* Clark & Co., 1868, 7 M. 51; Johnston *v.* Dilke, 1875, 2 R. 836.

[8] Mackenzie *v.* Mags. of Dingwall, 1839, 1 D. 487.

[9] Casey *v.* United Collieries, Ltd., 1907, S. C. 690, per Lord President Dunedin, p. 692.

the rule is that the Court ought not to set aside an award for excessive damages unless it is satisfied that, either from wrong intention or from incapacity, the jury have perpetrated an injustice and have given higher damages than any reasonable jury fairly performing the function of their office could have given.[1] In actions of damages for *personal injury* an award of £750 was held not to be excessive where a miner had sustained injuries to his spine and was permanently disabled;[2] £800 was considered not to be excessive where a lady in business as a grocer sustained injuries which resulted in permanent lameness;[3] £3000 was held not to be excessive where a draper sustained injuries which resulted in paralysis of the legs and left arm;[4] and £4000 was held not to be excessive where a farmer of thirty-six years of age whose rent was £565 per annum was injured and a tubercular condition in his spine was set up.[5] Where a lad earning 12s. 6d. per week was killed an award of £400 was not considered excessive,[6] though an award of £900 for the death of a builder whose income was £150 per annum was considered excessive.[7]

In actions of damages for *slander* it was held that an award of £50 was not excessive for erroneously publishing that the pursuer had been seven times convicted of theft;[8] that an award of £100 was not excessive for publishing that a decree in absence had been given against the pursuer instead of a decree by consent;[9] and that an award of £1250 was not excessive in a case where a law agent had been falsely accused of fraud.[10] It was held, however, that an award of £300 for *solatium* alone was excessive for writing letters falsely accusing the pursuer of theft and for lodging a false charge with the police;[11] and that an award of £1275 was excessive for a slander that pursuer had deceived the public by publishing an atlas bearing to be prepared by well-known geographers when it was not so prepared.[12]

[1] Casey *v.* United Collieries, Ltd., 1907, S. C. 690, per Lord Kinnear, p. 693. See also Landell *v.* Landell, 1841, 3 D. 819, at p. 825; Adamson *v.* Whitson, 1849, 11 D. 680; Young *v.* Glasgow Tramways Co., 1882, 10 R. 242, per Lord President Inglis, p. 245; Thoms *v.* Caledonian Rly. Co., 1913, S. C. 804.

[2] Casey *v.* United Collieries, Ltd., 1907, S. C. 690.

[3] Young *v.* Glasgow Tramways Co., 1882, 10 R. 242.

[4] Shields *v.* North British Rly. Co., 1874, 2 R. 126.

[5] Thoms *v.* Caledonian Rly. Co., 1913, S. C. 804.

[6] M'Master *v.* Caledonian Rly. Co., 1885, 13 R. 252.

[7] Wallace *v.* West Calder Co-operative Society, Ltd., 1888, 15 R. 307.

[8] Fletcher *v.* Wilsons, 1885, 12 R. 683.

[9] Hunter & Co. *v.* Stubbs, Ltd., 1903, 5 F. 920.

[10] Christian *v.* Lord Kennedy, 1818, 1 Murray, 419; 2 Murray, 51.

[11] Ritchie & Co. *v.* Barton, 1883, 10 R. 813.

[12] Johnston *v.* Dilke, 1875, 2 R. 836.

In a case of the wrongous imprisonment, by means of a Border warrant, of an Englishwoman on a visit to Scotland, an award of £500 against the party obtaining the warrant and of £300 against the Sheriff-Clerk who issued the warrant was not considered excessive.[1]

Where there is a slight error in the sum awarded owing to a miscalculation, the Court has power to put it right.[2]

Formerly it was held to be competent for the Court, without consulting the defender, to tell the pursuer that unless he accepted a smaller sum than what was awarded a new trial would be granted, and thereafter on the consent of the pursuer being obtained to reduce the award;[3] but this practice has now been departed from, and a verdict for a new amount can only be pronounced by the Court with the consent of both parties.[4]

It is competent to ask the Court to grant a new trial on the ground of *inadequate* damages.[5]

(iii.) *Res Noviter Veniens ad Notitiam.*—The new evidence discovered must be evidence which was not available at the trial owing to no fault either of omission or commission of the party asking for the new trial.[6] Accordingly, where a document had all along been in the possession of the agent of the party asking for a new trial, the motion for a new trial was refused.[7] The evidence must also be material to the case.[8] Thus, where in a slander action a verdict was given against the defenders, who asked for a new trial in respect that since the trial they had found out certain particulars against the pursuer's character, the Court refused the motion, as it was of opinion that the new averments did not justify the slander and would not have had any effect prejudicial to the pursuer in the minds of the jury had they been brought to the jury's notice.[9]

Where the Court decides that new evidence is material to the cause and that in respect thereof a new trial should be granted, it in no way decides that the new jury should on the new evidence pronounce a different verdict.[10]

[1] Landell *v.* Landell, 1841, 3 D. 819.

[2] Dalziel *v.* Duke of Queensberry's Exrs., 1826, 4 Murray, 10, at p. 18.

[3] Johnston *v.* Dilke, 1875, 2 R. 836; Ritchie & Co. *v.* Barton, 1883, 10 R. 813; Wallace *v.* West Calder Co-operative Society, Ltd., 1888, 15 R. 307.

[4] Watt *v.* Watt, L. R. [1905] A. C. 115; Boal *v.* Scottish Catholic Printing Co., Ltd., 1908, S. C. 667.

[5] Black *v.* Croall, 1854, 16 D. 431; Reid *v.* Morton, 1902, 4 F. 438.

[6] Paterson *v.* Stow, 1st February 1817, F. C.; Bannerman *v.* Scott, 1846, 9 D. 163.

[7] Byres *v.* Forbes, 1866, 4 M. 388.

[8] Ibid., per Lord Justice-Clerk Inglis and Lords Cowan and Neaves.

[9] Fletcher *v.* Wilsons, 1885, 12 R. 683.

[10] Bannerman *v.* Scott, 1846, 9 D. 163.

The averments of *res noviter* should be put before the Court in the form of a condescendence or minute.[1]

(iv.) *Such other Cause as is Essential to the Justice of the Case.*—The Court has sometimes granted a new trial on the ground of *surprise.* Thus, where the pursuers condescended on certain alleged errors in business books and rested at the trial on other specific errors totally different;[2] where an element of damage was brought to the notice of the jury by the Judge although there was no record for it;[3] where under a general denial evidence tending towards contributory negligence was allowed,[4] and where a jury must have decided the case on a ground not stated on record,[5] the Court granted a new trial. In the same way, if in a patent case evidence is allowed to be led of a discrepancy between the title and the specification, without averment of the same on record, a new trial will be granted.[6]

Where, however, the averments of one party are such as to put the other party on his guard, the latter should be prepared for all the views founded on these averments, and the Court will not grant a new trial on the ground of surprise.[7] Thus, where the defender had a plea that the pursuer was grossly negligent, and the jury brought in a verdict of contributory negligence, the Court refused to disturb the verdict.[8]

Where the verdict of the jury has been ambiguous,[9] or has affirmed two issues which are mutually destructive,[10] a new trial will be granted.

Where a juryman not only visits the *locus* of an accident but performs experiments along with interested parties at the *locus* to inform himself of how the accident occurred, a new trial will be granted;[11] but where he merely walks over the *locus* with a friend not interested in the case, the Court will not interfere with the verdict.[12] Again, it is not a good ground to interfere with a verdict that a juryman was one of 18,500 employees of one of the parties to the action;[13] or that it is

[1] Baillie *v.* Bryson, 1818, 1 Murray, 317, at p. 340; Bell *v.* Bell, 1819, 2 Murray, 130, at p. 135.

[2] Gye & Co. *v.* Hallam, 1832, 10 S. 710.

[3] Snare *v.* Earl of Fife's Trs., 1852, 24 Jur. 539.

[4] Crawford *v.* Lusk's Trs., 1884, 12 R. 25.

[5] Littlejohn *v.* Brown & Co., Ltd., 1909, S. C. 169.

[6] Kerr *v.* Clark & Co., 1868, 7 M. 51.

[7] Mackenzie *v.* Mags. of Fortrose, 1842, 4 D. 911; M'Aslan *v.* Glen, 1859, 21 D. 511.

[8] Murray *v.* County of the Middle Ward of Lanark Road Trs., 1888, 15 R. 737.

[9] Florence *v.* Mann, 1890, 18 R. 247.

[10] Spring *v.* Martin's Trs., 1910, S. C. 1087.

[11] Sutherland *v.* Prestongrange Coal, etc., Co., 1888, 15 R. 494.

[12] Hope *v.* Gemmell, 1898, 1 F. 74.

[13] Watson *v.* North British Rly. Co., 1901, 3 F. 342.

averred that the jury cast lots for their verdict;[1] or that their votes were wrongly counted;[2] or that they were under a misapprehension as to the meaning of their verdict.[3]

It is not a good ground for granting a new trial that counsel, contrary to the instructions of his client, gives up the case,[4] or fails to examine his client;[5] nor is it a good ground that the party asking for a new trial undertakes to prove that certain of the witnesses have perjured themselves.[6] Where, however, a document was produced at a trial which was afterwards found out to bear a false date and written on paper manufactured several years after the date it bore, a new trial was granted.[7]

In a case where the real question between the parties was not raised, the Court granted a new trial on an amended record with new issues.[8]

Where a *special verdict* was returned, the Court granted a new trial in respect that the findings of fact were insufficient to enable the Court to pronounce a verdict.[9]

Where a verdict was given for a defender in respect that a document which the pursuer desired to prove was unstamped, and the pursuer afterwards got it stamped, a new trial was granted;[10] but as a party desiring to prove an unstamped document may now do so upon payment to the Clerk of Court of the amount of the stamp and penalty and an additional penalty of £1,[11] it is thought that where this cause was not adopted at the trial, a new trial would not afterwards be granted.

Where the discretion of the presiding Judge with regard to proof in replication,[12] or additional evidence,[13] has been exercised unjustly, a motion for a new trial may be made.

[1] Stewart *v.* Fraser, 1830, 5 Murray, 166.

[2] Pirie *v.* Caledonian Rly. Co., 1890, 17 R. 1157.

[3] Fullarton *v.* Caledonian Rly. Co., 1882, 10 R. 70. See also Dobbie *v.* Johnston and Russell, 1861, 23 D. 1139.

[4] Currie *v.* Glen, 1846, 9 D. 308.

[5] Mackintosh *v.* Fraser, 1860, 22 D. 421.

[6] Turnbull *v.* Campbell, 1859, 21 D. 1021; Lockyer *v.* Ferryman, 1877, 4 R. (H. L.) 32, per Lord Chancellor Cairns, p. 35; Snodgrass *v.* Hunter, 1899, 2 F. 76.

[7] Millar *v.* Fraser, 1826, 4 Murray, 112, at p. 118.

[8] Gelot *v.* Stewart, 1870, 8 M. 649.

[9] Caledonian and Dumbartonshire, etc., Rly. Co. *v.* Lockhart, 1854, 17 D. 25.

[10] Ivison *v.* Edinburgh Silk Yarn Co., 1845, 8 D. 236.

[11] Court of Session Act, 1868, sec. 41; 33 & 34 Vict. cap. 99; 54 & 55 Vict. cap. 39, sec. 14.

[12] Rankine *v.* Roberts, 1873, 1 R. 225, per Lord President Inglis, p. 229.

[13] Christie *v.* Thompson, 1859, 21 D. 337, per Lord President M'Neill, p. 351.

(v.) *Motion for a New Trial Founded upon a Note of Exceptions.*—Not only may a motion for a new trial proceed upon any of the grounds already set forth, but a note of exceptions taken at the trial and signed by the presiding Judge may be made the ground of an application to set aside the verdict by motion for a new trial.[1]

(f) *Verdict set Aside and Judgment Entered for the Party Unsuccessful at the Trial.*—If after hearing parties upon a rule to show cause why a new trial should not be granted in terms of sec. 6 of the Jury Trials (Scotland) Act, 1815, on the ground that the verdict is contrary to evidence, the Court are *unanimously* of opinion that the verdict under review is contrary to evidence, and, further, that they have before them *all the evidence that could be reasonably expected to be obtained* relevant to the cause, they shall be entitled to set aside the verdict and, in place of granting a new trial, to enter judgment for the party unsuccessful at the trial.[2]

This new provision has been put in force in a couple of recent cases.[3]

(g) *Appeal from Interlocutor Granting or Refusing a New Trial.*—Such an interlocutor on a motion for a new trial is not subject to review by appeal to the House of Lords,[4] even where the ground of the motion has been an exception taken at the trial to a ruling of the presiding Judge.[5]

(3) *Bill of Exceptions.*—(a) *Generally.*—Review of the verdict of a jury by way of a bill of exceptions is only permissible where the party dissatisfied with the verdict has taken exception to the direction of the presiding Judge at the time of the trial.[6] See also *supra*, pp. 619, 620.

(b) *Note of Exception.*—Where an exception is taken at the trial a note thereof is taken by the Judge, or, if he shall so direct, or the party excepting shall think proper, a note thereof shall be written out and signed by the party excepting or his counsel, and also by the Judge at the time.[7] In practice, this provision is confined to the case of an exception to the Judge's charge, as an exception to the admission or

[1] Court of Session Act, 1868, sec. 34; Bicket *v.* Wood, 1893, 20 R. 874.

[2] Jury Trials Amendment (Scotland) Act, 1910 (10 Edw. VII. and 1 Geo. V. cap. 31), sec. 2.

[3] Mills *v.* Kelvin and James White, Ltd., 1913, S. C. 521; Macleod *v.* Edinburgh and District Tramways Co., Ltd., 1913, S. C. 624.

[4] 55 Geo. III. cap. 42, sec. 6; 59 Geo. III. cap. 35, sec. 17.

[5] Bicket *v.* Wood, 1893, 20 R. 874, per Lord President Robertson, p. 875.

[6] Campbell *v.* Campbell, 1834, 12 S. 870; M'Clelland *v.* Rodger & Co., 1842, 4 D. 646; Barles *v.* Strathern and Douglas, 1860, 22 D. 851, per Lord Justice-Clerk Inglis, p. 869; Ritchie & Son *v.* Barton, 1883, 10 R. 813, per Lord President Inglis, pp. 815, 816.

[7] Court of Session Act, 1868, sec. 34. See also *supra*, pp. 608, 609.

rejection of evidence is noted by the shorthand writer under the direction of the Judge. It is irregular in preparing a formal bill of exceptions for the Judge to make any alteration upon the note of exceptions signed by him at the trial.[1]

(c) *Form of Bill of Exceptions and Procedure Therein.*—The bill of exceptions, which is subsequently prepared, consists of a distinct statement of the exception or exceptions so noted, with such a statement of the circumstances in which the exception or exceptions were taken (including, if necessary, a statement of the purport of the evidence, or extracts therefrom, so far as bearing upon such exception or exceptions, but without any argument) as, along with the record in the cause, may enable the Court to judge of such exception or exceptions.[2]

The circumstances in which the exceptions were taken must be specifically set forth,[3] and also such excerpts from the evidence as is necessary to establish the points desired to be raised.[4] It is not sufficient compliance with the statute to print the whole evidence as an Appendix.[4]

The following is the bill of exceptions in a recent case:—

Bill of Exceptions for the Pursuer

in the cause in which

Mrs. Catherine Gibb, widow, residing at No. 4 Merchiston Avenue, Edinburgh, is *Pursuer;*

and

The Edinburgh and District Tramways Co., Ltd., incorporated under the Companies Acts, and having their registered office at No. 1 South Charlotte Street, Edinburgh, are *Defenders.*

Whereas in the action at the instance of the said Mrs. Catherine Gibb against the said Edinburgh and District Tramways Co., Ltd., the following issue was adjusted and settled by the Honourable Lord Guthrie (Ordinary), and appointed to be the issue for the trial of the cause:—

Whether, on or about 14th September 1910, in Lothian Road, Edinburgh, the pursuer was injured in her person through the fault of the defenders, to her loss, injury, and damage?

Damages laid at £2000.

Edinburgh, *7th December* 1911.—This issue as amended is authenticated as the issue for the trial of the cause. CHARLES J. GUTHRIE.

And whereas, at a sitting of the Court for the trial of the cause by jury, held at Edinburgh on the 25th, 26th, 27th, and 28th days of June 1912, before the Honourable Lord Hunter (Ordinary), the said issue came to be

[1] Earl of Glasgow *v.* Hurlet Alum Co., 1850, 7 Bell's App. 100.

[2] Court of Session Act, 1868, sec. 35.

[3] Connelly *v.* Clyde Navigation Trs., 1902, 5 F. 8; Glass *v.* Paisley Race Committee, 1902, 5 F. 14.

[4] Wilson *v.* Dick's Co-operative Institutions, Ltd., 1916, 1 S. L. T. 288. See also Glass *v.* Paisley Race Committee, 1902, 5 F. 14, per Lord Adam, p. 18.

tried by a jury, on which days there appeared the said pursuer and defenders by their counsel and agents, and the jurors of the jury aforesaid empanelled to try the said issue being called also came, and were there and then chosen, empanelled, and sworn to try the said issue.

And upon the trial of the said issue the counsel for the parties adduced evidence to maintain and prove their respective contentions.

The pursuer maintained, *inter alia*, that the defenders were negligent in respect that they had failed to provide side-guards for their cars, and that, had this precaution been adopted, the injuries to the pursuer would have been prevented.

The pursuer led evidence to the effect that she had stood in the four-foot-way between the two lines of rails waiting till the car passed; that her dress was caught by the car and she was thrown down; that had there been guards at the side of the car the injury sustained by the pursuer would in all probability have been avoided.

The defenders maintained that the cars were safe without side-guards, and led evidence to the effect that the pursuer, in a pre-occupied manner, walked against the side of the car, with the result that she was thrown down on the street.

It was common ground between the parties that the pursuer fell clear of the car, but that her leg went under the car, and was run over by the front wheel of the rear bogie.

After the evidence of both parties had been closed, and after their respective counsel had addressed the jury, the presiding Judge charged the jury to the effect that if they came to be of opinion that the pursuer's carelessness contributed to the accident they must return a verdict for the defenders, and that the question as to their opinion with reference to the propriety of having side-guards or not was immaterial. Counsel for the pursuer did then and there request the presiding Judge to direct the jury:—

That even if they be of opinion that the pursuer contributed by her fault to the accident which happened, she is not disentitled to recover damages from the defenders if the jury are also of opinion that reasonable care on the part of the defenders, viz. provision of life-guard to the car, would have prevented the accident.

Which direction the presiding Judge refused to give.

Whereupon the counsel for the pursuer respectfully excepted to his Lordship's refusal.

And the jury did thereafter deliver their verdict for the defenders, which was recorded in the following terms:—

> At Edinburgh, the 25th, 26th, 27th, and 28th days of June 1912, before the Honourable Lord Hunter, compeared the pursuer and defenders by their respective counsel and agents, and a jury having been empanelled and sworn to try the issue between the parties, the jury say upon their oath that in respect of the matters proved before them they unanimously find for the defenders. AND. ROSS,
>
> *Depute-Clerk of Session.*

And the counsel for the pursuer, having there and then proposed the foresaid exception, requested the said Lord Hunter to sign this bill of exceptions according to the form of statute in such cases made and provided, and

the said Lord Hunter did sign this bill of exceptions on the 8th day of July 1912, in the third year of His Majesty's reign. WILLIAM HUNTER.

When prepared, the bill of exceptions, which is adjusted at the sight of the presiding Judge and signed by him, is printed and boxed. On the day after boxing it appears in the Single Bills of the Inner House, and is sent to the Summar Roll, where the debate proceeds in the ordinary course.[1] By section 7 of the Jury Trials (Scotland) Act, 1815, the Division is directed to order the exception to be heard in presence on or before the *fourth* sederunt day after it is presented, but this provision is not followed in practice, although a similar provision in the same section dealing with appeal to the House of Lords is still acted on. The bill may be signed by the presiding Judge though he has resigned.[2] Where the presiding Judge has died before the adjustment of the bill, the latter may be signed by another Judge.[3]

Where a bill of exceptions is on the ground of a misdirection in law, the bill must state both the direction objected to and the law which the party dissatisfied maintains should have been stated.[4]

(d) *Amendment of Signed Bill of Exceptions.*—It is incompetent to amend or alter a signed bill of exceptions so as to make it consistent or in conformity with the notes taken by the presiding Judge at the trial.[5]

(e) *Time for Lodging Bill of Exceptions.*—It shall not be competent to proceed in any bill of exceptions, unless such bill shall be lodged within six days after the commencement of the next session, or of the meeting of the Court after the Christmas recess, if the cause has been tried after the end of the session, at the sittings in March or July, or during the Christmas recess, or upon Circuit; or within ten days if the case has been tried during the session, or immediately before the sitting down of the session, except leave has been obtained from the Lord Ordinary or the Division respectively to prolong the period for presenting the bill.[6]

Where the party insisting on a bill of exceptions is *in mora* in adjusting the bill, the Judge should refuse to sign it if the days allowed in the Act of Sederunt have elapsed.[7]

(f) *Notes of Evidence, etc.*—Unless the party excepting shall choose, or the Judge at the trial, or the Court at the discussion of bill, shall

[1] A. S., 16th February 1841, sec. 39; C. A. S., F, iii. 7.
[2] Smith *v.* Mackay, 1835, 13 S. 323.
[3] Shepherd *v.* Gibson's Trs., 1869, 8 M. 31.
[4] Baird *v.* Reilly, 1856, 18 D. 734; Wilson *v.* Dick's Co-operative Institutions, Ltd., 1916, 1 S. L. T. 288.
[5] Pollok *v.* Morris, 1845, 7 D. 973.
[6] A. S., 16th February 1841, sec. 38; C. A. S., F, iii. 6.
[7] Morrison *v.* Somerville, 1860, 23 D. 232.

so direct, it shall be unnecessary to print or submit to the Court the notes of evidence or the documentary evidence adduced at the trial; and when such notes and documents are submitted to the Court, they shall form no part of the bill of exceptions; and in discussing a bill of exceptions it shall be competent for either party to refer to the record, and to every document produced and put in evidence at the trial, and the notes of evidence at the trial may be produced and founded on at any time.[1]

(g) *Where Both Bill of Exceptions and a Motion for a Rule.*—If the party shall have lodged a bill of exceptions, and given notice of motion for a new trial in the same cause, the Court shall have both before them at the discussion on the bill of exceptions, so that both may be disposed of at the same time, if that shall be deemed expedient or necessary.[2]

In a case where the defender lodged a bill of exceptions and also moved for a rule, the procedure at the hearing was as follows:—The junior counsel for the defender opened upon the bill of exceptions, and in the same speech moved for a rule. The rule was then granted and (immediately) the pursuer's junior counsel replied upon the exceptions, and showed cause against the verdict being set aside. The senior counsel for the defender then replied on the exceptions, and moved that the rule be made absolute, the senior counsel for the pursuer confining his observations to the exceptions, the right of having the last speech upon a rule being with the party assailing the verdict.[3]

(h) *Grounds of Bill of Exceptions.*—(i.) *Generally.*—It is competent to except to the opinion and direction of the presiding Judge either as to (1) the competency of witnesses; (2) the admissibility of evidence; or (3) other matter of law arising at the trial.[4] Bills of exception are to be strictly construed, and the bill alone can be looked at for the terms of the ruling.[5]

(ii.) *Competency of Witnesses.*—Formerly the rules of evidence placed disabilities upon many classes of persons as witnesses. Thus persons related to the parties or agents of the parties, persons convicted of crime, persons present in Court during the trial, etc., were held to be incompetent witnesses. Exception to such witnesses had to be taken and disposed of before the witnesses were called, or at least sworn, if the objection was intended to be made out without the testimony of the witnesses themselves. Witnesses might, however, be examined *in initialibus* for the purpose of eliciting materials on which to reject

[1] Court of Session Act, 1868, sec. 35.
[2] A. S., 16th February, 1841, sec. 38; C. A. S., F, iii. 6.
[3] M'Alister *v.* Gemmill, 1862, 24 D. 956, at p. 967.
[4] 55 Geo. III. cap. 42, sec. 7.
[5] Kyle *v.* Jeffreys, 1859, 21 D. (H. L.) 8; 3 Macq. 611.

them.[1] By the Evidence (Scotland) Acts, 1840 to 1866, such disabilities have been removed, and accordingly objection to the competency of witnesses as such, as distinguished from the nature of the evidence which they might give, has practically disappeared.

(iii.) *Admissibility of Evidence.*—The decision of the Inner House upon a bill of exceptions taken on the ground of undue admission or rejection of evidence is governed by the following rule:—"A bill of exceptions shall not be allowed in any cause before the Court of Session upon the ground of the undue admission of evidence, if in the opinion of the Court the exclusion of such evidence could not have led to a different verdict from that actually pronounced; and it shall not be imperative on the Court to sustain a bill of exceptions on the ground of the undue rejection of documentary evidence, when it shall appear from the documents themselves that they ought not to have affected the result at which the jury by their verdict have arrived."[2]

Where there were three issues in a case, and documents tendered by the pursuer with reference to the second and third issues alone were averred to have been unduly rejected, and in respect of such rejection the pursuer did not ask for a verdict, a bill of exceptions was allowed.[3]

The unjust exercise of a Judge's discretion allowing or rejecting proof in replication[4] or additional proof[5] cannot be made the subject of a bill of exceptions.

The question arose in a case, but was not decided, whether it is competent on a bill of exceptions to review the decision of a presiding Judge at a trial upon the sufficiency of the evidence necessary to justify the reading of evidence taken on commission where the witness was unable to attend the Court.[6]

(iv.) *Other Matter of Law Arising at the Trial.*—In so far as there is no exception bringing out that something was misstated or omitted, the law presumes that the presiding Judge laid down everything that was necessary to be laid down, and that everything was rightly laid down.[7] Where a bill of exceptions is on the ground of misdirection in law, the bill must state both the direction objected to and the law which the party excepting maintains should have been stated.[8] What is excepted to must be a direction in law,[9] and accordingly a bill of excep-

[1] Dickson on Evidence, secs. 1542, 1629, 1632.
[2] 13 & 14 Vict. cap. 36, sec. 45; Maxwell *v.* Reid, 1863, 1 M. 932.
[3] Cameron *v.* Cameron's Trs., 1850, 13 D. 412.
[4] Rankine *v.* Roberts, 1873, 1 R. 225, per Lord President Inglis, p. 229.
[5] Christie *v.* Thompson, 1859, 21 D. 337, per Lord President M'Neill, p. 351.
[6] Willox *v.* Farrell, 1848, 10 D. 807.
[7] Addie *v.* Western Bank, 1865, 3 M. 899; Hogg *v.* Campbell, 1865, 3 M. 1018.
[8] Baird *v.* Reilly, 1856, 18 D. 734.
[9] M'Dougall *v.* Girdwood, 1867, 5 M. 937.

tions will not be allowed in respect of a direction which is not in reality upon a point of law, although the parties thought it was so.[1]

Where the presiding Judge is asked to lay down a proposition in law which as an abstract proposition is good law, he is entitled to consider whether it is right and proper that such a direction should be given in the circumstances, and he may refuse to do so.[2] Such a proposition must be framed with such precision and accuracy that the Judge can give it in the very terms proposed, otherwise he is not bound nor entitled to lay it down at all.[3] There must be no ambiguity about the direction which he wishes laid down,[4] and it must be of the essence of the case.[5]

In order that a bill of exceptions may succeed, the exception must have been well taken. Thus where the presiding Judge in charging the jury stated that the law was in conformity with a certain case, and quoted the rubric and the observations of one of the Judges and some observations of a Judge in another case, and the note of exception bore that counsel for the defender "excepted to the foresaid directions," it was held that, as the law contained in the said rubric and in these opinions was not excepted to, the exception had not been well taken.[6]

If the direction in law by the Judge is ambiguous, a bill of exceptions will be allowed.[7] It is not necessary, however, to show that the charge to the jury did in point of fact mislead the jury; it is sufficient if it was calculated to do so.[8]

A refusal to withdraw a case from the jury cannot be the subject of a bill of exceptions.[9]

(i) *Review of Interlocutor Deciding Bill of Exceptions.*—Such an interlocutor may be appealed to the House of Lords.[10]

(4) *Second and Third Trials.*—All the regulations as to abandonment of the suit, as to not proceeding to trial, and as to not appearing and proceeding with evidence at the trial, and all other matters and things already mentioned regulating the conduct of parties as to trials, shall be the same in the case of a new trial as in the case of an original trial.[11]

[1] Woods *v.* Caledonian Rly. Co., 1886, 13 R. 1118.

[2] Wood *v.* North British Rly. Co., 1899, 2 F. 1. See also Hogg *v.* Campbell, 1865, 3 M. 1018.

[3] Addie *v.* Western Bank, 1865, 3 M. 899.

[4] Callaghan *v.* Monkland Iron Co., 1856, 19 D. 52, per Lord Justice-Clerk Hope, p. 54.

[5] Keeney *v.* Stewart, 1909, S. C. 754, per Lord President Dunedin, p. 758.

[6] Baird *v.* Reilly, 1856, 18 D. 734.

[7] Wilson *v.* Sneddons, 1866, 4 M. 736; Fraser *v.* Younger & Sons, 1867, 5 M. 861.

[8] Cleland *v.* Weir, 1847, 6 Bell's App. 70.

[9] Keeney *v.* Stewart, 1909, S. C. 754.

[10] 55 Geo. III. cap. 42, sec. 7.

[11] A. S., 16th February 1841, sec. 41; C. A. S., F, iv. 1.

As has been already pointed out, where the verdict in a first trial has been overturned on the ground that it was contrary to evidence and the Court is unanimously of opinion that no new facts are likely to be forthcoming, it will enter judgment for the unsuccessful party.[1] Where, however, in such a case the Court is not unanimous or additional evidence may be forthcoming, a second trial may be granted, and even a third trial. Similarly, in other cases third trials may be granted, but, generally speaking, the Court does not look with favour upon third trials.[2] In the undernoted cases a third trial was granted.[3]

(5) *Court for the Decision of Motions for a New Trial or Bills of Exceptions.*—When a motion for a new trial or a bill of exceptions comes before one of the Divisions of the Court, if the Judge who tried the cause is not one of the Judges of the Division, such Judge shall be called in to hear the motion or bill, as the case may be; and when the cause is advised such Judge shall give his judgment with the other Judges, and the decision shall be in conformity with the opinion of the majority of the Judges present.[4]

No verdict of a jury shall be discharged or set aside upon a motion for a new trial, unless in conformity with the opinion of a majority of the Judges of the Division, and in case of equal division judgment shall be given in conformity with the verdict; but this provision shall not apply to hearings upon bills of exceptions.[5]

In a case where the Court which decided a motion for a new trial was composed of three permanent Judges of the First Division, and an Outer House Judge who presided at the jury trial and two of the permanent Judges of Division were in favour of the rule being made absolute, and one of the permanent Judges of Division and the Judge who tried the cause were of opinion that the rule should be discharged, it was held that the words "in case of equal division" in sec. 61 of the Court of Session Act, 1868, meant equal division of the whole Judges present, including the Judge who tried the cause, although he was not one of the Judges of the Division.[6]

[1] The Jury Trials Amendment (Scotland) Act, 1910, sec. 2; Mills *v.* Kelvin & James White, Ltd., 1913, S. C. 521; Macleod *v.* Edinburgh and District Tramways Co., Ltd., 1913, S. C. 624.

[2] Grant *v.* Wm. Baird & Co., Ltd., 1903, 5 F. 459. See also M'Quilkin *v.* Glasgow District Subway Co., 1902, 4 F. 462.

[3] Flood *v.* Caledonian Rly. Co., 1889, 27 S. L. R. 127; Watson *v.* North British Rly. Co., 1904, 7 F. 220; Mitchell *v.* Caledonian Rly. Co., 1910, S. C. 546.

[4] Court of Session Act, 1868, sec. 58.

[5] Ibid., sec. 61.

[6] Bicket *v.* Wood, 1893, 20 R. 874.

PART VII

PARTICULAR FORMS OF ACTION

CHAPTER I

DIVISIONS OF ACTIONS

(1) Civil and Criminal.—The first general division of actions is into civil and criminal. A *civil* action, properly so called, is one which is brought for the enforcement of a private right or the reparation of a private injury; whereas a *criminal* action is an action in which an offender is prosecuted *ad vindicatam publicam*, or for the punishment of an offence against the public. This division has already been dealt with under the head of *Jurisdiction* (*supra*, p. 128 *et seq.*), the general rule being that civil actions fall under the exclusive jurisdiction of the Court of Session, and that criminal actions are excluded from that jurisdiction. It must be remembered, however, that this division is by no means absolute. A crime is still a civil wrong, and reparation to the individual in respect thereof may be sought for in the Court of Session, where, moreover, petitions and complaints are matters of not infrequent occurrence. On the other hand, the High Court of Justiciary is the Court of Appeal under the Small Debt Act. Criminal actions are called *prosecutions*.

(2) Actions and Petitions.—Civil actions may first be divided into *actions* and *petitions*. An *action* generally asks the Court to adjudicate upon the real or supposed rights of certain individual opposing parties, whereas a *petition* usually asks the Court to grant certain statutory remedies, or, in respect of its *nobile officium*, to confer some privilege. Although both may become contentious, the former is contentious in a more definite way, for the pursuer in an *action* always has in view some particular person or persons against whom he wishes the judgment of the Court; whereas in a *petition* the petitioner only indicates to the Court the possible source or sources from which opposition may be expected and upon whom the petition may be served. An *action* is a writ in the name of the Sovereign, and may be served after the summons has passed the Signet. A *petition* is addressed to the Court, and requires the sanction of the latter before it can be served.

(3) Civil Actions According to their Conclusions.—A civil action, as distinguished from a petition, may be either (*a*) declaratory; (*b*) rescissory; (*c*) petitory; (*d*) possessory; (*e*) penal; (*f*) competitive;

or (*g*) relative to execution; or it may partake of more than one of the foregoing characteristics.

(a) A *declaratory* action is one in which some right of property, servitude, or *status*, or of some inferior right, which is contested or imperfectly defined, is sought to be declared in favour of the pursuer, but where nothing is demanded to be paid or performed by the defender.[1] It must have certain legal consequences, otherwise it is incompetent.[2] Contingent rights may be the subject of a declarator,[3] but only if they are disputed.[4] It is not competent to raise a bare abstract declarator of the meaning of an Act of Parliament,[5] especially if the question is competently in dependence before another Court.[6] Where, however, there is a question of liability or exemption from liability to make a continuing or recurrent money payment imposed by statute, the question can be competently raised in a declarator.[7] (See *Declarator, infra*, p. 647.)

(b) A *rescissory* action, or action of reduction, is an action to annul any deed, decree or other writing executed, or any illegal act done, in prejudice of a pursuer's right.[8] An action of reduction may be used to annul any deed or act which is either valid until reduced, or is *ipso jure* null.[9] It is also competent to reduce decrees of inferior Courts or of the Court of Session on grounds either of nullity, such as want of jurisdiction, fraud, perjury, or irregularity of procedure, or on the merits of the action.

A reduction in which forgery is relied upon as a ground of reduction is called a *reduction-improbation.* Where forgery is not alleged, the action is a simple reduction.

An action of *reduction reductive* is an action in which a decree of reduction which has been erroneously or improperly obtained is sought to be reduced.

The Court has introduced a new form of action of reduction. The old form has not been abolished, but if the older form is employed, it is not competent for the agent to charge any higher fees for the

[1] Erskine's Inst. iv. 1. 46.

[2] Gifford *v.* Traill, 1829, 7 S. 854; Lyle *v.* Balfour, 1830, 9 S. 22. See also Stewart & Co. *v.* Sillars, 1906, 13 S. L. T. 800.

[3] Mackenzie's Trs. *v.* Mackenzie's Tutors, 1846, 8 D. 964.

[4] Mags. of Edinburgh *v.* Warrender, 1863, 1 M. 887.

[5] Steuart *v.* Parochial Board of Keith, 1869, 8 M. 26.

[6] Todd *v.* Burnet, 1854, 16 D. 794.

[7] Hogg *v.* Parochial Board of Auchtermuchty, 1880, 7 R. 986; Glasgow City and District Rly. Co. *v.* Mags. of Glasgow, 1884, 11 R. 1110; Sullivan *v.* Close 1898, 6 S. L. T. 2. See also Cowan *v.* Gordon, 1868, 6 M. 1018.

[8] Erskine's Inst. iv. 1. 18; Stair, iv. 20. 2.

[9] M'Millan *v.* Free Church, 1861, 23 D. 1314, per Lord Curriehill, p. 1336.

preparation of the summons, or in connection with the procedure in the action, than if the new form had originally been used.[1] (See *Reduction, infra,* p. 675.)

(c) "*Petitory* actions are so called, not because something is sought to be awarded by the Judge (for in that sense all actions must be petitory), but because some demand is made upon the defender, in consequence either of a right of property or credit in the pursuer. Thus actions for restitution of moveables, actions of poinding, of furthcoming, and indeed all personal actions upon contracts or *quasi*-contracts . . . are petitory." [2] In actions for injury to the person and for breach of contract, although at the date of the action it is impossible to ascertain with precise accuracy the amount of loss which will result, the whole damage must be recovered in one action.[3]

(d) *Possessory actions* are those wherein an absolute right is not insisted for, but possession is claimed to be attained, retained, or recovered.[4] They are in contradistinction to petitory actions, which proceed upon some absolute right in the person of the pursuer, or at least in a right which is prior and preferable to that of the defender.[5] In our older law special forms of possessory actions were in use, such as spuilzie,[6] molestation,[7] intrusion and ejection,[8] and succeeding in the vice.[9] These actions are now obsolete, although an action of intrusion by means of a summary application to the Sheriff was suggested as the proper remedy by Lord Justice-Clerk Inglis in a case[10] so late as the year 1863. In most cases procedure by interdict or suspension and interdict is now resorted to in order to determine possessory questions. Actions of removing and maills and duties may also be classed as possessory actions, but all three may also be petitory actions if they are based upon an absolute right, as distinguished from a simple right of possession, on the part of the pursuer.[11]

A *possessory judgment* may be appealed to either in support of a pursuer in a possessory action or as a defence.[12] This is a judgment

[1] A. S., 20th March 1907, sec. 3 ; C. A. S., C, iv. 4 (a).

[2] Erskine's Inst. iv. 1. 47. See also Stair, iv. 21. 1-6 ; Stobbs *v.* Caven, 1873, 11 M. 530, per Lord Deas.

[3] Stevenson *v.* Pontifex and Wood, 1887, 15 R. 125.

[4] Stair, iv. 3. 47.

[5] Stobbs *v.* Caven, 1873, 11 M. 530, per Lord Deas, p. 534.

[6] Stair, i. 9. 16.

[7] Erskine's Inst. iv. 1. 48.

[8] Stair, i. 9. 25 ; Erskine's Inst., iii. 7. 16.

[9] Stair, ii. 9. 45.

[10] Dickson *v.* Dickie, 1863, 1 M. 1157.

[11] Stair, iv. 22. 14 ; Erskine's Inst. iv. 1. 49.

[12] Stair, iv. 22. 5 ; iv. 26. 10 ; iv. 26. 15 ; Erskine's Inst. ii. 6. 28.

whereby one who has been in the lawful possession of heritable property upon a written title for seven years without interruption is entitled to be continued in possession until his title of possession is reduced or a preferential right is established by declarator.[1]

Questions regarding possession usually now occur as incidental to actions in which the question of absolute right is raised, and although it was formerly the law that actions of interdict were generally regarded as too late when the act complained of was already completed, it is now possible, where the respondent has done an act which the Court might have prohibited by interdict, for a complainer to obtain, under a suspension and interdict, specific relief against any illegal act complained of, or for the respondent to be ordained to perform any act which may be necessary for reinstating the complainer in possession.[2] The restoration of real and personal property which has been violently or fraudulently taken away may be decreed to be restored under a summary petition to the Court.[3]

(e) *Penal actions* are actions which conclude not for indemnification only, but for extraordinary damages by way of penalty. Penal actions proper, such as actions against tutors and curators for penalties in respect of failure to make up inventories,[4] or petitions and complaints,[5] do not transmit against the representatives of the delinquent.[6] Penal actions must be distinguished from actions arising from delict, in which latter case the actions transmit against representatives. (See *Executors, supra*, p. 204.)

(f) *Competitive actions* or *competitions* are actions in which two or more persons are claimants for the same right or upon the same fund. The chief competitive action is the action of multiplepoinding, which is generally limited to moveable property or rights for which a third party is bound to account to the common debtor of the claimants. (See *Multiplepoinding, infra*, Chap. iv. p. 658.)

There are other actions which may become competitive, such as actions relative to diligence, but the essential element in a multiplepoinding is that there is double distress, except, possibly, where trustees raise such an action in order to obtain exoneration and discharge.[7]

[1] Stair, iv. 17. 2; iv. 45. 17; Erskine's Inst. iv. 1. 50.

[2] Court of Session Act, 1868, sec. 89. [3] Ibid., sec. 91.

[4] Macturk *v.* Greig, 1830, 8 S. 995; Mollison *v.* Murray, 1833, 12 S. 237; Act 1672, cap. 2.

[5] Gibson *v.* Barbour's Representatives, 1846, 8 D. 427.

[6] Erskine's Inst. iii. 1. 15; iv. 1. 14; Bell's Prin., secs. 544, 546; Morrison *v.* Cameron, 25th May 1809, F. C.; Auld *v.* Shairp, 1874, 2 R. 191, per Lord Neaves, p. 199. See also Rae *v.* Walker, 1877, 5 R. 34.

[7] Glen's Trs. *v.* Miller, 1911, S. C. 1178.

(g) *Actions Relative to Execution.*—The more important of these actions not already noticed are:—

(i.) *Adjudication* is the action by which land and other heritable estate is attached in satisfaction of debt, either in security or in execution.

(ii.) *Poinding* is the action whereby the property of the debtor's moveables is transferred to a creditor.

(iii.) *Furthcoming* is the action by which a creditor asks that the property of the debtor arrested in the hands of a third party may be transferred to the creditor.

(iv.) *Sequestration* is the action by which, in the case of bankruptcy, the whole of a debtor's estate is transferred to a trustee for the purpose of equitable administration among his creditors.

(v.) *Suspension*, as distinguished from suspension as a process of review, is the action whereby the execution of real or personal diligence is stayed, and is divided into suspension and suspension and interdict, which refer to the former kind of diligence, and suspension and liberation, which refers to the latter.

(4) Outer and Inner House Actions.—There is another division of actions in the broad sense into Outer and Inner House actions, but it is now of little importance. All Court of Session actions now commence in the Outer House by summons in regular form and only arrive in the Inner House by reclaiming note, or, in certain cases, by report of the Lord Ordinary. Certain actions, however, commence in the Outer House in the ordinary way, but are transferred to the Inner House for judgment. The only actions of this nature now left are as follows:—

(a) *Division of Commonty.*—This summons is called and enrolled in the Outer House, where the record is made up, incidental or preliminary questions decided, and proof is heard. After proof great avizandum is made by the Lord Ordinary to the Inner House with the proof.[1]

(b) *Division of Runrig Lands.*—This summons is practically obsolete, as nearly the whole runrig lands have been divided. The procedure is similar to the action of division of commonty.[2]

(c) *Ranking and Sale.*—This action is now almost superseded by the simpler procedure of the Bankruptcy Acts,[3] but it is still competent.[4]

[1] Act 1695, cap. 69 (record edition), cap. 38 (12mo edition); A. S., 18th June 1852; C. A. S., C, iv. 1.

[2] Act 1695, cap. 36 (record edition), cap. 23 (12mo edition); Russel *v.* York Buildings Co., 1774, Mor. 14144.

[3] Goudy on Bankruptcy (3rd ed.), p. 544.

[4] Cannon's Trs. *v.* Lake, 1883, 21 S. L. R. 101; Bankruptcy Act, 1913, secs. 92, 110.

The summons is enrolled and the cause conducted before the Lord Ordinary, who pronounces an interlocutor of ranking and superintends the sale. The final decree approving the sale must be pronounced by the Inner House on the report of the Lord Ordinary.[1]

(d) *Cognition and Sale.*—This is an action at the instance of tutors to obtain a warrant to sell the whole or a part of the pupil's heritable estate. It is now practically superseded by summary petition.[2] The procedure is similar to that in ranking and sale, and the Court, after advising the proof, grants warrant to sell the whole or a part of the property. The Court acts as a Court of Equity in granting such warrants, but it will not interpose except in cases of great necessity and where the estate is so burdened as to afford no reasonable prospect of beneficial management for the pupil without a sale.[3]

Proving of the tenor was until recently an Inner House action, but it is now an Outer House action, and subject to the like review as if the action were an ordinary petitory action, except that, where undefended, it still requires to be proved.[4]

With regard to *Petitions*, as the Inner House has original jurisdiction in all cases in which the *nobile officium* of the Court is appealed to, all summary petitions used to be brought before the Inner House, which sometimes remitted them to a Lord Ordinary. By the Distribution of Business Act,[5] however, "all summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually depending at the time of presenting the same shall be brought before the Junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just; and in particular all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with by the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court, viz.:—

"1. Petitions and applications under any of the various statutes now in force relative to entails:

"2. Petitions and applications under any of the General Railway Acts, or under the Lands Clauses Consolidation (Scotland) Act, 1845, or under any local or personal Act:

[1] Act 1681, cap. 83 (record edition), cap. 17 (12mo edition); Mackay's Manual, p. 177.

[2] White, Petr., 1855, 17 D. 599, per Lord Deas, p. 602.

[3] Finlaysons *v.* Finlaysons, 22nd December 1810, F. C.

[4] A. S., 20th March 1907, sec. 7; C. A. S., C, iv. 5.

[5] Court of Session Act, 1857 (20 & 21 Vict. cap. 56), sec. 4.

"3. Petitions and applications relative to money consigned under any statute or law, subject to the order, disposal, or direction of the Court of Session:

"4. Petitions and applications for the appointment of judicial factors, factors *loco tutoris* or *loco absentis*, or *curators bonis*, or by any such factors or curators for extraordinary or special powers, or for exoneration or discharge:

"5. All petitions, applications, and reports under the Act of the 12th and 13th Victoria, chapter 51, intituled *An Act for the Better Protection of the Property of Pupils, Absent Persons, and Persons under Mental Incapacity, in Scotland.*"

These petitions and applications have now been transferred to the Bill Chamber.[1] (See Maclaren's Bill Chamber Practice.)

Besides petitions to the Junior Lord Ordinary, certain petitions may be presented to any Lord Ordinary under the Trusts Acts, the Personal Diligence Act, the Conjugal Rights Act, and the Married Women's Property Act. (See *Petitions, infra*, Part viii.)

The Lord Ordinary on the Bills has jurisdiction in petitions in sequestrations.

Petitions based on the supreme equitable jurisdiction of the Court, however, must be presented to the Inner House. (See *Petitions, infra*, Part viii.; *Jurisdiction, supra*, p. 100.)

Special cases can only be brought in the Inner House,[2] and with exceptions,[3] appeals from Inferior Courts are brought to the Inner House.[4]

(5) Principal and Accessory. — Another division of actions is into principal and accessory actions. An accessory action is an action which, in unexpected or incidental circumstances, is necessary to enable another action called the principal action to be resumed or carried on.

The principal accessory actions were:—

(a) *Wakening.*—This was an action necessary where no step in the principal action had been taken for a year and day. Such an action was not necessary in summary petitions,[5] cases where issues have been adjusted, Exchequer causes commenced by *subpœna*, or in any

[1] Clerks of Session (Scotland) Regulation Act, 1889 (52 & 53 Vict. cap. 54), sec. 3.

[2] Court of Session Act, 1868 (31 & 32 Vict. cap. 100), sec. 63.

[3] 31 & 32 Vict. cap. 96, secs. 16 and 20; Heritors of Pitsligo *v.* Gregor, 1879, 6 R. 1062.

[4] Court of Session Act, 1868, secs. 65 and 66.

[5] Wemyss, Petr., 1860, 22 D. 556.

Inner House processes.[1] A minute to waken the cause has now been substituted for the action, and is necessary whether the action has been sisted or not.[2] It is incompetent to waken a cause in which appearance has not been entered by minute of wakening, the proper course to pursue being by summons of wakening.[3] It has been held competent, however, to proceed by minute to waken and transfer an undefended action of separation and aliment in which aliment with expenses was awarded and the husband died without payment of expenses and in arrear with aliment.[4] (See *Motion to Waken, supra*, p. 462.)

(b) *Transference.*—This was an action necessary to transfer a suit in the case of the death of a party to the principal suit. It has not been necessary in the case of a pursuer since 1693,[5] or of a defender since 1868.[6] A minute is all that is now required.[7] Where an action requires to be both wakened and transferred, it may be done by one minute combining a craving for both.[8] (See *Motion for Transference, supra*, p. 466.)

(c) *Exhibition ad Probandum.*—This accessory action was at one time necessary where writings required in evidence in an action were in the possession of third parties,[9] but it has been almost entirely superseded by motion for diligence against havers. It may still be used where a party in an action shows sufficient cause to entitle him to inspect writings which cannot be recovered by diligence, as where there is a substantive action before another Court which has no power to order the production of documents.[10] This action must be distinguished from the action of exhibition *ad deliberandum*, to enable an heir to decide whether he shall make up his title, the latter action being a principal action. The documents are exhibited, when ordered, in the hands of the Clerk of Court and are not put into process.[11]

(d) *Transumpt.*—This action "is competent to any person who has

[1] Gillies *v.* Scott, 1829, 7 S. 839; American Mortgage Co. of Scotland, Ltd. *v.* Sidway, 1906, 14 S. L. T. 521.

[2] Court of Session Act, 1868 (31 & 32 Vict. cap. 100), sec. 95; American Mortgage Co. of Scotland, Ltd., *supra.*

[3] Lorrain's Trs. *v.* Brodie, 1881, 19 S. L. R. 278.

[4] Mowatt *v.* Mowatt, 1910, 2 S. L. T. 205.

[5] Act 1693, cap. 24 (record edition), cap. 15 (12mo edition).

[6] Court of Session Act, 1868, sec. 96.

[7] Ibid.; Watson *v.* Cowan, 1894, 2 S. L. T. 168; Watson *v.* Watson, 1898, 6 S. L. T. 201; Davidson, Pirie & Co. *v.* Dihle's Representatives, 1900, 2 F. 640; Gowans *v.* Adam, 1906, 14 S. L. T. 328.

[8] Court of Session Act, 1868, sec. 97.

[9] Stair, iv. 33. 3.

[10] Campbell *v.* Campbell, 1869, 7 M. 759, per Lord President Inglis, pp. 762, 763.

[11] Clark *v.* Melville, 1880, 8 R. 81.

a partial interest in a writing, or immediate use for it to support his titles or defences in other actions against him in whose custody the writing lies, to exhibit it, that so a transumpt thereof may be judicially made out and delivered to the pursuer."[1] It is not often seen nowadays but is still competent.[2] Where it is possible in any other way to obtain the same result, an action of transumpt will not be allowed.[2]

(e) *Proving the Tenor.*—This is a declarator of the terms of a writing which has been lost, destroyed, or obliterated, in order that it may be used in an action instead of the original. The original action is usually sisted to enable a proving of the tenor to be brought.[3] It is still necessary except where a summons, petition, or other original writ or pleading is lost or destroyed, in which case a copy thereof proved in the cause to the satisfaction of the Court before whom the cause is depending at the time may be substituted and held equivalent to the original for the purposes of the action.[4] This provision has now been extended to lost interlocutor sheets.[5]

Copies of lost steps of process may, of course, be held equivalent to originals by consent of parties.[6]

Proving of the tenor may also be a principal action. (See *Proving the Tenor, infra,* Chap. xii.)

(6) Real and Personal Actions.—Actions are also divided into actions *in rem* and actions *in personam*, or real and personal actions. A *real* action is an action founded on a right of property in a subject, or a *jus in re*, the object of the action being the recovery of the property. A *personal* action is founded only on a personal obligation, or *jus ad rem*, and its object is to enforce implement of the obligation. The former binds all possessors of the subject and their representatives; the latter only binds the person subject to the obligation and his representatives. This division is by no means exhaustive, as there are actions which partake of neither one characteristic nor the other.[7]

(7) Private and Popular Actions.—The division into private and popular actions was made in the civil law, but the law of Scotland recognises no popular action with the exception of the actions raised

[1] Erskine's Inst. iv. 1. 53.

[2] Selkirk *v.* Service, 1880, 8 R. 29, per Lord President Inglis, p. 30.

[3] Mein *v.* Dunse, 1701, Mor. 2742; Boyd *v.* Anderson, 1823, 2 S. 363 (N. E. 323); Shaw *v.* Shaw's Trs., 1876, 3 R. 813. See also Gilchrist *v.* Morrison, 1891, 18 R. 599.

[4] Court of Session Act, 1868, sec. 15; Couper *v.* Bain, 1869, 7 M. 1130.

[5] A. S., 20th March 1907, sec. 12; C. A. S., A, iii. 8.

[6] Watson *v.* Scott, 1839, 1 D. 548; Forsyth *v.* Aird, 1853, 16 D. 197, at p. 205.

[7] Stair, iv. 3. 45; Erskine's Inst. iv. 1. 10.

by kinsmen of minors in suspect tutory or reducing deeds granted by the minor to his hurt and ratified on his oath.[1] To these must be added the action for vindication of a public right.[2]

(8) Maritime Actions.—These actions formerly belonged to the Court of Admiralty, but were transferred to the Court of Session by 1 Will. IV. cap. 69, sec. 21, and maritime summonses may be raised and may pass the Signet like other Court of Session summonses.[3] (See *Jurisdiction, supra*, p. 125.)

Nautical assessors *may* be summoned by the Court to assist with their nautical skill in any action or proceeding arising out of or relating to collision at sea, salvage, towage, or any other maritime matter, but *must* be summoned on the application of either party to the action.[4] The fees in maritime actions are the same as in ordinary actions.[5]

(9) Consistorial Actions.—These actions, so called because they originally belonged to the jurisdiction of the Ecclesiastical or Consistorial Courts, are actions arising out of the relation of husband and wife. From their origin and nature they have peculiarities in procedure which keep them in a division apart, and will be dealt with under the head of *Consistorial Actions* (*infra*, Chap. vi.).

(10) Miscellaneous.—There are several actions, such as actions for choosing curators, and cognition of insane persons, etc., which do not fall within any of the divisions enumerated, and these will be explained later under their several headings.

[1] Stair, i. 6. 26; Erskine's Inst. iv. 1. 17; Act 1681, cap. 85 (record edition), cap. 19 (12mo edition).

[2] Torrie *v.* Duke of Athol, 1849, 12 D. 328; affd. 1 Macq. 65; Jenkins *v.* Robertson, 1869, 7 M. 739; Potter *v.* Hamilton, 1870, 8 M. 1064; Grahame *v.* Mags. of Kirkcaldy, 1882, 9 R. (H. L.) 91, per Lord Watson, p. 93.

[3] 1 & 2 Vict. cap. 118, sec. 29.

[4] 57 & 58 Vict. cap. 40, sec. 2.

[5] 52 & 53 Vict. cap. 54, sec. 9.

CHAPTER II

DECLARATOR

(1) Definition.—A declaratory action is one in which some right of property, or *status*, or of some inferior right, which is contested or imperfectly defined, is sought to be declared in favour of the pursuer, but where nothing is demanded to be paid or performed by the defender.[1]

(2) Competency.—(a) *Action with Declaratory Conclusions Alone.*—Where an action with only declaratory conclusions is raised, it must be with regard to some right which will benefit the pursuer. Thus actions of declarator in the abstract with no legal consequences are incompetent.[2] It must also be with regard to a right which is disputed or which is doubtful,[3] and with regard to a particular case and not general.[4] It is not necessary that it should be an immediate right; a future right, if disputed, may be the subject of a declarator,[5] and even a contingent right.[6]

Where there is a special and appropriate remedy, declarator will not be allowed.[7]

(b) *Action of Declarator with other Conclusions Added.*—It is always competent to raise an action of declarator where petitory, reductive, or possessory conclusions are added for the purpose of giving effect to the rights declared, or of clearing away the adverse titles or interests which have been negatived.[1] In the same way, it is always competent to raise an action with declaratory conclusions alone where they are really complementary of another action.[8] Thus, where an action was raised to have compensation awarded for damage done to a pursuer's property,

[1] Erskine's Inst. iv. 1. 46.

[2] Gifford *v.* Trail, 1829, 7 S. 854; Lyle *v.* Balfour, 1830, 9 S. 22; *cp.* Stewart & Co. *v.* Sillars, 1906, 13 S. L. T. 800.

[3] Mags. of Edinburgh *v.* Warrender, 1863, 1 M. 887, per Lord Neaves, p. 896; M'Gowan *v.* City of Glasgow Friendly Society, 1913, S. C. 991.

[4] Callender's Cable, etc., Co. *v.* Glasgow Corporation, 1900, 2 F. 397; M'Gowan *v.* City of Glasgow Friendly Society, 1913, S. C. 991.

[5] Provan *v.* Provan, 1840, 2 D. 298, per Lord Moncreiff, p. 300 (note); Fleming *v.* M'Lagan, 1879, 6 R. 588, per Lord Young, p. 598.

[6] Mackenzie's Trs. *v.* Mackenzie's Tutors, 1846, 8 D. 964.

[7] Baring Bros. & Co. *v.* Wight, 1824, 2 S. 727 (N. E. 609).

[8] Barbour *v.* Grierson, 1827, 5 S. 603 (N. E. 565), per Lord Glenlee.

and a question arose whether the property really belonged to the pursuer, an action by the latter to declare his right thereto was held competent.[1]

It is competent to raise a declarator in the Court of Session that a parish council is bound to afford adequate parochial relief, and that otherwise than by receiving and maintaining the pauper in their poor-house, and to add a conclusion for decree against the defenders to instantly grant outdoor relief to the pursuer.[2]

(c) *Where Declaratory Conclusions Necessary.*—(i.) *Generally.*—Whenever the right upon which the pursuer desires to found an action is not quite clear, it is necessary to preface his petitory, reductive, prohibitive, or possessory conclusions with a declaratory conclusion.[3] Thus, where the pursuer wishes to invert possession or uninterrupted use, he must first raise a declarator of his right.[4] Similarly, where an irregular practice of striking fiars' prices, which had existed for one hundred years, was desired to be altered;[5] and where magistrates desired to interfere in the management of a mortification, which, although vested in them *ex officio*, had been allowed by their predecessors in office to fall into other hands,[6] an action of declarator of the pursuer's right was held to be a necessary preliminary.

(ii.) *Trust.*—An action of reduction of a deed, *ex facie* absolute and purporting to be onerous, on the ground that it was gratuitous and in trust only, is only competent if there are conclusions declaratory of the trust,[7] except the action is at the instance of the truster's creditors.[8]

(iii.) *Adjudication.*—Where the lands have not already become irredeemable through the running of prescription, an action of declarator of expiry of the legal is necessary in order that the lands adjudged may become irredeemable.[9]

(iv.) *Irritancy or Tinsel of the Feu.*—This irritancy, provided by the Act 1597, cap. 17 (record edition), cap. 250 (12mo edition), was sometimes enforced by conventional as well as legal stipulation. In all cases, however, it requires a declarator.[10]

[1] Macdonell *v.* Caledonian Canal Commissioners, 1830, 8 S. 881.
[2] Cuthill *v.* Parish of Inverkeilor, 1909, 1 S. L. T. 189.
[3] Cruickshank *v.* Irving, 1854, 17 D. 286, per Lord President M'Neill, p. 289.
[4] Lord Lovat *v.* Fraser, 1845, 8 D. 316; Grierson *v.* Sandsting, etc., School Board, 1882, 9 R. 437.
[5] Mylne *v.* Horne, 1850, 12 D. 883.
[6] Mags. of Lanark *v.* Wylie, 1852, 14 D. 876.
[7] Anstruther *v.* Mitchell and Cullen, 1857, 19 D. 674.
[8] Lord Elibank *v.* Hamilton, 1827, 6 S. 69.
[9] Graham Stewart on Diligence, p. 655 *et seq.*
[10] Bell's Prin., sec. 701 (6).

(v.) *Non-Entry.*—No lands are now deemed to be in non-entry, and consequently a declarator of non-entry is not required, but an action of declarator and for payment of a casualty has taken its place.[1]

(vi.) *Forfeiture of Superiority.*—This formerly required a declarator, but recourse to the old practice for forfeiture is now rendered practically unnecessary.[2]

(vii.) *Forfeiture of Entail.*—There must be a declarator of the irritancy before conclusions reductive of the defender's titles can be considered.[3]

(viii.) *Irritancy of Leases.*—A *conventional* irritancy may be enforced without resort to a declarator if the fact is instantly verifiable or admitted, as where there is a stipulation that the lease shall be *ipso facto* null and void upon the bankruptcy of the tenant or upon his sequestration at the instance of the landlord.[4] If, however, the fact is not admitted,[5] or the irritancy is an unusual one,[6] it is necessary to proceed by declarator. A *legal* irritancy requires declarator.[7]

(d) *Where Declaratory Conclusions Unnecessary.*—Where the pursuer's title is quite clear, it is unnecessary for him to preface any action he may desire to take in respect of his right by a declaratory conclusion. Thus, where the pursuer is owner of a patent or of a copyright, it is unnecessary in raising an action of damages or for interdict to preface these conclusions by a declarator of his right to the patent or copyright.[8]

(e) *Declarator of the Meaning of an Act of Parliament.*—It is incompetent to conclude for a declarator in the abstract of the meaning of a public Act of Parliament, separate from and independent of any consequent right in the pursuer, or any practical object or purpose as to its meaning.[9] Accordingly, it is incompetent for a person to bring an

[1] Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. cap. 94), sec. 4 (4).

[2] 31 & 32 Vict. cap. 101, secs. 104-111; 37 & 38 Vict. cap. 94, sec. 4 (2); Bell's Lect. (3rd ed.), ii. 792, note (*c*).

[3] Bontine *v.* Dunlop, 1823, 2 S. 115 (N. E. 106).

[4] Gordon *v.* Copland, 1805, Mor. App. Jack, No. 11; Forbes *v.* Duncan, 2nd June 1812, F. C.; Scott *v.* Wotherspoon, 1829, 7 S. 481; Hall *v.* Grant, 1831, 9 S. 612; Stewart *v.* Watson, 1864, 2 M. 1414; Lyon *v.* Irvine, 1874, 1 R. 512, per Lord Ormidale, p. 517.

[5] Hog *v.* Morton, 1825, 3 S. 617 (N. E. 433).

[6] Wylie *v.* Heritable Securities Co., 1871, 10 M. 253; Lord Belhaven and Stenton *v.* Chassels, 1904, 12 S. L. T. 290.

[7] Hunter, Landlord and Tenant, ii. 134; Rankine on Leases (3rd ed.), p. 533 *et seq.*

[8] Green *v.* Shepherd, 1866, 4 M. 1028, per Lord Justice-Clerk Inglis, pp. 1029, 1030.

[9] Gifford *v.* Trail, 1829, 7 S. 854; Lyle *v.* Balfour, 1830, 9 S. 22; Balfour *v.* Malcolm, 1842, 1 Bell's App. 153, per Lord Campbell, p. 164; Todd *v.* Burnet, 1854, 16 D. 794; Hogg *v.* Auchtermuchty Parochial Board, 1880, 7 R. 986, per Lord Young, p. 991; Orr *v.* Alston, 1912, 1 S. L. T. 95.

action declaratory of an Act of Parliament anticipatory of some exaction which is not threatened.[1] Where, however, there is a threat to enforce an Act of Parliament in a particular way so as to affect a particular person,[2] or there is a question involved as to liability of particular parties for a money payment under an Act of Parliament, the Court will allow an action of declarator by such parties to be brought with a view of construing the statute.[3]

Again, although an action declaratory of the meaning of a general clause in an Act is incompetent, it is quite competent to declare its meaning when applied to a particular instance, as, where the subject in a statute was, every road, quay, lane, etc., possessing certain qualities, and the subject in the action was North Junction Street, Leith, an action of declarator of the meaning of the statute in respect of the latter street was held competent.[4]

(f) *Declarator of the Meaning of Interlocutors.*—It is competent to bring an action of declarator of the meaning of a judgment of the Court,[5] but not to declare that a judgment of the Court is invalid.[6] Reduction in the latter case is the only remedy.[6]

(g) *Declarator ab ante.*—In actions of declarator of future or contingent rights all parties interested, or who could possibly be interested, must be called as parties, otherwise the Court will not entertain the action. This is specially seen in actions of declarator *ab ante* of questions arising out of settlements in which a present judgment might not be *res judicata* when the question actually arose. Thus, where a pursuer concluded for a declarator that he had a vested right in the whole, or part, of the residue of an estate, defeasible only on a certain event, and all parties who could possibly become interested when the event should take place were not represented, the Court dismissed the action.[7]

[1] Hogg *v.* Auchtermuchty Parochial Board, 1880, 7 R. 986, per Lord Young, p. 991.

[2] Cowan *v.* Gordon, 1868, 6 M. 1018; Hogg *v.* Auchtermuchty Parochial Board, 1880, 7 R. 986. See also Tennent *v.* Mags. of Partick, 1894, 21 R. 735.

[3] Edinburgh and Glasgow Rly. Co. *v.* Meek, 1849, 12 D. 153; British Fisheries Society *v.* Mags. of Wick, 1872, 10 M. 426, per Lord Cowan, p. 431; Edinburgh Street Tramways Co. *v.* Torbain, 1876, 3 R. 655; Glasgow City and District Rly. Co. *v.* Mags. of Glasgow, 1884, 11 R. 1110; *cp.* Steuart *v.* Keith Parochial Board, 1869, 8 M. 26.

[4] Leith Police Commissioners *v.* Campbell, 1866, 5 M. 247, per Lord Justice-Clerk Inglis, p. 251. See also Sullivan *v.* Close, 1898, 6 S. L. T. 2.

[5] Ross *v.* Mackenzie, 1836, 14 S. 845, per Lord Corehouse, p. 848 (note); Morton, Whitehead and Greig *v.* Smith, 1864, 3 M. 29; Park's Curator *v.* Black, 1870, 8 M. 671.

[6] Ross *v.* Mackenzie, 1836, 14 S. 845.

[7] Smith *v.* M'Coll's Trs., 1910, S. C. 1121; Murray *v.* Murray, 1909, 1 S. L. T. 122. See also Harveys *v.* Harvey's Trs., 1860, 22 D. 1310; Barron *v.* Barron, 1881,

In a different class of case the same decision was arrived at. Thus, in a declarator *ab ante* where the pursuers sought declarator that during the lifetime of a person insured under a policy of life assurance they were in right of the policy as assignees, and that the assurance company was bound, on the sums contained in the policy falling due, to make payment to the pursuers or the persons deriving right from them, the Court held that the assurance company were not the proper contradictors of the action, and dismissed it.[1]

Where, however, all the parties presently interested have been made parties and desire a judgment, or where all the parties are present and defeasance, if any, is practically impossible, the Court will entertain an action of declarator *ab ante* and give its judgment.[2]

(h) *Declarator to Review a Final Decision of an Inferior Court, etc.*—It is incompetent to review a decision regarding a police offence, or a judgment of an inferior Court that is final, by means of an action of declarator of the meaning of the statute upon which such judgment proceeded;[3] nor is it competent to declare the meaning of an Act of Parliament where the interpretation of such Act is properly the subject of litigation in an inferior Court.[4] In the same way, it is incompetent by means of a declarator of fact of a general nature, and not with reference to a particular case, to take away from the discretion of an administrative official in the discharge of public duty, or from the authority of an inferior Court to which an appeal may be made upon such matter and upon which it is final.[5]

(i) *Declarator Regarding Assessments.*—Where an assessment has been imposed, or is about to be imposed, according to certain principles adopted by an assessing body, it is competent to establish or to review by way of declarator such method of assessment. An assessing body is in a different position from an inferior Court, in respect that although

19 S. L. R. 275; Fleming *v.* M'Lagan, 1879, 6 R. 588; Millar *v.* Millar's Trs., 1896, 4 S. L. T. 122; Burgh-Smeaton *v.* Burgh-Smeaton's Judicial Factor, 1907, S. C. 1009; Gillespie *v.* Riddell, 1908, S. C. 628.

[1] Allgemeine Deutsche Credit Anstalt *v.* Scottish Amicable Life Assurance Society, 1908, S. C. 33.

[2] Murray *v.* Murray, 1833, 11 S. 629; Gordon *v.* Gordon's Trs., 1886, 13 R. 934, at p. 936; Chaplin's Trs. *v.* Hoile, 1890, 18 R. 27; Falconar Stewart *v.* Wilkie, 1892, 19 R. 630, per Lord Kyllachy, p. 635, and Lord Kinnear, p. 642; Davidson *v.* Davidson, 1906, 14 S. L. T. 337; *cp.* Earl of Galloway *v.* Garlies, 1838, 16 S. 1212.

[3] Balfour *v.* Malcolm, 1842, 1 Bell's App. 153; Thomas *v.* Keating, 1855, 17 D. 1133; Leith Police Commissioners *v.* Campbell, 1866, 5 M. 247; *cp.* Cuthill *v.* Parish of Inverkeilor, 1909, 1 S. L. T. 189.

[4] Todd *v.* Burnet, 1854, 16 D. 794.

[5] Callender's Cable, etc., Co. *v.* Glasgow Corporation, 1900, 2 F. 397.

the former is vested with statutory powers, it is not in reality a Court, and if an action of reduction of the assessment were brought, the action would require to be directed against the assessing body—a situation in which an inferior Court, with jurisdiction in the proper sense of the term, could never be placed. Accordingly, the Court has held that a declarator either *ab ante* where it is obvious how the assessment is going to be imposed, or a declarator when the assessment has been imposed, is competent.[1]

The proper parties must be called as defenders.[2]

(j) *Declarator regarding the Valuation Roll.*—Where the assessor does not comply with the statutory requisites in making up the roll, it is competent to reduce an entry and to have a declarator of the proper entry.[3]

(k) *Qualification by Declarator of a Decree of Preference in a Multiplepoinding.*—Notwithstanding a decree of preference in a multiplepoinding in which certain parties were preferred as next of kin, a declarator that the next of kin held the estate subject to a certain bequest was found competent.[4]

(3) Form of Conclusions in an Action of Declarator of Trust.—By the Court of Session Act, 1850, sec. 1, a new form of summons was instituted, and the pursuer of any summons was directed to prepare such summons in such way and manner as the Court, having regard to the forms set forth in Schedule A annexed thereto, should from time to time prescribe by Act of Sederunt as applicable to the various forms of action in use at that date. The Court, however, has not taken advantage of this provision, and accordingly pursuers require to adapt the forms given to the circumstances of their particular cases. One of the forms set forth in Schedule A is an action of declarator of trust, the conclusions of which are as follows:—

Therefore it ought and should be found and declared, by decree of the Lords of our Council and Session, that a disposition, dated ,

[1] Edinburgh and Glasgow Rly. Co. *v.* Meek, 1849, 12 D. 153; Miller *v.* Gordon, 1859, 21 D. 975; Scottish North-Eastern Rly. Co. *v.* Gardiner, 1864, 2 M. 537; British Fisheries Society *v.* Mags. of Wick, 1872, 10 M. 426, per Lord Cowan, p. 431; Parochial Board of Bothwell *v.* Pearson, 1873, 11 M. 399; Hope *v.* Corporation of Edinburgh, 1897, 5 S. L. T. 195; Greenock Harbour Trs. *v.* Mags. of Greenock, 1904, 41 S. L. R. 658; 1905, 42 S. L. R. 848; *cp.* Steuart *v.* Keith Parochial Board, 1869, 8 M. 26.

[2] Boyd *v.* Shaw, 1827, 5 S. 413 (N. E. 392); Steuart *v.* Keith Parochial Board, 1869, 8 M. 26, per Lord Neaves; Bothwell Parochial Board *v.* Pearson, 1873, 11 M. 399, per Lord President Inglis.

[3] Moss' Empires, Ltd. *v.* Walker, 1916, 1 S. L. T. 103.

[4] Mags. of Dundee *v.* Lindsay, 1856, 19 D. 168.

whereby, for the causes therein specified, the pursuer sold, alienated, and disponed to the defender, and his heirs and assignees whomsoever, heritably and irredeemably, all and whole the lands of , was a trust in the person of the defender for the use and behoof of the pursuer and his heirs or assignees: And the defender ought and should be decerned and ordained, by decree foresaid, to denude of the said lands, and to convey the same, with the writs and evidents thereof, to the pursuer, and his heirs and assignees, with warrandice from the defender's own facts and deeds.

(4) PROCEDURE.—The procedure in an action of declarator is in all respects similar to the procedure in an ordinary action with this exception, that in declarators of a consistorial character and of proving the tenor proof must be led whether the action is defended or not.

CHAPTER III

COUNT, RECKONING, AND PAYMENT

(1) GENERALLY.—This is an action founded upon the relation of principal and agent, in which the principal, whether he be a partner, beneficiary, landlord, or other principal, demands an account of his agent's intromissions, whether he be a co-partner, guardian, factor, or other agent, with the estate of the principal.

(2) CONCLUSIONS.—In an ordinary action of count, reckoning, and payment the pursuer concludes:—

(*a*) For the exhibition and production by the defender of a full and particular account of the latter's whole intromissions as agent for the pursuer in order that the true balance due to the pursuer may be ascertained.

When the account has been produced under this general conclusion, it is quite competent for the pursuer to state any objection and claim which such account may raise, although not specially mentioned in the condescendence.[1]

(*b*) For payment to the pursuer of a stated sum, or such other sum as shall appear and be ascertained as the balance of the defender's intromissions, with the legal interest from the date when said balance should have been paid until payment.

This conclusion is quite sufficient to cover a larger sum than the sum stated. Thus, where the conclusion was for "the sum of £350 sterling, or such other sum, etc.," and the accountant to whom a remit was made brought out the balance at £377, 6s. 8½d., the Court granted decree for the latter sum.[2]

(*c*) Failing the production of said account, for payment to the pursuer of a stated sum, which, in that case, shall be held to be the balance of the defender's said intromissions.

The omission of this conclusion by inadvertence does not make the action fatally defective, so as to render amendment incompetent.[3]

(*d*) Whether the said account is produced or not, for expenses.[4]

[1] Cochrane *v.* Black, 1855, 17 D. 321, at pp. 324, 325.
[2] Spottiswoode *v.* Hopkirk, 1853, 16 D. 59.
[3] Dobson *v.* Hughson, 1858, 20 D. 610.
[4] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), Schedule A, No. 2.

In the ordinary case, the accounting only extends down to the date of citation.[1] In order that the accounting may be continuous, the consent of parties must be obtained,[1] or the conclusion must be expressly so laid, as where an accounting was asked "from the 12th day of October 1848 to the 11th November 1888, and subsequently and in time coming thereafter during the dependence of the present action," etc.[2]

It is sometimes competent for the pursuer to conclude for a sum which is made up of a principal sum and interest thereon until the date of citation, and to ask interest on said combined sum from the date of citation. In the undernoted case the Court held that under the terms of the conclusions of the summons such an accumulation was competent.[3] (See *Interest, supra*, p. 298 *et seq.*)

In an action of count, reckoning, and payment by a partner against his co-partner which concluded for payment of a certain sum to the partnership and also to the pursuer and defender as the individual partners thereof, the Court held that the conclusion was not a conclusion in favour of the pursuer individually.[4]

Where an action concluded for an accounting down to the death of a deceased partner, it was held competent in the accounting, not only to credit the defenders with sums paid by them to the representatives of the deceased, but also to debit the defenders with any payments made by the representatives of the deceased to the defenders.[5]

(3) Competency.—An action of count, reckoning, and payment by a discharged bankrupt against his discharged trustee is incompetent.[6]

It is competent for an acceding creditor to a trust deed for creditors to raise an action of accounting against the trustee, the alternative sum mentioned in the conclusions being the full debt due by the bankrupt to the pursuer.[7]

It is quite competent in an action of accounting to ask for greater interest than was actually received by the defender on money under his care, *i.e.* to demand damages for his failure to properly invest the same instead of placing the money on deposit-receipt.[8]

An action of count and reckoning by an employer against his servant is not an appropriate remedy, as the latter is not an indepen-

[1] Wallace *v.* Henderson, 1875, 2 R. 999, per Lord Deas, p. 1001.
[2] Wauchope *v.* North British Rly. Co., 1860, 23 D. 191, at p. 201.
[3] Maclean *v.* Campbell, 1856, 18 D. 609.
[4] Cameron *v.* M'Murray, 1855, 17 D. 870.
[5] Donaldson *v.* Finlay, Bannatyne & Co., 1860, 22 D. 937 ; 1864, 2 M. (H. L.) 86.
[6] Burns *v.* Craig, 1869, 7 M. 476.
[7] Raimes, Clark & Co. *v.* Swan's Tr., 1902, 10 S. L. T. 316.
[8] Melville *v.* Noble's Trs., 1896, 24 R. 243.

dent person, and the books which he keeps are the books of his master and not his own.[1]

(4) DEFENCES.—The usual defences are:—

(a) *Denial of Liability to Account.*—A decision upon this defence may be arrived at after consideration of documentary evidence, or admissions of parties, in the Procedure Roll.[2] In other cases a proof may be necessary.

(b) *Settled Account.*—Discharge is presumed from the settlement of a factor's or other periodical accounts.[3] There is also a presumption of payment from *mora* or from the relations and actings of parties.[4]

An account which has been docqueted as correct is held as settled,[5] except as to errors *calculi*,[6] or palpable errors, such as entries placed on the wrong side of the balance-sheet.[7]

A condescendence of alleged errors may be ordered.[8]

An account presumably settled may, however, be reduced on several grounds, such as fraud, essential error, etc.[9]

The mode of settlement of an account in order to be probative depends upon the nature of the account.[10]

(c) That the defender has always been willing to account with the pursuer, and that the action is unnecessary.

(5) PROCEDURE.—If the case is undefended, decree in terms of the alternative conclusion is given.

Formerly, if the case was defended, a pursuer might, before the closing of the record, obtain a diligence to recover the accounts in order to enable him to set forth his condescendence, and to submit

[1] Govan Old Victualling Society, Ltd. *v.* Wagstaff, 1907, 44 S. L. R. 295; *cp.* Macallan *v.* Cockburn, 1837, 15 S. 956.

[2] Lawson *v.* Lawson's Trs., 1872, 11 M. 168.

[3] Erskine's Inst. iii. 4. 10; M'Arthur *v.* M'Arthur, 1821, 1 S. 39 and 83 (N. E. 41 and 87); Walker *v.* Drummond, 1836, 14 S. 780; Glasgow Infirmary *v.* Caldwell, 1857, 20 D. 1; Laing *v.* Laing, 1862, 24 D. 1362; Fell *v.* Rattray, 1869, 41 Jur. 236.

[4] Wilsons *v.* Wilson, 1783, Mor. 11646; Stuart *v.* Maconochie, 1836, 14 S. 412; Russell's Trs. *v.* Russell, 1885, 13 R. 331. See, however, M'Laren *v.* Liddell's Trs., 1860, 22 D. 373.

[5] Learmonth & Co. *v.* Erskine, 1823, 2 S. 426 (N. E. 379); Elder *v.* Smith, 1829, 7 S. 656; Macdonell *v.* Mackenzie, 1829, 7 S. 798; Walker *v.* Drummond, 1836, 14 S. 780; Ayr Road Trs. *v.* Adams, 1883, 11 R. 326.

[6] Forbes' Trs. *v.* Edinburgh and Glasgow Union Canal Co., 1834, 12 S. 365; Colvil *v.* Jamieson, 1839, 1 D. 526; Pollok, Gilmour & Co. *v.* Ritchie, 1851, 13 D. 640, per Lord Cuninghame, p. 643.

[7] M'Laren *v.* Liddell's Trs., 1862, 24 D. 577, per Lord Benholme; Laing *v.* Laing, 1862, 24 D. 1362, per Lord Cowan.

[8] Wilson *v.* Duke of Hamilton, 1822, 1 S. 443 (N. E. 411).

[9] Laing *v.* Laing, 1862, 24 D. 1362, per Lord Justice-Clerk Inglis.

[10] Dickson on Evidence, sec. 797 *et seq.*; Hannay & Son's Tr. *v.* Armstrong, 1875, 2 R. 399; affd. 1877, L. R. 2 App. Cas. 531.

the accounts to an accountant for that purpose.[1] This, however, is not according to the present practice.

Formerly on special cause shown a remit might be made to an accountant before the record was closed,[2] but in view of the present practice this will only be granted in very special circumstances.

When the record is closed, if there is a defence that the defender is under no liability to account to the pursuer, the case will be sent to the Procedure Roll, where the plea may be disposed of upon documents produced or the admissions of parties;[3] or if the facts are contested, a proof of this plea may be allowed either at the closing of the record or after consideration on the Procedure Roll. If the plea is repelled, or if no such plea is stated, the Lord Ordinary will order the production of accounts by the defender within a limited time—generally ten days—and will order the pursuer, if so advised, to state objections thereto within a like period thereafter. Sometimes the interlocutor gives the defender a right to answer such objections within a like period after the objections have been stated. If it does not do so the defender can usually obtain such an order if he so desires. A record is then made up on the accounts, objections thereto, and answers to objections, and is printed by the pursuer. Printing of this record is sometimes dispensed with on cause shown, but if so, a manuscript copy of the accounts, objections, and answers should be prepared in the form of a record for the use of the Judge. This record comes out in the ordinary Adjustment Roll, and is thereupon sent to the Procedure Roll, where a discussion takes place upon both records. A decision may be arrived at in the Procedure Roll without the necessity of a proof or a remit to an accountant.[4] If a decision cannot be arrived at on the Procedure Roll, a proof will be allowed or a remit made to an accountant. A remit may be made notwithstanding the opposition of either party.[5] A remit to an accountant is an interlocutor which may be appealed to the House of Lords under 48 Geo. III. cap. 151, sec. 15, although leave to appeal is not granted.[6]

Under the old practice a jury trial might be allowed, especially where there were matters of fact at issue,[7] but it is no longer the practice to submit any points of an accounting to a jury.

[1] Donaldson *v.* Bannatyne, 1828, 7 S. 130.
[2] Mackintosh *v.* Macqueens, 1830, 8 S. 668.
[3] Lawson *v.* Lawson's Trs., 1872, 11 M. 168.
[4] Dick's Trs. *v.* Hannah, 1870, 8 S. L. R. 137.
[5] Carron Co. *v.* Stainton's Trs., 1857, 19 D. 932; Western Bank *v.* Baird's Trs., 1866, 4 M. 1071.
[6] North British Bank *v.* Collins, 1852, 1 Macq. 369.
[7] Forbes *v.* Campbell, 1857, 19 D. 1008.

CHAPTER IV

MULTIPLEPOINDING

(1) DEFINITION.—A multiplepoinding is an action by which heritable or moveable property claimed by different parties is brought into Court either by the holder of such property or by one of the claimants thereto, in order that the true ownership of said property may be ascertained, and its holder, if in a fiduciary position, exonered and discharged.

(2) THE PARTIES.—The parties are (1) the holder of the property in dispute; and (2) the claimants, who must be at least two in number. The holder of the property in dispute is always the *pursuer*, and the others are *defenders*. If the holder of the disputed property is the raiser of the action, he is called the *pursuer and real raiser*. If, however, the action is raised by one of the claimants in the name of the holder of the property in dispute, the latter is called the *pursuer and nominal raiser*, and the claimant who raised the action is called *defender and real raiser*. The holder of the disputed property may himself be a claimant. All parties who have made, or are thought to be entitled to make, a claim should be cited as defenders.

(3) FORM OF SUMMONS.—The form of an action of multiplepoinding is fixed by the Court of Session Act, 1850,[1] and is in the following terms:—

GEORGE THE FIFTH, etc.—Whereas it is humbly meant and shown to us by our lovite *A.* [*insert name and designation*], pursuer, against *B.* [*insert name and designation*], common debtor, and *C.*, *D.*, and *E.* [*insert names and designations of each in order, and state who is the real raiser*[2]], creditors or pretended creditors of the said *B.*, all defenders, in terms of the condescendence and note of pleas in law hereunto annexed: Therefore it ought and should be found and declared, by decree of the Lords of our Council and Session, that the pursuer is only liable in once and single payment of the principal sum of £ , contained in a bond, dated , granted by him to the said *B.*, his heirs, executors, or assignees, and interest thereon from the day of until payment, or until consignation in this process, and that to the person or persons who may have just right thereto; for determining which the said several persons, creditors or pretended creditors foresaid, and the said *B.*, common debtor, for his interest, and all others

[1] 13 & 14 Vict. cap. 36, Sched. A, No. 5. [2] Ibid., sec. 19.

pretending right thereto, ought to produce their respective grounds of debt and diligences thereon, or other interest in the said sum, and dispute their preference thereto; And the pursuer should be found entitled to retain the expenses of the process as the same shall be ascertained in the course thereof, and decerned and ordained to make payment of what sum shall remain in his hands after such retention to such of the defenders or others as may be found to have best right thereto; And the defenders who shall be found to have no right to the sums *in medio*, and all others, ought and should be decerned and ordained, by decree foresaid, to desist and cease from further troubling the pursuer with respect to the premisses in time coming, conform to the laws and daily practice of Scotland used and observed in the like cases, as is alleged.—OUR WILL IS HEREFORE, etc.

This form is, of course, subject to alteration according to the nature of the property in dispute and the circumstances of the case. Where the pursuers are in a fiduciary capacity, a conclusion for exoneration and discharge may be added. A conclusion for expenses may also be added where required.

(4) CONDESCENDENCE.—Whether the action is raised by the holder of the fund or by a claimant in name of the holder of the fund, a condescendence must be annexed to the summons explaining the circumstances in which the action is rendered necessary. If the action is at the instance of a claimant on the fund, the terms of the condescendence in support of the summons is more rigorously scrutinised than when the action is brought by the holder of the fund, because in the former case the real raiser is undertaking to set forth his own case, and may be required to set forth a relevant ground of claim, whereas in the latter case it is impossible to determine the relevancy of a defender's case on the statement of the pursuer who calls him into Court, and before the defender has had an opportunity of stating his claim for himself.[1] (See *infra*, p. 662.)

The real raiser, when not the pursuer, must always be careful not to make statements in the condescendence which the pursuer may object to.[2]

(5) CONDESCENDENCE OF THE FUND IN MEDIO.—"Where the person possessed of the funds is the real raiser, he shall give out a condescendence of the fund in his hands along with the summons, and where he is only the nominal pursuer, he shall, at the first calling of the cause, either give in a precise and articulate condescendence of the amount of the funds in his hands, stating likewise any claim or lien which he may think he has on the fund, or produce objections as his defences against

[1] Fraser's Exrx. *v.* Wallace's Trs., 1893, 20 R. 374, per Lord Kinnear, p. 380.

[2] Carmichael *v.* Todd, 1853, 15 D. 473. See also Rankin *v.* Kirkwood, 1845, 17 Jur. 292.

the summons served as a claim upon him; otherwise he shall be held as confessed, or a condescendence may be ordered from any of the claimants."[1]

(6) JURISDICTION.—The existence of the fund in Scotland is sufficient to found jurisdiction.[2]

(7) CITATION.—When a multiplepoinding is raised in the name of the holder of a fund by one of the claimants, it must be intimated to the nominal pursuer, by being served on him in the same manner, and on the same *induciæ*, as if he were one of the defenders; and an execution of said intimation must be returned along with the executions of citation.[3]

A multiplepoinding is a privileged summons, and may thus proceed on the shorter *induciæ* of six days. Where, however, there is a conclusion for exoneration, or a declaratory conclusion, the ordinary *induciæ* is required.[4]

(8) DEFENCES.—Defences may be lodged in a multiplepoinding on different grounds. Thus pleas of "no jurisdiction,"[2] *forum non conveniens*,[5] and "all parties not called"[6] may be stated, but the most usual defences are (*a*) incompetency; and (*b*) no fund *in medio*.

Objection to the competency of the action may be pleaded either by the pursuer and nominal raiser or by any of the claimants.[7] Where such an objection is to be taken, the objector must enter appearance and lodge defences within ten days of the date of calling, and thereafter a record is made up as in ordinary actions and the case sent to the Procedure Roll, and a decision arrived at *ante omnia*.[8]

The defence of no fund *in medio* is peculiar to the pursuer and nominal raiser, and the procedure adopted where it, or any other competent defence, is pleaded is the same as is followed where the competency is objected to.

(9) EFFECT OF ACTION ON DILIGENCE.—Service of a summons of multiplepoinding is not equivalent to a sist of diligence, and does not

[1] A. S., 11th July 1828, sec. 47; C. A. S., C, iv. 3 (*a*).

[2] Mansfield, Ramsay & Co. *v.* Smith, Wright, and Gray, 1795, Mor. 2594; Cameron *v.* Chapman, 1838, 16 S. 907; Miller *v.* Ure, 1838, 16 S. 1204; Bell *v.* Stewart, 1852, 14 D. 837; Crockart *v.* Dundee and Arbroath Rly. Co., 1852, 15 D. 202.

[3] A. S., 11th July 1828, sec. 23; C. A. S., C, iv. 3 (*c*).

[4] Shand's Practice, pp. 230 and 588, 589.

[5] Okell *v.* Foden, 1884, 11 R. 906.

[6] Connell *v.* Ferguson, 1861, 23 D. 683, per Lord Neaves, p. 686.

[7] Stewart *v.* Stewart, 1828, 7 S. 145.

[8] Connell *v.* Ferguson, 1861, 23 D. 683, per Lord Neaves, p. 686; Clark *v.* Campbell, 1873, 1 R. 281.

preclude a lawful creditor from proceeding with his diligence.[1] The remedy of the holder of the fund is to raise a suspension and interdict against anyone attempting to do diligence upon it, at the same time consigning the fund and producing the process of multiplepoinding.[2]

A creditor actually appearing as a claimant in a multiplepoinding is not entitled to proceed with diligence against the fund, although this does not apply to a claimant merely cited.[3]

(10) COMPETENCY. — (a) *Generally.* — The original purpose of a multiplepoinding was to decide between parties who had each done diligence upon the same fund. This rule, however, has given way to the rule that a multiplepoinding is competent where there are separate and hostile claims on the same fund. (See next paragraph.) The subject-matter in dispute is usually a sum of money, but the right to corporeal moveables of any kind[4] and questions of heritable title[5] may be settled by a multiplepoinding, although a petitory action is sometimes more appropriate.[6] (See *Fund in Medio*, *infra*, 662.)

Incidentally, questions of all kinds may be decided. Thus a deed may be reduced without recourse to a separate action;[7] a person may be presumed dead;[8] or a question of legitimacy may be decided.[9]

(b) *Double Distress.*—(i.) *Generally.*—"In the original conception of the process the proper ground of a multiplepoinding was double distress in the strict sense of the term, or, in other words, competition created by rival diligence. But in later times it has not been thought indispensable to have double diligence, but double claims to the same fund have been thought sufficient. It is still, however, necessary to the validity of the action that there should be a true case of double claim to one fund or property on separate and hostile grounds, not a mere case got up in order to try a question of debt or obligation between two individuals, the proper mode of trying which is a direct action."[10]

[1] Bell's Comm. (7th ed.), ii. 278; Anderson *v.* Stewart, 1831, 10 S. 49; Hendry *v.* Brown, 1851, 13 D. 1046; Smith's Trs. *v.* Grant, 1862, 24 D. 1142, per Lord Kinloch, p. 1159.

[2] Ferguson *v.* Bothwell, 1882, 9 R. 687. See also Anstruther *v.* Lewis, 1851, 13 D. 778; Mitchell *v.* Strachan, 1869, 8 M. 154.

[3] Bell's Comm. ii. 278; Graham Stewart on Diligence, p. 137.

[4] Baillie *v.* Baillie, 1830, 8 S. 318.

[5] Edinburgh Merchant Maiden's Hospital *v.* Greig's Exrs., 1902, 10 S. L. T. 317; Bankton, iv. 42. 6.

[6] Ogilvy's Trs. *v.* Chevalier, 1874, 1 R. 693.

[7] Logan *v.* Byres, 1895, 2 S. L. T. 455; A. S., 20th March 1907, sec. 6; C. A. S., C, iv. 4 (*d*).

[8] Tait's Factor *v.* Meikle, 1890, 17 R. 1182.

[9] Tulloh's Trs. *v.* Coles, 1895, 3 S. L. T. 17.

[10] Russel *v.* Johnston, 1859, 21 D. 886, per Lord Kinloch, p. 887. See also Scott

In order that there should be double distress, the claims should be on the same plane. Accordingly, a person claiming for a debt against an estate and a beneficiary upon the estate are not competing claimants.[1]

There may be double distress although the holders of the fund state that they have no doubts about the person to whom it is payable and that there is no difficulty in getting a discharge.[2]

(ii.) *Difference between Action Raised by the Holder of the Fund and by a Claimant.*—"The practice of our Courts warrants a much greater latitude in the case of the holder of the fund than in the case of the competitors, and for the reason that the holder of the fund can never raise a direct action, and is not bound to remain a depository till the day of his death, or till the disputing parties agree to settle their claims. He is entitled to be relieved by means of an action of multiplepoinding after a reasonable time, and accordingly it is a sufficient justification of the institution of the action, and is the criterion of its competency, that the claims intimated make it impossible for the depository to pay to one of the parties without running the risk of an action at the instance of the other."[3] It is not sufficient, however, for the holder of the fund merely to represent that a conflicting claim has been made: some intelligible ground for the claim must be stated.[4]

(iii.) *Fund in Medio.*—This is the name given to the property in dispute in a multiplepoinding.

The fund *in medio* must be a fund presently due and in hand,[5] and not something exigible in the future.[6]

It is not an objection to the competency of the action that the nominal raiser does not admit that there is a fund *in medio*. It only

v. Drysdale, 1827, 5 S. 689 (N. E. 643); Fraser's Exrx. *v.* Wallace's Trs., 1893, 20 R. 374, per Lord President Robertson and Lord M'Laren; Commercial Bank of Scotland *v.* Muir, 1897, 25 R. 219; M'Dowall and Neilson's Tr. *v.* Hagart & Co., 1905, 8 F. 235; Colonial Mutual Life Assurance Society *v.* Brown, 1911, 48 S. L. R. 427, per Lord Justice-Clerk Macdonald, p. 428.

[1] Glen's Trs. *v.* Miller, 1911, S. C. 1178. See also Johnston *v.* Richardson, 1905, 13 S. L. T. 537.

[2] Greenshields' Trs. *v.* Greenshields, 1915, 2 S. L. T. 189.

[3] Winchester *v.* Blakey, 1890, 17 R. 1046, per Lord M'Laren, p. 1050. See also Commercial Bank of Scotland *v.* Muir, 1897, 25 R. 219, per Lord Kinnear; Colonial Mutual Life Assurance Society *v.* Brown, 1911, 48 S. L. R. 427, per Lord Justice-Clerk Macdonald, p. 428.

[4] Fraser's Exrx. *v.* Wallace's Trs., 1893, 20 R. 374, per Lord M'Laren, p. 379, and Lord Kinnear, p. 380.

[5] Anderson *v.* Cameron's Trs., 1844, 17 Jur. 42; Nimmo *v.* Murray, 1863, 1 M. 791; Richardson *v.* Wilson, 1905, 12 S. L. T. 775.

[6] Pentland *v.* Royal Exchange Assurance Co., 1830, 9 S. 164. See also Provan *v.* Provan, 1840, 2 D. 298.

raises a question when it becomes necessary to lodge a condescendence of the fund.[1] When this occurs, it is quite sufficient that there should be a fund, although not definitely ascertained. Thus, where the fund *in medio* was an instalment of money due by the nominal raiser to one of the defenders under a contract, the actual amount of which had not been certified as correct by the engineer's certificate, the Lord Ordinary held this to be sufficient.[2]

The fund *in medio* may be heritable as well as moveable. Thus, in an early case, the share of a heritable bond was held to be a proper fund *in medio;*[3] in a later case the Lord Ordinary was satisfied with a fund *in medio* which was partly heritable;[4] and in a comparatively recent case a fund *in medio* which consisted solely of heritable estate was sustained.[5]

The fund *in medio* must not include anything which is not the subject-matter of dispute. In one case the item not in dispute was struck out of the condescendence of the fund.[6] In another case the action was held to be incompetent *quoad* the undisputed property;[7] and in a third the whole action was held to be incompetent.[8]

(iv.) *Trustees.*—It is not double distress where there are claims by creditors upon the estate which the beneficiaries have interpelled the trustees from paying. The trustees are only entitled to be ranked on the estate after debts have been paid, and the proper course in such circumstances is for the trustees to await a petitory action at the instance of such creditors.[9] In the same way, an action of multiplepoinding raised by a daughter who claims *legitim* from her father's estate and calling the beneficiaries under her father's will as the other defenders is not a competent action, as there is no double distress.[10] Where, however, there is an alleged creditor who has a claim which he

[1] Crombie *v.* Christian's Trs., 1830, 8 S. 745; Threshie *v.* Johnston, 1830, 8 S. 1064; Miller *v.* Ure, 1838, 16 S. 1204.

[2] Highland Rly. Co. *v.* British Linen Co., 1901, 38 S. L. R. 584.

[3] M'Intyre's Trs. *v.* Schaw, 1829, 7 S. 636.

[4] Logan *v.* Byres, 1895, 2 S. L. T. 455.

[5] Boyd's Trs. *v.* Boyd, 1906, 13 S. L. T. 878.

[6] Dunn's Trs. *v.* Barstow, 1870, 9 M. 281.

[7] MacGillivray's Trs. *v.* Dallas, 1905, 7 F. 733.

[8] Macnab *v.* Waddell, 1894, 21 R. 827; *cp.* Commercial Bank of Scotland, Ltd. *v.* Muir, 1897, 25 R. 219.

[9] Robb's Trs. *v.* Robb, 1880, 7 R. 1049; M'Rae *v.* Gray, 1895, 32 S. L. R. 172; Gordon *v.* Gordon, 1895, 32 S. L. R. 355; Mackenzie's Trs. *v.* Sutherland, 1895, 22 R. 233; Glen's Trs. *v.* Miller, 1911, S. C. 1178.

[10] Johnston *v.* Richardson, 1905, 13 S. L. T. 537. See also Crokat *v.* Lord Panmure, 1853, 15 D. 737.

will neither abandon nor sue for in a petitory action, it would seem that a multiplepoinding may be raised.[1]

(v.) *Insolvent Estate.*—A multiplepoinding is not an appropriate action for the distribution of a fund held in trust for creditors. Accordingly, where a farmer executed a trust deed for behoof of his creditors and a non-acceding creditor arrested funds in the trustee's hands and raised a multiplepoinding, the action was held to be incompetent;[2] and where a law agent had received a fund from a client with instructions to apply it *primo loco* in payment of his own account of expenses, and *secundo loco* in paying a composition to the client's creditors, it was held that there was no double distress, and that a multiplepoinding raised by a creditor was incompetent.[3] Where, however, there is a surplus in the hands of the trustee of a partnership after paying creditors, and it is claimed by each of the partners, there is double distress, and a multiplepoinding raised by one of the partners is competent.[4]

Where the creditor of a deceased person raised an action against the latter's executor, which, if successful, would make the estate insolvent, and another creditor raised a multiplepoinding alleging that the first creditor's claim was excessive, the latter action was held to be competent, especially as the executor was a consenting party;[5] and the same result was arrived at where the competition was between the trustee in bankruptcy and a person claiming a right over the fund in respect of advances and a lien.[6]

Where an arrestment has been used against property belonging to a person who is thereafter sequestrated, and the property is claimed both by the trustee in the sequestration and the arrester, the Court has held that there is double distress, and that an action of multiplepoinding is competent.[7] In a later case in the Outer House in similar circumstances the Lord Ordinary held that there was no double distress in respect that the claim of the trustee did not conflict with that of the arrester, that the trustee was entitled to prevail in terms of the Bankruptcy Act, 1856, and that the right of the creditor could be worked out in the sequestration.[8] In a case where the goods arrested

[1] Blair's Trs. *v.* Blair, 1863, 2 M. 284; Glen's Trs. *v.* Miller, 1911, S. C. 1178, per Lord Johnston, p. 1185.

[2] Kyd *v.* Waterson, 1880, 7 R. 884. See also Crichton *v.* Irvine, 1836, 14 S. 628.

[3] Glass *v.* Robertson, 1899, 1 F. 391.

[4] Tait *v.* Geddie, 1896, 3 S. L. T. 289.

[5] Jamieson *v.* Robertson, 1888, 16 R. 15.

[6] M'Dowall and Neilson's Tr. *v.* Hagart & Co., 1905, 8 F. 235.

[7] Dill, Wilson, and Muirhead *v.* Ricardo's Tr., 1885, 12 R. 1404. See also Park *v.* Watson, 1874, 2 R. 118, per Lord President Inglis, p. 120.

[8] Wishart *v.* Reynolds, 1900, 8 S. L. T. 123.

had been placed in a store in the name of a person who subsequently became bankrupt, and were claimed by the trustee of the bankrupt, the arrester, and another person who alleged that he had delivered them to the bankrupt on sale or return, a multiplepoinding raised by the last-mentioned party in name of the storekeeper was held competent.[1]

(vi.) *Proper Discharge of a Debt.*—In the ordinary case a debtor is not entitled to raise a multiplepoinding in order to get a proper discharge of his debt.[2] In one case, however, where *A.* was debtor to *B.* to the extent of £150, and *C.* presented *A.* with a bill for £100 for his acceptance drawn by *B.* upon *A.* in favour of *C.*, and *A.* refused to accept the bill in respect that while *C.* represented that the bill operated as an assignation by *B.* in favour of *C.* of the sum due by *A.* to *B.*, *B.* reserved his right to challenge the bill on the ground that it had been improperly filled up, the Court held that there was double distress, and that *A.* could raise an action of multiplepoinding.[3]

(vii.) *Arrestments.*—Where property is arrested as belonging to a certain person, and a third party claims the property arrested as his own, a multiplepoinding to discover the rightful owner is competent.[4]

(viii.) *Money in Bank in Joint Names.*—If there is a dispute between two persons and one of them deposits the money in dispute in bank in their joint names pending the decision of the dispute, a multiplepoinding raised by the other is incompetent.[5] Where, however, the money has come from an outside source, and two parties claim it and agree to place it in bank pending the decision of the dispute, an action of multiplepoinding is quite competent.[6]

(ix.) *Money Deposited with a Third Party to Await a Settlement.*—Where by agreement money was deposited for three months with a firm of law agents to await the settlement of certain claims against the depositor, and after three months the depositor and one of the claimants had agreed, but the others still threatened claims, a multiplepoinding by the holder of the money was held competent.[7] Where, however, the money was simply deposited with a third party to meet a claim

[1] Ross *v.* Plano Co., 1902, 10 S. L. T. 314.

[2] Moncrieff *v.* Bethune, 1844, 6 D. 1100; Great North of Scotland Rly. Co. *v.* Gauld, 1863, 1 M. 1053, per Lord Kinloch, p. 1054; Connell's Tr. *v.* Chalk, 1878, 5 R. 735.

[3] Lattimer *v.* Wight, 1880, 18 S. L. R. 57.

[4] Pollard *v.* Galloway and Nivison, 1881, 9 R. 21; North British Rly. Co. *v.* White, 1881, 9 R. 97. See also Ross *v.* Plano Co., 1902, 10 S. L. T. 314.

[5] Royal Bank of Scotland *v.* Ellis, 1902, 10 S. L. T. 167.

[6] Commercial Bank of Scotland *v.* Muir, 1897, 25 R. 219.

[7] Winchester *v.* Blakey, 1890, 17 R. 1046.

if it should be established, a multiplepoinding raised by the creditor in the name of the depository was held to be incompetent.[1]

(x.) *Money Placed in Bank on Deposit-Receipt by a Deceased Person.*—Where such money is claimed (1) by an alleged donee, and (2) by the next of kin of the deceased, there is double distress.[2]

(xi.) *Claims by a Person and by his Assignee.*—Where such claims are absolutely antagonistic there is double distress.[3]

(xii.) *Policy of Insurance.*—Where the sum due under a policy was payable at a certain date and the sum was arrested in the hands of the insurance company by a creditor of the person insured, and the person insured also claimed the same sum, a multiplepoinding at the instance of the insurance company was held to be competent.[4]

(xiii.) *Bondholders.*—Where a prior bondholder, who has sold a property in terms of his bond, has a surplus after deducting the amount contained in his bond, it is no part of his duty to raise a multiplepoinding with regard to the surplus. His duty ends when he has consigned the surplus in bank, and claimants on the surplus should be left to settle their claims in their own way, which may be done by petition or otherwise.[5]

(xiv.) *Bill of Exchange.*—Where the acceptor of a bill is interpelled from paying the amount contained in the bill by a person alleging that the holder has no right to it, but that the person interpelling is the true owner, and proper averments are made, there is double distress, and a multiplepoinding is a competent process to decide the true ownership.[6]

(xv.) *Subscribed Fund.*—Where a fund was subscribed for the purpose of building a chapel and was lodged in bank, and the congregation split into two parties, each of which claimed the fund as representing the original church, a multiplepoinding raised in name of the bank by certain contributors to the fund was held competent.[7]

(11) Exoneration.—(a) *Trustees.*—There are expressions in some of the decisions which might lead one to suppose that trustees have a

[1] Clark *v.* Campbell, 1873, 1 R. 281. See also Stewart *v.* Stewart, 1828, 7 S. 145; Dennistoun *v.* Stewart & Co., 1853, 16 D. 154.

[2] Royal Bank of Scotland *v.* Price, 1893, 20 R. 290; *cp.* Bank of Scotland *v.* Comrie, 1871, 8 S. L. R. 419.

[3] Fraser's Exrx. *v.* Wallace's Trs., 1893, 20 R. 374. See also National Provident Institution *v.* M'Leod, 1915, 2 S. L. T. 328.

[4] Colonial Mutual Life Assurance Society *v.* Brown, 1911, 48 S. L. R. 427.

[5] Milne *v.* Louttit's Tr., 1898, 5 S. L. T. 297. See also Antrobus, etc., Petrs., 1896, 4 S. L. T. 89.

[6] Agnew *v.* White, 1899, 1 F. 1026.

[7] Connell *v.* Ferguson, 1857, 19 D. 482; 1861, 23 D. 683.

general right to raise an action of multiplepoinding in order to obtain exoneration.[1] No such right, however, exists, and trustees can only raise an action of multiplepoinding for exoneration where there is (*a*) double distress;[2] or (*b*) a refusal to exoner extrajudicially.[3]

Where a trustee is not satisfied with the discharge which is offered him he is not in consequence entitled to raise a multiplepoinding.[4] "If a debtor is not satisfied with the discharge offered he has an obvious remedy. If he is bound to pay under a bond and disposition, and is charged to pay, his remedy is suspension of the charge. If it be an ordinary debt that he is called upon to pay, his remedy is to let the creditor raise an action for payment, and he will then have an opportunity of stating in defence that the discharge offered was not sufficient."[5]

(b) *Judicial Factor.*—Although there may be cases where a judicial factor, holding a fund which is demanded by various parties, may bring a multiplepoinding,[6] there is no precedent for a judicial factor bringing a multiplepoinding to be exonered from the administration of a fund and discharged of his intromissions and having his bond of caution delivered up.[7]

(12) Procedure where no Defences are Lodged.—(a) *First Interlocutors.*—The terms of the first interlocutor depend upon circumstances. If there is a possibility that claimants exist who have not been called, or if claimants are called whose addresses are unknown, or if for any other reason the case is one where intimation of the action by advertisement is advisable, the pursuer or real raiser may enrol the cause after the lapse of *ten* days from the date of calling and move for an interlocutor in the following terms:—

> The Lord Ordinary appoints intimation of the dependence of this action to be made once [*or* twice, *as the case may be*] a week for successive weeks in the following newspapers, viz. , in order that all parties not otherwise cited may enter appearance in the cause by the day of next.

[1] Davidson *v.* Ewen, 1895, 3 S. L. T. 162; Paterson's Trs. *v.* Paterson, 1899, 7 S. L. T. 134.

[2] M'Rae *v.* Gray, 1895, 32 S. L. R. 172; Gordon *v.* Gordon, 1895, 32 S. L. R. 355; Mackenzie's Trs. *v.* Sutherland, 1895, 22 R. 233; Glen's Trs. *v.* Miller, 1911, S. C. 1178.

[3] Taylor *v.* Noble, 1836, 14 S. 817; Connell's Tr. *v.* Chalk, 1878, 5 R. 735, per Lord President Inglis, p. 736; M'Rae *v.* Gray, 1895, 32 S. L. R. 172; Mackenzie's Trs. *v.* Sutherland, 1895, 22 R. 233; Glen's Trs. *v.* Miller, 1911, S. C. 1178.

[4] Moncrieff *v.* Bethune, 1844, 6 D. 1100.

[5] Connell's Trs. *v.* Chalk, 1878, 5 R. 735, per Lord President Inglis, p. 737.

[6] Carmichael *v.* Todd, 1853, 15 D. 473, per Lord Rutherfurd, p. 474; Tait's Factor *v.* Meikle, 1890, 17 R. 1182.

[7] Campbell *v.* Grant, 1870, 8 M. 988.

A copy of the advertisement and certificate that it has been made should thereafter be lodged in process.

The foregoing interlocutor may, however, be combined with the following:—

Finds the pursuer liable in once and single payment, and appoints all parties claiming an interest in the fund to lodge their condescendence and claims by the day of next.

Should, however, advertisement be not required, the last-mentioned interlocutor alone will form the first interlocutor in the case.

At the same time, the Lord Ordinary may be asked to hold the condescendence annexed to the summons as a condescendence of the fund *in medio*, or an order may be taken upon the pursuer or defenders to lodge a condescendence of the fund within a certain time, and for objections, if any, within a certain time thereafter. This, however, may be deferred until later.[1]

(b) *Where no Objections to the Condescendence of the Fund in Medio.*—Where there are no objections, the holder of the fund is entitled to get out of the process, and may do so in the following way:—*First*, the Lord Ordinary may be asked to grant him a decree for his expenses, as taxed, out of the fund *in medio*, and upon this being obtained, *second*, the fund may be consigned, less said expenses, in bank in name of the Clerk of Court, and, *third*, the Lord Ordinary may then approve of the condescendence of the fund *in medio*, and, in respect of the consignation as aforesaid, exoner and discharge the pursuer in terms of the conclusions of the summons to that effect.

(c) *Objections to the Condescendence of the Fund in Medio.*—If this condescendence has been lodged, either by the condescendence annexed to the summons being so held, or after an order on the pursuer or defenders, as already mentioned, any of the claimants[2] may lodge a paper entitled "Objections to the Condescendence of the Fund *in Medio*." This paper consists of a condescendence and note of pleas in law in usual form, and is signed by counsel. A record may then be made up and closed on the condescendence of the fund and on the objections thereto. This is treated as a cause in itself and proceeds to judgment in the ordinary way.[3]

Where the objection to the fund *in medio* is that there is no such fund, this requires to be done by way of defences (*q.v.*).

(d) *Interlocutor Approving of the Fund in Medio.*—An interlocutor

[1] Ramsay's Judicial Factor *v.* British Linen Bank, 1912, S. C. 206.

[2] Lang *v.* Reid and Monach, 1826, 5 S. 21 (N. E. 19); Donaldson's Tr. *v.* Beattie, 1914, 1 S. L. T. 170.

[3] Walker's Tr. *v.* Walker, 1878, 5 R. 678.

approving of the condescendence of the fund *in medio* and repelling objections thereto and finding the objectors liable in expenses is an interlocutor which may be reclaimed against within twenty-one days,[1] without leave.[2] If not reclaimed against within that time it cannot be afterwards brought under review of the Inner House on a reclaiming note taken on the merits.[3]

(e) *Second Order for Claims.*—After the expiry of the first interlocutor ordering claims a second order for claims is usually taken in the following terms :—

> The Lord Ordinary of new appoints all parties having an interest in the fund *in medio* to lodge their condescendences and claims and that by the day of next.

(f) *Condescendence and Claim.*—A condescendence and claim cannot be lodged without an order for claims.[4]

The condescendence is similar to that in an ordinary summons, and the claimant may *brevitatis causa* adopt such of the condescendence annexed to the summons as he thinks proper. The condescendence is followed by a claim, in which is set forth the particular part of the fund *in medio* to which the claimant desires to be ranked and preferred, and appropriate pleas in law are added. It is not sufficient that the claimant should deny his rival claimant's averments ; it is necessary that facts should be set forth showing that he is entitled to the whole or part of the fund, and this should be followed by a definite claim, otherwise he will not be ranked and preferred to any portion of the fund, even although the rival claim has been repelled.[5]

Written documents are not set forth *in extenso* in the condescendence, but are printed separately and referred to in the pleadings as set forth in such separate print.[6]

The condescendence and claim is signed by counsel.

The new Codifying Act of Sederunt seems in this matter to have reverted to the practice of the Court in the year 1828. Its provisions are as follows:—"In the further preparation of the cause, the claimants in a multiplepoinding shall state their respective claims in the form of condescendences, with the conclusions to be drawn from the facts so stated, in the shape of notes of pleas,

[1] School Board of Harris *v.* Davidson, 1881, 9 R. 371.
[2] Walker's Tr. *v.* Walker, 1878, 5 R. 678.
[3] North British Rly. Co. *v.* Gledden, 1872, 10 M. 870.
[4] Connell *v.* Ferguson, 1861, 23 D. 683, per Lord Neaves, p. 687.
[5] Ibid., p. 686. See also Crawfurd *v.* Crawford's Creditors, 1845, 17 Jur. 172.
[6] Court of Session Act, 1868, sec. 30.

producing therewith their grounds of debt, and other writings for instructing their claims; and it shall be competent to the Lord Ordinary, if he see cause, to appoint the creditors to meet, and choose a common agent, as at present practised in a ranking and sale, who shall prepare and lodge a state of the claims and preferences, putting his objections, therein stated, to each or any of the claims, in the form of answers to a condescendence, with a note of pleas; and *quoad ultra*, the duty and nature of his office shall be similar to that of a common agent in a process of ranking and division; and if no common agent shall be appointed, the parties shall be required to revise their condescendences, each being allowed to state, in the close of his condescendence, his objections to any other claim or claims, in the form of answers to a condescendence, with a note of pleas; and thereafter, in every instance, the procedure shall correspond, as nearly as may be, to what is provided in the case of an ordinary action."[1] In connection therewith sec. 30 of the Court of Session Act, 1868, may be referred to:—

"In actions of multiplepoinding it shall not be necessary to lodge answers to the original condescendences and claims, unless it is made to appear to the satisfaction of the Lord Ordinary that the claimants are at issue on matters of fact material to the action, and that answers are necessary; and in such actions it shall be competent for parties having opposing interests (where they are agreed upon the facts) to make their averments in the form of a joint case, appending thereto their respective claims and pleas in law."

(g) *Consignation.*—Whenever the amount of the fund *in medio* has been ascertained, either by no objections being lodged to the condescendence of the fund, or by a decision upon such objections, consignation, on the motion of any claimant,[2] may be ordered by the Court in the following terms:—

> The Lord Ordinary authorises the real raiser [*or as the case may be*] to consign the amount of the fund *in medio* in the Bank to await the orders of the Court or the Lord Ordinary.

If this order has been taken in absence, the holder may be reponed on presenting a reclaiming note.[3] If the order is not obeyed, a decree of consignation may be obtained, and care should be taken that the

[1] 11th July 1828, sec. 48; C. A. S., C, iv. 3 (*b*).

[2] Wallace *v.* Campbell, 1822, 1 S. 509 (N. E. 471); British Linen Co. *v.* Breadalbane Trs., 1836, 15 S. 356, per Lord Medwyn, p. 360.

[3] Lawrie *v.* Grant, 1829, 7 S. 649.

holder of the fund is made liable in the expense of the extract.[1] If decree has passed in absence it may be suspended.[2]

If the holder of the fund has a claim on the fund he cannot be ordered to consign.[3] The claim must, however, be liquid.[4]

The effect of consignation is to set free the holder of the fund and, where sought, to entitle him to exoneration.[5]

(h) *Where there is no Competition.*—Where only one claim has been lodged, or where the several claimants have arranged among themselves the respective proportions of the fund *in medio* to which they are entitled, the Lord Ordinary will pronounce an interlocutor in the following terms:—

The Lord Ordinary, in respect no other claim has been lodged, and no objection stated, for aught yet seen ranks and prefers the claimants *A. B.* and *C. D.* on the fund *in medio* in terms of their respective claims Nos. and of process, and decerns.[6]

Sometimes the interlocutor contains a declaration that, in the event of any person subsequently appearing and making good a preferable claim, the claimant preferred shall be bound to repay the sum to such person or persons as the Court may direct.[7]

An interlocutor "for aught yet seen" is not an absolute decree,[8] and accordingly other subsequent claimants may be reponed against it at any time before extract by lodging a reclaiming note.[9] The terms, as regards expenses, upon which subsequent claimants may be reponed, depends upon whether the latter were called as defenders in the action or were not so called.[10]

Where implement of the decree has been obtained, the remedy is by reduction.[11] A decree in absence, or "for aught yet seen," however, is stronger against one who has been cited and has not appeared than in an ordinary action, and accordingly a reduction will not be allowed except where the pursuer has "ane necessar caus of his absence and nocht comperance quhen he wes summound hor yit sall haif ony actioun

[1] Agnew's Trs. *v.* Macneel, 1827, 5 S. 309 (N. E. 287).
[2] Macleman *v.* Cameron, 1827, 5 S. 370 (N. E. 343).
[3] M'Kenzie *v.* M'Kenzie, 1827, 5 S. 725 (N. E. 676).
[4] Ewing *v.* Wight, 1831, 10 S. 109.
[5] Shand's Practice, p. 595.
[6] Kerr's Tr., 1894, 2 S. L. T. 10; Gauden's Tr. *v.* Jamieson, 1902, 10 S. L. T. 326.
[7] Union Bank *v.* Gracie, 1887, 25 S. L. R. 61.
[8] Geikie *v.* Morris, 1858, 3 Macq. 347, per Lord Chelmsford, p. 358.
[9] Shand's Practice, pp. 599, 600.
[10] Ibid.; Maclaren on Expenses, p. 289 *et seq.*
[11] Stodart *v.* Bell, 1860, 22 D. 1092.

for the byrun proffitt is intromettit with be the obtener of the decreit fra the obtening thairof."[1]

He may also reduce the decree if he is a minor without tutors and curators.[2]

(i) *Where there is a Competition.*—Where competing claims are lodged, a record on the summons and condescendences and claims is made up and closed. It is usually printed by the real raiser,[3] but the Lord Ordinary may appoint one of the claimants to do so.[4] After the record is closed the cause is sent to the Procedure Roll, where parties are heard or a proof taken, after which the Lord Ordinary pronounces an interlocutor repelling the unsuccessful claims and sustaining the claims of the successful parties. An interlocutor sustaining the claim of one claimant has the effect of repelling a similar claim by another claimant.[5] Any claimant has a title and interest to examine the grounds of a competing claimant's claim.[6]

A decree in a competition is *res judicata* against all the parties in the proceedings in which the judgment is pronounced,[7] and this extends to the case where a claimant puts forward the same pleas as have been determined adversely against a different claimant in a previous process.[8] It will not, however, protect the claimant who receives it from the demand of any other claimant, not a party to the process, who can instruct a better right and insists upon repetition.[9] Where the decree has become final and has been implemented the only recourse of the latter is by an action of reduction.[10]

(j) *Government Duties.*—Previous to any order for payment being presented to the Lord Ordinary or the Court for signature, all Government duties must have been paid out of the fund *in medio*.[11]

(k) *Claims not Timeously made.*—It is a matter entirely in the discretion of the Court to permit, or refuse, claims not timeously made to

[1] Act 1584, cap. 10 (record edition), cap. 3 (12mo edition); Campbell *v.* Bain, 1678, Mor. 9128; Ersk. Inst. iv. 3. 23.

[2] Act 1584, cap. 10 (record edition), cap. 3 (12mo edition).

[3] Town and County Bank, Ltd. *v.* Lilienfield, 1900, 8 S. L. T. 227.

[4] A. S., 5th February 1861, sec. 8.

[5] Shand's Practice, p. 598.

[6] Dickson and Walker *v.* John Mitchell & Co., 1910, S. C. 139.

[7] Elder's Trs. *v.* Elder, 1895, 22 R. 505.

[8] M'Caig *v.* Maitland, 1887, 14 R. 295.

[9] Anderson *v.* Stewart, 1831, 10 S. 49.

[10] Stodart *v.* Bell, 1860, 22 D. 1092.

[11] Legacy Duty Act, 1796 (36 Geo. III. cap. 52), sec. 25; Succession Duty Act, 1853 (16 & 17 Vict. cap. 51), sec. 53; Customs and Inland Revenue Act, 1888 (51 & 52 Vict. cap. 8), sec. 24 (3); Finance Act, 1894 (57 & 58 Vict. cap. 30), sec. 8 (1); C. A. S., B, v.; A. S., 1st July 1908; A. S., 3rd December 1912.

be received,[1] except where there has been an interlocutor on the merits which has become final. In the latter case it is impossible to entertain a new claim, even though it has been allowed to be received,[2] and, strictly speaking, the Lord Ordinary should not allow such a claim to be received, even though he afterwards rejects it.[3] A riding claim may, however, be received where the interlocutor on the merits has become final,[4] provided there is no decree for payment.[5] In a recent case a pursuer and real raiser was allowed to state in a condescendence of the fund *in medio*, made up after claimants had been ranked by a final interlocutor, a claim of retention or compensation which he had against a claimant who had been ranked and preferred to the whole fund.[6]

Where the claims can competently be received the question resolves itself into one of expenses, and a distinction is drawn between cases where the claimant has been called as a defender and where he has not been so called. (See Maclaren on Expenses, p. 289 *et seq.*)

(l) *Amendment of Claim.*—When a record is closed in a multiplepoinding it carries with it all the finality and effects of a closed record in an ordinary action.[7] Accordingly, claims may be amended in the same way and upon the same conditions as in ordinary actions. (See *supra, Motion for Leave to Amend*, p. 449 *et seq.*)

It is not competent to amend after a decree on the merits has become final.[8] Where, however, the decree on the merits is a decree which may be altered owing to change of circumstances, as where a decree for aliment at a certain rate was given and it was subsequently found that aliment was no longer necessary, an amendment may be allowed in order to meet the altered circumstances.[9]

In one case where the Inner House perceived that the true point of law had not been raised, the case was remitted back to the Lord Ordinary to open up the record and allow new statements for the purpose of raising it.[10] In another case where a party claimed on the

[1] Binnie's Trs. *v.* Henry's Trs., 1883, 10 R. 1075 ; Cowan's Trs. *v.* Cowan, 1888, 16 R. 7.

[2] Duncan's Factor *v.* Duncan, 1874, 1 R. 964 ; Landale *v.* Wilson, 1900, 2 F. 1047 ; Terrell *v.* Ker, 1900, 2 F. 1055 ; Ramsay's Judicial Factor *v.* British Linen Bank, 1911, S. C. 832.

[3] Terrell *v.* Ker, 1900, 2 F. 1055, per Lord Trayner, p. 1059 ; Ramsay's Judicial Factor *v.* British Linen Bank, 1911, S. C. 832, per Lord Mackenzie.

[4] Dymond *v.* Scott, 1877, 5 R. 196 ; Landale *v.* Wilson, 1900, 2 F. 1047, per Lord Trayner, p. 1053.

[5] Anglo-Foreign Banking Co., 1879, 16 S. L. R. 731 ; Scottish Life Assurance Co. *v.* John Donald, Ltd., 1902, 9 S. L. T. 348.

[6] Ramsay's Judicial Factor *v.* British Linen Bank, 1912, S. C. 206.

[7] Stevenson's Trs. *v.* Dumbreck, 1857, 19 D. 462 ; affd. 1861, 23 D. (H. L.) 1.

[8] Terrell *v.* Ker, 1900, 2 F. 1055. [9] Purves' Trs. *v.* Purves, 1900, 8 S. L. T. 179.

[10] Ferguson's Trs. *v.* Hamilton, 1862, 4 Macq. 397.

footing that a competitor was entitled to share in the fund, and when it was decided that the latter had no such right, asked to be allowed to amend his claim, his request was refused.[1]

(m) *Abandonment of Claim.*—When a claimant abandons under the Judicature Act, the expense of the opposing claim is part of the expense which he will require to pay.[2]

A claimant may be held to have abandoned his claim. Thus a party who had lodged a claim did not obtemper an order for revisal and the record was closed without him. The case eventually went to a jury trial, and he was asked to participate. He refused to do so, and, after the verdict, he wished to participate in the result. The Court, however, refused to allow him to do so, holding that he had abandoned his claim.[3]

(n) *Riding Claims.*—A riding claim is a claim at the instance of a creditor of one of the claimants to be ranked and preferred upon such portion of the fund *in medio* as his debtor may be found entitled to. This is the only way in which a creditor of a claimant can claim in a multiplepoinding.[4]

The creditor's claim must be liquid and constituted.[5] It is distinguishable from an ordinary claim in this respect, that it can be lodged after an interlocutor on the merits has become final, but before an order for payment has been made.[6]

The usual form of interlocutor ranking and preferring a riding claim is:—

> Finds the claimant *A. B.* entitled to be ranked *primo loco* in the fund *in medio* in terms of his claim No. of process, but in respect of the claim for *C. D.*, No. of process, as a rider upon the claim of the said *B. A.*; Ranks and prefers the claimant *C. D.* upon the fund *in medio* in room and place of primary claimant, and as a rider upon his claim, in terms of his condescendence and claim No. of process.

(o) *Mandatary.*—The sisting of a mandatary by a claimant who is a foreigner or a Scotsman resident abroad is a question of circumstances.[7]

[1] Graham's Tr. *v.* Grahams, 1868, 6 M. 820, at pp. 831, 832.

[2] Agnew *v.* White, 1900, 8 S. L. T. 43.

[3] Gallie *v.* Wylie, 1845, 7 D. 301.

[4] Gill's Trs. *v.* Patrick, 1889, 16 R. 403.

[5] Home's Trs. *v.* Ralston's Trs., 1834, 12 S. 727; Royal Bank of Scotland *v.* Stevenson, 1849, 12 D. 250; Wilson *v.* Young, 1851, 13 D. 1366.

[6] Dymond *v.* Scott, 1877, 5 R. 196; Landale *v.* Wilson, 1900, 2 F. 1047, per Lord Trayner; Anglo-Foreign Banking Co., 1879, 16 S. L. R. 731; Scottish Life Assurance Co. *v.* John Donald, Ltd., 1902, 9 S. L. T. 348; Ramsay's Judicial Factor *v.* British Linen Bank, 1911, S. C. 832, per Lord Mackenzie.

[7] North British Rly. Co. *v.* White, 1881, 9 R. 97; Town and County Bank, Ltd. *v.* Lilienfield, 1900, 8 S. L. T. 227; Stow's Trs. *v.* Silvester, 1900, 8 S. L. T. 253; Gordon's Trs. *v.* Forbes, 1904, 6 F. 455; Elmslie *v.* Pauline, 1905, 7 F. 541.

CHAPTER V

REDUCTION AND REDUCTION-IMPROBATION

I. Reduction.—(1) *Generally.*—An action of reduction is an action to annul any deed, decree, or other writing executed, or any illegal act done, in prejudice of a pursuer's right.[1] *Reduction of decrees* is specially dealt with later in this chapter, p. 692.

An action of reduction may be raised without petitory or declaratory conclusions, although it is usual to include these in order to give effect to the decree of reduction.[2] It is not necessary that the deed should be reduced *in toto;* it may be reduced so far as it affects the pursuer's interests alone.[3] Where, however, the deed represents an inseparable transaction, as where the deed embodies a contract of sale of different subjects for one price,[4] it is necessary to reduce the whole deed. Where in an arbitration the arbiter awarded a larger sum in name of penalties than was claimed by the successful party, a reduction *quoad excessum* was held competent.[5] In an action of reduction of an antenuptial marriage contract at the instance of the wife's creditors the point was not decided whether the provisions in favour of the husband could be reduced *quoad excessum.*[6]

Reduction is the only method of obtaining restitution where a deed has been entered into under essential error induced by *innocent* misrepresentation.[7]

It is not always necessary to reduce a writing before raising an action of declarator of a right contrary to the terms of the writing.[8]

(2) *Necessity for a Substantive Action of Reduction.*—(a) *Generally.*—A person desirous of setting aside a deed or writing may always have

[1] Erskine's Inst. iv. 1. 18; Stair, iv. 20. 2.

[2] Graham *v.* North British Bank, 1850, 12 D. 907.

[3] M'Conechy *v.* M'Indoe, 1853, 16 D. 315. See also Bain *v.* Lady Seafield, 1887, 14 R. 939; Balls *v.* J. & W. Macdonald, 1909, 2 S. L. T. 310.

[4] Whyte *v.* Forbes, 1890, 17 R. 895.

[5] Adams *v.* Great North of Scotland Rly. Co., 1889, 16 R. 843.

[6] Carphin *v.* Clapperton, 1867, 5 M. 797. See also Watson *v.* Grant's Trs., 1874, 1 R. 882; M'Lay *v.* M'Queen, 1899, 1 F. 804, per Lord Adam, p. 810.

[7] Manners *v.* Whitehead, 1898, 1 F. 171.

[8] M'Gowan *v.* City of Glasgow Friendly Society, 1913, S. C. 991.

recourse to a substantive action of reduction in the Court of Session for that purpose. Where, however, in the course of proceedings in that Court a deed or writing is produced either by the pursuer or defender and founded on, and the opposite side wishes to set it aside, the question often arises whether it is necessary for the deed or writing to be reduced by a substantive action or whether the document can be set aside in the same proceedings in which it produced and founded on, *i.e. ope exceptionis.* The question is one of much difficulty.

(b) *Prior to Act of Sederunt, 20th March* 1907.—Sir George Mackenzie in his observations upon the Act 1621, cap. 18, against dispositions made in defraud of creditors, says:[1] "Nullities are either such as are received *ipso jure* or *ope exceptionis.* That is said to be null, *ipso jure*, where the thing is declared null by any express law, as this is by this statute, *quod contra legem fit, pro infecto habetur, et ipso jure nullum est. L. non dubium. C. de legib.*: That was *nullum ope exceptionis,* which was not receiveable, except the nullity had been proponed, by him to whom it was competent: But in our law *nullum ipso jure*, and *nullum ope exceptionis,* are the same, and *termini convertibiles:* And with us the opposition is betwixt *nullum ope exceptionis,* and *actionis;* the reason of which difference proceeds from the favour designed by the law, *quoad* the form of procedure. For if anything be null by way of exception, it is received summarly against the pursuit, without raising an action of reduction or declarator; but what is only null by way of action, needs process of reduction, or declarator."

This statement of the law has received the approval of Lord President Inglis and Lord Benholme.[2]

Notwithstanding this statement, Sir George Mackenzie has to admit[3] that the practice has not been in conformity with the law, and that in particular, although the statute with which he is dealing—Act 1621, cap. 18—expressly provided that alienations in defraud of creditors are null, the practice was to reduce such alienations not *ope exceptionis* but by substantive action. Bell in his Commentaries[4] thus sums up the matter: "The general rule respecting the challenge of nullities is, that where it is expressly declared by law, and the ground of the nullity either depends on a negative which proves itself, or is established by the deed in question, it may be pleaded in the way of exception or defence against any claim or any plea granted on the deed; but that where the nullity is not plainly declared by law, or where the fact out of which it

[1] Vol. ii. pp. 23, 24. See also Hope's Minor Practicks, tit. xiii. sec. 16 *et seq.*
[2] Dickson *v.* Murray, 1866, 4 M. 797.
[3] Vol. ii. p. 24.
[4] Vol. ii. pp. 181, 182 (7th ed.).

is to be inferred is not proved by the deed itself, it is necessary to proceed by way of action of reduction or declarator in order to make the challenge effectual. *In practice* this distinction came to be very much overlooked, and all nullities whatever were held pleadable only by way of action, unless where the Legislature expressly declared the deed null by way of exception or reply." In fact, so far did the practice go, that even in the case of the Act 1621, cap. 18, above mentioned, where the nullity was declared to be of no effect "by way of action, exception, or reply," a substantive action of reduction was required,[1] and so remained until the Bankruptcy (Scotland) Act, 1856, put the practice in accordance with the law.[2]

Accordingly, the general practice was that not only did all *voidable* deeds require to be reduced by a substantive action of reduction, but most of the deeds and writings declared null and void by statute or common law also required this form of procedure, and were not permitted to be set aside *ope exceptionis*, the exceptions to this rule being deeds and writings *ipso jure* null whose nullity could be instantly verified. Among the latter the most notable examples are deeds or writings:—

(i.) Executed without the necessary statutory solemnities.[3]

(ii.) Unstamped and understamped.[4]

(iii.) Relating to gaming and betting.[5]

(iv.) In fraud of the Revenue and Excise Acts.[6]

(v.) Contrary to the Tippling Act;[7] the Printer's Act;[8] the Truck Act;[9] and the Trade Union Acts.[10]

[1] Vol. ii. pp. 181, 182 (7th ed.).

[2] 19 & 20 Vict. cap. 79, sec. 10; Thomas *v.* Waddell, 1869, 7 M. 558. See also 3 & 4 Geo. V. cap. 20, sec. 8.

[3] 1540, cap. 37 (record edition), cap. 117 (12mo edition); 1579, cap. 18 (record edition), cap. 80 (12mo edition); 1593, cap. 25 (record edition), cap. 179 (12mo edition); 1681, cap. 5 (both editions); 1696, cap. 15 (both editions); 21 & 22 Vict. cap. 76, sec. 34; 23 & 24 Vict. cap. 143, sec. 20; 31 & 32 Vict. cap. 101, sec. 149.

[4] Neil *v.* Leslie, 1867, 5 M. 634, per Lord President Inglis; Court of Session Act, 1868, sec. 41; 54 & 55 Vict. cap. 39, sec. 14.

[5] 1621, cap. 14 (both editions); 5 & 6 Will. IV. cap. 41; Hamilton *v.* M'Lauchlan, 1908, 16 S. L. T. 341.

[6] 39 & 40 Vict. cap. 36; Russell *v.* Liston's Trs., 1844, 6 D. 1138; Blair *v.* Allen, 1858, 21 D. 15; Greig & Co. *v.* Conacher's Factor, 1876, 4 R. 187.

[7] 24 Geo. II. cap. 40; 25 & 26 Vict. cap. 38; Macpherson *v.* Jamieson, 1901, 4 F. 218.

[8] 39 Geo. III. cap. 79, secs. 28, 29, 31; 51 Geo. III. cap. 65, sec. 3; 2 & 3 Vict. cap. 12, sec. 2; 32 & 33 Vict. cap. 24.

[9] 1 & 2 Will. IV. cap. 37; 50 & 51 Vict. cap. 46; M'Farlane *v.* Birrell, 1888, 16 R. (J.) 28.

[10] 34 & 35 Vict. cap. 31; 39 & 40 Vict. cap. 22; M'Kernan *v.* United Operative Mason's Association, 1874, 1 R. 453. See also Wilkie *v.* King, 1911, S. C. 1310; Love *v.* Amalgamated Society of Lithographic Printers, 1912, S. C. 1078.

(vi.) Void under the Bankruptcy Acts.[1]

(vii.) Embodying a *pactum de quota litis.*[2]

(viii.) By a pupil.[3]

(ix.) By a minor who has curators, without their consent.[4]

(x.) *Contra bonos mores.*[5]

(xi.) In restraint of the liberty of the person,[6] or of trade.[7]

(xii.) Constituting marriage brocage bonds.[8]

(xiii.) Inconsistent with the national war policy,[9] or the course of justice.[10]

(xiv.) Setting forth the personal obligation of a married woman.[11]

(xv.) Which are forged.[12]

In all these cases reduction may proceed *ope exceptionis.*

Discharges of claims for injury may be reduced *ope exceptionis* where the averments are relevant to permit of a reduction.[13]

Bills of exchange *ex facie* regular may be suspended on the ground of intoxication,[14] or force and fear,[15] or forgery,[16] without the necessity of a formal action of reduction.

[1] Bankruptcy (Scotland) Act, 1856, sec. 10. In this case, setting aside by way of exception is expressly made competent. Thomas *v.* Waddell, 1869, 7 M. 558. See also Bankruptcy (Scotland) Act, 1913, sec. 8.

[2] M'Kenzie *v.* Forbes, 1774, 5 Brown's Supp. 528; Johnston *v.* Rome, 1831, 9 S. 364; Anstruther *v.* Wilkie, 1856, 18 D. 405.

[3] Bell's Prin., sec. 2067.

[4] Ibid., sec. 2088; Erskine's Inst. i. 7. 34.

[5] Christison *v.* M'Bride, 1881, 9 R. 34; Henderson *v.* Caldwell, 1890, 28 S. L. R. 16; Laughland *v.* Miller, Laughland & Co., 1904, 6 F. 413; Macdougall *v.* Bremner, 1907, 44 S. L. R. 804; Smith & Sons *v.* Buchanan, 1910, 2 S. L. T. 387; A. B. *v.* C. D., 1912, 1 S. L. T. 44.

[6] Erskine's Inst. i. 7. 62; Allan and Mearns *v.* Skene, 1728, Mor. 9454; Gibson *v.* Stewart, 1828, 6 S. 733.

[7] Meikle *v.* Meikle, 1895, 3 S. L. T. 204; Dumbarton Steamboat Co., Ltd. *v.* Macfarlane, 1899, 1 F. 993; Mulvein *v.* Murray, 1908, S. C. 528.

[8] Bell's Prin., sec. 39.

[9] Ibid., sec. 43.

[10] Bell's Comm. (5th ed.), i. 301.

[11] Erskine's Inst. i. 6. 25 (note (*c*)); M'Lean *v.* Angus Bros., 1887, 14 R. 448; Jackson *v.* Macdiarmid, 1892, 19 R. 528; Astley's Exr. *v.* Murray's Tr., 1901, 9 S. L. T. 18.

[12] Shand's Practice, pp. 289 and 651; Rathbones *v.* Glenny, 1833, 11 S. 574; Earl of Galloway *v.* Grant, 1857, 20 D. 230; Conacher *v.* Conacher, 1859, 21 D. 597,

[13] North British Rly. Co. *v.* Wood, 1891, 18 R. (H. L.) 27; Mackie *v.* Strachan, Kinmond & Co., 1896, 23 R. 1030; Mathieson *v.* Hawthorns & Co., Ltd., 1899, 1 F. 468.

[14] Pollok *v.* Burns, 1875, 2 R. 497.

[15] Wightman *v.* Graham, 1787, Mor. 1521; Thomson *v.* Annandale, 1829, 7 S. 305; Thomson on Bills (3rd ed.), p. 455.

[16] Findlay *v.* Currie, 1850, 13 D. 278; Boyd *v.* Union Bank of Scotland, 1854, 17 D. 159; Frost *v.* North of Scotland Banking Co., 1858, 20 D. 1135; Warden *v.* British Linen Co., 1863, 1 M. 402; Brown *v.* British Linen Co., 1863, 1 M. 793.

(c) *Act of Sederunt, 20th March* 1907.—Down to the year 1907 there seems to have been only two statutes which in express terms dealt with the right of challenge, *ope exceptionis* in the Court of Session, of void or voidable deeds or writings; and both these statutes had reference to bankruptcy proceedings. In the first—the Act 1621, cap. 18—although alienations in defraud of creditors were expressly declared null at the instance of the true and just creditor by way of action, exception, or reply, no effect, as we have seen, was given, in practice, to the provision regarding exception or reply. The second statute, however—the Bankruptcy (Scotland) Act of 1856[1]—put the procedure upon a footing consistent with the law, and since the date of that statute alienations of property by a party insolvent or notour bankrupt, which are voidable by statute or at common law, have been set aside by way of exception or reply both in the Court of Session and the Sheriff Court.[2]

By the Act of Sederunt, 20th March 1907,[3] however, it is enacted, "Where in any action a deed or writing is founded on by either party, all objections thereto may be stated and maintained by way of exception without the necessity of bringing a reduction thereof, unless the Court or Lord Ordinary shall consider that the matter would be more conveniently tried in a separate action of reduction."

Although at first sight this provision seems to make it possible to reduce *ope exceptionis* any deed or writing which is founded on in any action in the Court of Session, there is a possibility that the Court may qualify the apparent universality of its terms when the subject comes up for decision. So far there has been only one case in which this provision has directly come under the notice of the Court, but as the competency of setting aside the document in the case in question by way of exception was not challenged, it can only be referred to inferentially. There have been, however, similar provisions applicable to the Sheriff Court in existence for some years, and it is in view of the decisions which the Court has pronounced in cases arising out of these provisions that the above-mentioned possibility has been hazarded.

By the Sheriff Courts (Scotland) Act, 1877, sec. 11,[4] it was enacted,

[1] 19 & 20 Vict. cap. 79, sec. 10.

[2] Ibid.; 20 & 21 Vict. cap. 19, sec. 9; Dickson *v.* Murray, 1866, 4 M. 797; Moroney & Co. *v.* Muir & Sons, 1867, 6 M. 7; Mackenzie *v.* Calder, 1868, 6 M. 833; Thomas *v.* Waddell, 1869, 7 M. 558; Brown's Trs. *v.* Fraser, 1870, 8 M. 820.

[3] Sec. 6; C. A. S., C, iv. 4 (*d*).

[4] 40 & 41 Vict. cap. 50.

"When in any action competent in the Sheriff Court a deed or writing is founded on by either party, all objections thereto may be stated and maintained by way of exception, without the necessity of bringing a reduction thereof: Provided always, that if any objection to a liquid document of debt, now maintainable only by way of reduction, shall be maintained by way of exception, the objector shall find such caution, or make such consignation, as the Sheriff or Sheriff-Substitute may direct."

Under this section it has been decided that it was quite competent to reduce a submission and award *ope exceptionis* in an action in the Sheriff Court for the amount of the award. This judgment was pronounced by the Lord Ordinary, the reclaimer not submitting any argument to the Inner House upon this point.[1] In a later case, Lord President Inglis expressed an opinion that a sheriff-officer's execution was a writing under the statute and could be reduced *ope exceptionis*.[2] A decree of Court, however, was held not to be a deed or writing in the sense of this section.[3]

The Sheriff Courts (Scotland) Act, 1877, was repealed by the Sheriff Courts (Scotland) Act, 1907, which contains the following provision:— "When a deed or writing is founded on by any party in a cause, all objections thereto may be stated and maintained by way of exception, without the necessity of bringing a reduction thereof."[4]

Under this rule it has been held that a deed cannot be set aside by way of exception unless the party taking objection is in a position to reduce the deed without the necessity of prefacing his action of reduction by declaratory conclusions;[5] and that a decree *in foro* is not a deed or writing that can be reduced *ope exceptionis*.[6] The most important decision, however, was pronounced by the Second Division in a recent appeal from the Sheriff Court in a petition for completion of title to lands where a will was sought to be set aside *ope exceptionis* on the ground of fraud. The Sheriff-Substitute granted a proof of fraud, and Lord Justice-Clerk Macdonald in recalling that judgment said: "The purpose of allowing documents produced in a process to be set aside *ope exceptionis* was to prevent unnecessary complications and delays in

[1] Nivison *v.* Howat, 1883, 11 R. 182, at p. 189. See also Wilson *v.* Glasgow Tramways Co., 1878, 5 R. 981, with regard to the Small Debt Court.

[2] Scott *v.* Cook, 1886, 24 S. L. R. 34. See, however, Tait *v.* Johnston, 1891, 18 R. 606, and cases therein referred to; Reid *v.* Clark, 1914, 2 S. L. T. 68.

[3] Neil *v.* M'Nair, 1901, 3 F. (J.) 85, per Lord Moncreiff, p. 89.

[4] 7 Edw. VII. cap. 51; First Schedule, rule 50.

[5] Duke of Argyll *v.* Muir, 1910, S. C. 96.

[6] Leggat Bros. *v.* Gray, 1912, S. C. 230. See also Neil *v.* M'Nair, 1901, 3 F. (J.) 85, per Lord Moncreiff, p. 89.

procedure when adminicles of evidence were put forward, and their genuineness or validity was challenged, as, for example, in a question where a claim for payment was met by the production of a receipt. Here the attack which is made is upon a document which is not merely a piece of evidence but is the very foundation of the defence set up by the objector to the petitioner's being declared infeft. If allowed and successful it would not, and could not, be *res judicata* in other proceedings. That being so, it is evident that the rules of the Act, which were intended to simplify procedure and prevent delays, might, and indeed would, if applied to the setting aside of the settlement in this particular proceeding, lead to complication, trouble, and expense, rather than to the facilitating of procedure. . . . In my opinion the law by which documents may be set aside *ope exceptionis* in the course of proceedings—which has been most beneficial in its operation—was never intended, and is not in the enactments so expressed as, to apply to a document forming the basis of a party's alleged right of action or the basis of a defence against an attack on title, in neither of which cases could a decision on exception have any effect beyond the then litigation. It could not invalidate the document. The statutory change in the law was intended to enable a Judge, even in the inferior Court, to take out of the way what might be brought forward in a process, so as to exclude it from being of weight in the proceeding before him. The intention was to enable the Judge to purge out what might be produced to affect his mind, if, for instance, it could be shown that the deed was not what it bore to be, or was invalid for want of formalities in signature, or was vitiated by erasure. It was never intended to give the power to consider questions of weakness and facility in the case of a will or settlement, which would be setting up a different process inside a process—a course which would have the very opposite effect from the intention of the statute—namely, to simplify procedure."[1]

Lord Salvesen in like manner expressed the opinion that a deed or writing which is the foundation of a process, or the entire basis of a defence, cannot be set aside by way of exception, and that the same result follows where the decision cannot be *res judicata*.

This last decision, if applicable to the Court of Session, goes a long way towards circumscribing the otherwise apparently unrestricted terms of sec. 6 of the Act of Sederunt. It is necessary, however, to direct attention to the only decision of the Court in which sec. 6 has been concerned.[2] The facts are these:—In an action for the price of

[1] Donald *v.* Donald, 1913, S. C. 274. [2] Oswald *v.* Fairs, 1911, S. C. 257.

furniture, which the defender had contracted to purchase at a price to be fixed by valuation, the defender, taking advantage of sec. 6 of the Act of Sederunt, 20th March 1907, pleaded that the furniture had been fraudulently substituted for the furniture he had agreed to purchase, and that he had entered into the submission to the valuators under essential error induced by fraud. On these averments a record was made up and a proof taken. It is true that no objection seems to have been taken by the pursuer to the competency of the defender's pleas or of his attempt to set aside the submission *ope exceptionis*, and accordingly there is no judgment of the Court upon this point; but it is worthy of remark that there is no suggestion that either the Lord Ordinary or the First Division had any doubt of the competency of the procedure adopted. It is possible, therefore, that the cases quoted with reference to the Sheriff Court may not be followed in their entirety when the terms of sec. 6 of the Act of Sederunt come to be fully and authoritatively interpreted.

In any event, there can be no absolute right in either party to an action to set aside a deed or writing by way of exception, as the Court or Lord Ordinary has a discretionary power to insist upon procedure by way of a substantive case of reduction.[1]

The Act of Sederunt of 1907 in no way modifies the instances given previous to that date where deeds or writings were allowed to be set aside *ope exceptionis*.

(3) *Form of Summons.*—The Court of Session Act, 1850,[2] set up a new form of summons and defences, and one of the forms given in the Schedule[3] annexed to the Act was a form of a summons of reduction. It is in the following terms:—

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, To , messengers-at-arms, our Sheriffs in that part, conjunctly and severally, specially constituted, greeting.—OUR WILL IS, etc. [*take in will of summons in common form, down to the statement of the reasons, then say*] for the reasons and causes set forth in condescendence and note of pleas hereunto annexed; Therefore, and for other reasons to be proponed at discussing hereof, the said last will and testament [*or other document sought to be reduced, as the case may be*], with all that has followed or may follow on the same, ought and should be reduced, retreated, rescinded, cassed, annulled, decerned and declared, by decree of our said Lords, to have been from the beginning, to be now, and in all time coming, null and void, and of no avail, force, strength, or effect in judgment,

[1] A. S., 20th March 1907; C. A. S., C, iv. 4 (*d*).
[2] 13 & 14 Vict. cap. 36, sec. 1.
[3] Ibid., Schedule A, No. 4.
[4] In the form appropriate to actions of reduction at that date.

or outwith the same in time coming, and the pursuer reponed and restored thereagainst *in integrum*: And the defender ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £ sterling [*insert conclusion for expenses as before*], or else to allege a reasonable cause in the contrary, with certification to the defender, if he fail, our said Lords will proceed in the said matter, and reduce, decern, and declare in manner foresaid.—According to justice, etc. [*according to the usual form as before*].

By the same Act,[1] and subsequently by the Court of Session Act, 1868,[2] power was given to the Court to regulate the forms of summonses and writs by Act of Sederunt, and accordingly by Act of Sederunt, 20th March 1907, it was provided as follows:—"The summons in an action of reduction may be in the form, or as nearly as may be in the form, contained in the schedule hereunto annexed."[3] The form of summons in the schedule is as follows:—

EDWARD THE SEVENTH, etc.—Whereas it is humbly meant and shown to us by our lovite *A. B.*, pursuer, against *C. D.*, defender, in terms of the condescendence and note of plea in law hereunto annexed; Therefore the defender ought and should be decerned and ordained, by decree of the Lords of our Council and Session, to exhibit and produce before our said Lords [*here enumerate the deeds sought to be reduced*]; and the said deeds ought and should be reduced by decree of our said Lords, and the pursuer reponed and restored thereagainst *in integrum*. And the defender ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £ sterling, or such other sum as our said Lords shall modify, as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland, used and observed in the like cases, as is alleged.—OUR WILL IS HEREFORE, etc.

In the event of the form prescribed by the Court of Session Act, 1850, being employed, it is not competent for the agent to charge any higher fees for the preparation of said summons or in connection with the procedure in the action than if the latter form had originally been used.[3]

The older form has now been practically superseded.

(4) *Jurisdiction.*—Actions of reduction are only competent in the Court of Session.[4] Deeds which are made void by the Bankruptcy (Scotland) Act, 1856, as amended by the Act of the following year, and alienations of property which are voidable by statute or at common law, may be set aside in the Sheriff Court either by way of action or exception, and a decree setting aside the deed by exception has the

[1] 13 & 14 Vict. cap. 36, sec. 1.
[2] 31 & 32 Vict. cap. 100, sec. 106.
[3] A. S., 20th March 1907, sec. 3; C. A. S., C, iv. 4 (*a*).
[4] Sheriff Courts (Scotland) Act, 1907, sec. 5 (4).

like effect, as to the party objecting to the deed, as if such decree were given in an action at his instance.[1] The only effect of this, however, is, that when such a deed is questioned in any action in the Sheriff Court, its validity may be determined solely for the purposes of that action. Again, when a deed or writing is founded on by a party in a cause in the Sheriff Court, all objections thereto may be stated and maintained by way of exception, without the necessity of bringing a reduction thereof.[2] In order to do so, however, the party taking the objection must be in such a position as to be able to raise at once an action of reduction. If he is only in the position to raise an action of reduction after he has obtained a decree of declarator of his right, he may not maintain such objection *ope exceptionis*, but must raise an action of declarator and reduction in the Court of Session.[3]

In the same way, if the judgment of the Sheriff cannot be *res judicata* as to the validity of the deed or writing, or if the interests of other persons who are not parties to the cause, and cannot be compelled to appear, are concerned, or if the Sheriff cannot finally dispose of the objection so as to supersede the necessity of bringing a reduction, the objection cannot be stated and maintained by way of exception, and an action of reduction must be raised.[4] Objection to a decree cannot be taken by way of exception in the Sheriff Court.[5] (See *Jurisdiction, supra*, p. 82 *et seq.*)

(5) *Grounds of Action.*—Among the most common grounds of action are the following, viz.:—Want of statutory solemnities; mental incapacity; facility and circumvention; undue influence; fraudulent misrepresentation; innocent misrepresentation inducing error *in essentialibus;* error *in essentialibus;* concealment; force and fear; intoxication; minority and lesion; alienations by a bankrupt; deeds *ultra vires* or illegal; and forgery; and reference is made to the various text-books dealing with these subjects.

(6) *Averments.*—In a reduction of a will on the ground of the testator's insanity a general averment that the testator was of unsound mind when he made the will is insufficient if the facts stated or admitted by the pursuer raises a strong presumption that the testator was sane and there is nothing in the will to indicate insanity.[6]

[1] 19 & 20 Vict. cap. 79, sec. 10; 20 & 21 Vict. cap. 19, sec. 9. See 3 & 4 Geo. V. cap. 20, sec. 8.

[2] Sheriff Courts (Scotland) Act, 1907; First Schedule, rule 50.

[3] Duke of Argyll *v.* Muir, 1910, S. C. 96.

[4] Donald *v.* Donald, 1913, S. C. 274.

[5] Leggat Bros. *v.* Gray, 1912, S. C. 230.

[6] Hope *v.* Hope's Trs., 1896, 23 R. 513. See also Morrison *v.* Maclean's Trs., 1862, 24 D. 625.

General averments of fraud are not sufficient. They must be supported by facts which are sufficient to support the inference that fraud has been committed; and if the facts averred are insufficient to support, or are inconsistent with, such an inference, the action will be dismissed as irrelevant.[1] Where, however, facility and lesion are also averred, specific acts of fraud are not required to be stated.[2] Fraud is personal, and accordingly averments must be made against a particular person or persons and not against a firm or corporation.[3] There must be an averment that the particular fraud alleged was material,[4] or induced the pursuer to enter into the agreement.[5] Where there is a considerable lapse of time before challenging the fraud, the strictest pleading will be enforced.[6]

In an action founded on innocent misrepresentation the averments must be specific on all the necessary points.[7] In actions on the ground of facility and circumvention it is not necessary to aver distinct instances of particular acts and practices amounting to fraud or circumvention.[8] All that is required is an averment of weakness and facility on the part of the person signing the deed, and of lesion to the pursuer, with a statement of impetration and the circumstances surrounding it in the particular case.[9] Where acts are averred there must be some correspondence between the facility and the kind of acts employed against the granter.[10]

In an action of reduction of an *inter vivos* deed on the ground of undue influence the facts to be averred are, *first*, the existence of a relation between the granter and grantee of a deed which creates a dominant or ascendant influence; *second*, the fact that confidence and trust arose from that relation; *third*, the fact that a material and gratuitous benefit was given to the prejudice of the granter; and

[1] Shedden *v.* Patrick, 1852, 14 D. 721, per Lord Fullerton, p. 727; affd. 17 D. (H. L.) 18; Leslie *v.* Lumsden, 1856, 18 D. 1046; Hogg *v.* Campbell, 1864, 2 M. 848; Broatch *v.* Jenkins, 1866, 4 M. 1030; Boustead *v.* Gardner, 1879, 7 R. 139.

[2] Clunie *v.* Stirling, 1854, 17 D. 15, per Lord Justice-Clerk Hope, p. 18; Horsburgh *v.* Thomson's Trs., 1912, S. C. 267.

[3] Thomson & Co. *v.* Pattison, Elder & Co., 1895, 22 R. 432.

[4] Burnett *v.* Burnett, 1859, 21 D. 813.

[5] Ibid.; Ehrenbacher & Co. *v.* Kennedy, 1874, 1 R. 1131.

[6] Irvine *v.* Kirkpatrick, 1850, 7 Bell's App. 186, per Lord Brougham, p. 218.

[7] Adam *v.* Newbigging, 1888, L. R. 13 App. Cas. 308, at p. 320; Woods *v.* Tulloch, 1893, 20 R. 477, per Lord Kyllachy; Ferguson *v.* Wilson, 1904, 6 F. 779.

[8] Clunie *v.* Stirling, 1854, 17 D. 15, at p. 18.

[9] Horsburgh *v.* Thomson's Trs., 1912, S. C. 267.

[10] Morrison *v.* Maclean's Trs., 1862, 24 D. 625. See also Houston *v.* Aitken, 1912, S. C. 1037.

fourth, the circumstance that the granter entered into the transaction without the benefit of independent advice or assistance.[1]

In an action of reduction of a *mortis causa* deed the pursuer must aver such undue influence as amounts to fraud or coercion,[2] except in the case of a law agent, or one having a general management,[3] or a medical or spiritual adviser.[4]

In actions on the ground of error an averment of the particular kind of error must be made.[5]

In actions on the ground of concealment there must be an averment that there was a legal duty on the part of the defender to disclose.[6]

Intoxication must be averred of such a kind as to deprive the person of giving consent,[7] except where fraud is averred, when partial incapacity will be sufficient.[8]

(7) *Procedure.*—After the summons has been signeted, served, and called in the ordinary way, the defender may elect not to enter appearance, in which case decree in absence may be taken on the Undefended Roll. The interlocutor granting decree in absence, it is thought, should be simply in respect of no appearance. Should the defender enter appearance and fail to lodge defences within ten days from the date of calling, the pursuer may take decree in absence on the Undefended Roll in terms of the above-mentioned interlocutor. By sec. 22 of the Court of Session Act, 1868, an alternative method of procedure is provided where the defender has timeously entered appearance but failed to lodge defences within the statutory period. In such a case, as an alternative, "the cause may be enrolled for the purpose of obtaining an order for satisfying the production, and thereafter the cause may be enrolled by either party for further procedure." This, it is thought, refers only to the procedure followed prior to the Act of Sederunt,

[1] Gray *v.* Binny, 1879, 7 R. 332, per Lord Shand, p. 347.

[2] Boyse *v.* Rossborough, 1856, 6 Clark (H. of L. C.), 2, at p. 47; Weir *v.* Grace, 1899, 2 F. (H. L.) 30; Forrests *v.* Low's Trs., 1907, S. C. 1240, per Lord Kinnear, pp. 1255, 1256.

[3] Grieve *v.* Cunningham, 1869, 8 M. 317; Forrests *v.* Low's Trs., 1907, S. C. 1240, per Lord Kinnear. See also Hunter *v.* Atkins, 1832, 3 Myl. & K. 113.

[4] Munro *v.* Strain, 1874, 1 R. 522; Forrests *v.* Low's Trs., 1907, S. C. 1240, per Lord Kinnear, p. 1256; M'Kechnie *v.* M'Kechnie's Trs., 1908, S. C. 93.

[5] Ritchie *v.* Ritchie's Trs., 1866, 4 M. 292; Munro *v.* Strain, 1874, 1 R. 522; Yeatman *v.* Proctors, 1877, 5 R. 179.

[6] Irvine *v.* Kirkpatrick, 1850, 7 Bell's App. 186; Leslie *v.* Lumsden, 1856, 18 D. 1046; Broatch *v.* Jenkins, 1866, 4 M. 1030; Peek *v.* Gurney, 1873, L. R. 6 E. & I. App. 377; Liverpool Palace of Varieties *v.* Miller, 1896, 4 S. L. T. 153.

[7] Stair, i. 10. 13; Erskine's Inst. iii. 1. 16; Lord Haltoun *v.* Earl of Northesk, 1672, Mor. 13384; Mackie *v.* Maxwell, 1752, Mor. 4963; Johnston *v.* Clark, 1854, 17 D. 228; Taylor *v.* Provan, 1864, 2 M. 1226, at pp. 1232, 1233.

[8] Couston *v.* Miller, 1862, 24 D. 607.

20th March 1907, in a case where appearance had been entered but no *preliminary* defences lodged within ten days of the calling, in which case the defender immediately thereafter enrolled the cause and took an order upon himself to satisfy production, and has no reference to the present procedure where defences containing both preliminary objections, if any, and defences on the merits require to be lodged within ten days of the date of calling. (See *infra*.) In the same way, sec. 12 of the Act of Sederunt, 14th October 1868, seems to have no reference to the present procedure.

If the defender enters appearance and elects to defend, he must lodge his defences on or before the tenth day from the date of calling the summons, and these defences must contain both his defences on the merits as well as his preliminary objections, if any.[1]

If there are preliminary objections to satisfying the production, the defender does not lodge with his defences the writings sought to be reduced, but the record is made up on the condescendence and preliminary objections, and closed on these alone. The cause is then sent to the Procedure Roll for further procedure, and the cause goes on to a final issue upon the preliminary objections. If the preliminary objections are sustained, the case comes to an end. If they are repelled, the defender must satisfy production. If he fails to do so, decree of certification for non-production is pronounced and the cause comes to an end. If the defender satisfies production, an interlocutor is pronounced holding the production satisfied and closing the record on the merits, and the cause proceeds in the ordinary way.

If the defender enters appearance and lodges defences containing no objections to satisfying production, he must, along with his defences, produce the writs or documents sought to be reduced so far as the same are in his possession or under his control.[2] If he fails to produce them, a decree of certification for non-production will be pronounced which will terminate the cause. If he does produce them, an interlocutor is pronounced holding the production satisfied and closing the record, and the cause proceeds in the ordinary way.

Sometimes, however, the preliminary objections are not dealt with *in initio litis*, but are reserved for consideration along with the merits. In such a case the defender must satisfy production prior to the closing of the record.[3]

[1] A. S., 20th March 1907, sec. 4; C. A. S., C, iv. 4 (*b*).

[2] A. S., 20th March 1907, sec. 5; C. A. S., C, iv. 4 (*c*).

[3] Officers of State *v.* Mags. of Brechin, 1827, 5 S. 672 (N. E. 627); Pattison *v.* Dunn's Trs., 1863, 1 M. 647; United College of St. Andrews *v.* Blyth, 1864, 2 M. 810, per Lord Justice-Clerk Inglis; Cochran *v.* Dunlop, 1872, 9 S. L. R. 597; Whyte *v.* Forbes, 1890, 17 R. 895, at p. 897.

In one case which was undefended and the pursuer himself satisfied production, he was allowed an *ex parte* proof, and instead of obtaining a decree in absence obtained a decree on the proof adduced;[1] and in another case where the defender did not defend further after production was satisfied, the same procedure was adopted.[2]

(8) *Defences.*—(a) *Preliminary Objections.*—(i.) *Generally.*—In the summons a call is made upon the defender to exhibit and produce the writings sought to be reduced. Formerly it was the practice, if the defender desired to state any objection against satisfying production, to lodge preliminary defences confined to this point,[3] but this was not imperative.[4] However, the practice has now been definitely departed from, and "it shall not be competent for a defender who objects on any ground to satisfy the production to lodge preliminary defences; and if he intends to defend the action, he shall put in defences stating his preliminary objections as well as his defences on the merits of the reduction.[5] Accordingly, defences containing preliminary objections require to be lodged on or before the tenth day after the date of the calling of the summons.[6]

(ii.) *Nature of Objections.*—The usual preliminary pleas may be stated, such as "no jurisdiction";[7] "no title to sue";[8] incompetency;[9] irrelevancy;[10] and "all parties not called."[11] It may also be pleaded that the pursuer, instead of bringing a reduction, should have availed himself of statutory provisions for review,[12] or of a more appropriate form of process;[13] and that the action is premature.[14]

[1] Eason *v.* Eason, 1863, 1 M. 1163. [2] Hay, 1855, 17 D. 434.

[3] Court of Session Act, 1850, sec. 7.

[4] Mackintosh *v.* Arkley, 1868, 6 M. (H. L.) 141.

[5] A. S., 20th March 1907, sec. 4; C. A. S., C, iv. 4 (*b*).

[6] Court of Session Act, 1868, sec. 22.

[7] Kirkpatrick *v.* Irvine, 1838, 16 S. 1200; Charles *v.* Charles' Trs., 1868, 6 M. 772; Longworth *v.* Yelverton, 1868, 7 M. 70; Shaw *v.* Dow and Dobie, 1869, 7 M. 449.

[8] Macdonell *v.* Macdonald, 1826, 4 S. 371 (N. E. 374); Graham *v.* Hunter, 1828, 7 S. 13; Irving *v.* Irving, 1837, 15 S. 993; Ross *v.* Paul, 1837, 15 S. 780; 1840, 1 Rob. App. 246; Hamilton *v.* Henderson, 1849, 11 D. 577; Clark *v.* Loudon, 1856, 18 D. 499; M'Gowan *v.* Robb, 1862, 1 M. 141; Earl of Perth *v.* Lady Willoughby de Eresby's Trs., 1869, 7 M. 642; affd. 9 M. (H. L.) 83; Craig *v.* Craig's Trs., 1904, 12 S. L. T. 136.

[9] Macdonell *v.* Macdonald, 1826, 4 S. 371 (N. E. 374); Mackintosh *v.* Arkley, 1868, 6 M. (H. L.) 141; Smith *v.* Smith's Trs., 1905, 12 S. L. T. 782.

[10] Ramsay *v.* Bruce, 1849, 12 D. 243.

[11] Officers of State *v.* Mags. of Brechin, 1827, 5 S. 672 (N. E. 627); Graham *v.* North British Bank, 1850, 12 D. 907.

[12] Crawford *v.* Lennox, 1852, 14 D. 1029; Kinghorn *v.* The Glenyards Fireclay Co., 1907, 14 S. L. T. 683.

[13] Smith *v.* Smith's Trs., 1905, 12 S. L. T. 782. See also Nivison *v.* Howat, 1883, 11 R. 182.

[14] Caledonian Rly. Co. *v.* Glasgow Corporation, 1907, S. C. (H. L.) 7.

The defender may also plead that he has an independent and preferential title, so that even if the deeds sought to be reduced are reduced the pursuer cannot succeed.[1] This is called *title to exclude*, and when pleaded, the defender must exhibit the exclusive title.[2] Examples of title to exclude may be found in the undernoted cases.[3] It is not a good defence of title to exclude to found upon the deeds sought to be reduced;[4] or upon prescription;[2] or homologation.[5] It is a matter in the discretion of the Court to decide whether a discharge by the pursuer of all claims under the deed sought to be reduced forms a title to exclude. Where the pursuer attacked both the deed and the discharge, it was held not to be necessary for the pursuer to reduce the discharge before calling for production of the deed also sought to be reduced.[6]

Where an action of reduction regarding the same deeds was decided in favour of the defender, and was *res judicata* in a question with the pursuer of a second reduction, it was held sufficient for the defender to produce the first decree as excluding the pursuer's title to call for production of the writs in the second reduction.[7]

A defender may raise a counter action of reduction impugning the pursuer's title, and will be entitled to have his action decided first.[8]

A defender may also plead that the pursuer should satisfy production himself.[9]

(b) *Defences on the Merits.*—There is no peculiarity in defences on the merits of an action of reduction calling for special mention.

A defence of homologation of a deed executed while a person was insane is incompetent.[10]

Mora alone is not a good plea in defence, but will be taken into consideration by the Court, and will influence its estimate of the facts.[11]

[1] Erskine's Inst. iv. 1. 23.

[2] Earl of Perth *v.* Lady Willoughby de Eresby's Trs., 1869, 7 M. 642; affd. 9 M. (H. L.) 83.

[3] Robertson *v.* Megget, 1822, 1 S. 364 (N. E. 342); Earl of Strathmore *v.* Earl of Strathmore's Trs., 1830, 8 S. 530; affd. 1831, 5 W. & S. 170; Ker *v.* Ker's Trs., 1830, 8 S. 694; affd. 1831, 5 W. & S. 718.

[4] Clark *v.* Loudon, 1856, 18 D. 499.

[5] M'Michan *v.* M'Michan's Trs., 1839, 1 D. 1085; Gall *v.* Bird, 1855, 17 D. 1027; Fraser *v.* Macleay, 1882, 9 R. 1036, per Lord Lee, p. 1039.

[6] Fraser *v.* Macleay, 1882, 9 R. 1036. See also Crichton *v.* Crichton's Trs., 1874, 1 R. 688.

[7] Maule *v.* Maule, 1827, 5 S. 256 (N. E. 238).

[8] M'Kenzie *v.* Robertson, 1823, 2 S. 203 (N. E. 181).

[9] Law *v.* Hume, 1683, 2 Brown's Supp. 44; Learmont *v.* Lord Arniston, 1698, Mor. 13514; Auchinmoulie *v.* Hope, 1713, Mor. 13517.

[10] Gall *v.* Bird, 1855, 17 D. 1027.

[11] Irvine *v.* Kirkpatrick, 1850, 7 Bell's App. 186; Bain *v.* Assets Co., 1905, 7 F. (H. L.) 104; A. W. Gamage, Ltd. *v.* Charlesworth's Tr., 1910, S. C. 257.

(9) *Satisfying Production.* — Where preliminary objections are stated in the defences, production does not require to be satisfied unless and until the preliminary objections have been repelled, in which case an interlocutor is pronounced in the following terms:—

The Lord Ordinary, having heard counsel on the preliminary objections and considered the process, repels said objections and appoints the defender to satisfy production within days.

"Where the defender does not state any objection against satisfying the production, he shall, along with his defences, produce the writs or documents sought to be reduced so far as the same are in his possession or under his control."[1]

The general rule is that the defender is bound to produce the documents called for in so far as in his possession or under his control.[2] Thus, where a Sheriff was defender in a reduction of certain warrants granted by him, which were the absolute property of a third person, and the Sheriff satisfied production, Lord Justice-Clerk Inglis highly disapproved of the Sheriff's action, and pointed out that the proper course was to have stated a preliminary objection against satisfying production.[3]

Where writings are in the custody of the Court of Session, all that the defender can be called upon to do is to lodge a note of all the decrees, or of recording the deeds,[4] or to produce extracts if he has them.[5] If he has no extracts he cannot be compelled to produce them at his own expense.[6]

If the writs are in the custody of, or recorded in the books of, an inferior Court, nothing short of the deed itself will satisfy production, and unless the defender produce the original writ, decree of certification will pass.[7] If, however, the defender is not in possession of the decree of an inferior Court, and takes nothing under the decree, he cannot be called upon to produce it at his own expense.[8]

[1] A. S., 20th March 1907, sec. 5; C. A. S., C, iv. 4 (*c*).

[2] Ibid.; Earl of Buchan *v.* Campbell, 1756, Mor. 6676; Elder *v.* Smith, 1829, 7 S. 656.

[3] Mackintosh *v.* Arkley, 1868, 6 M. (H. L.) 141, per Lord Justice-Clerk Inglis, p. 143 (note).

[4] Erskine's Inst. iv. 1. 22; Bankton, i. 10. 215; Saline's Children *v.* Callendar, 1684, Mor. 6675; Law *v.* Hume, 1683, 2 Brown's Supp. 44; Colvil *v.* Haly, 1687, 2 Brown's Supp. 100.

[5] Muir *v.* Miller, 1717, Mor. 13518.

[6] Law *v.* Hume, 1683, 2 Brown's Supp. 44; Learmont *v.* Lord Arniston, 1698, Mor. 13514; Auchinmoulie *v.* Hope, 1713, Mor. 13517.

[7] Baine *v.* Balfour, 1668, Mor. 6693; Hay *v.* Jameson, 1671, Mor. 6693.

[8] Clark *v.* Watson, 1804, Mor. 12216.

If the original deeds are required from the record, it is the duty of the pursuer to make the requisite application to the Court to have them transmitted, although in a simple reduction such an application will not be granted *in initio litis*, an extract at that stage being sufficient, and the pursuer can apply at a later stage for production of the original.[1]

Where a decree-arbitral was sought to be reduced by one of the parties to the arbitration, the defenders being the arbiter and the other party to the arbitration, it was held that, the decree-arbitral being in the hands of the clerk to the reference, who held it for the parties subject to payment of the expenses of the arbiter and his clerk, the defending party to the arbitration required to produce the decree although the pursuer refused to pay his share of said expenses.[2]

In the older practice it was not unusual to allow actions of proving the tenor to be repeated *incidenter* to stop certification.[3] Sometimes the decree of certification was asked to be sisted until a proving the tenor was decided. In one case this was refused, the Court stating that it was unnecessary, as the defender, if he succeeded in proving the tenor, could bring a reduction of the decree of certification.[4] In a later case, however, the Court refused to grant decree of certification *contra non producta* where the defender had raised actions of proving the tenor.[5] There seems little doubt that a decree *in foro* in an action of proving the tenor against the pursuer in an action of reduction will satisfy production, but there is some doubt whether a decree in absence will have the like effect.[6]

Copies have been allowed to satisfy production where principals have not been readily available.[7]

Production may be satisfied on a box day in vacation or recess.[8]

(10) *Proof.*—"All actions of reduction on the head of furiosity and idiotcy, or on facility and lesion, or on force and fear" have been held as causes appropriate to jury trial.[9] This direction is not imperative, and the tribunal and mode of proof will depend upon the circumstances of each individual case. (See *supra*, p. 545 *et seq.*)

(11) *Reduction of Letters-Patent.*—Revocation of any patent, with

[1] Alisons, Petrs., 1829, 7 S. 552; A. S., 16th February 1841; A. S., 16th July 1859; C. A. S., B, ii. 4.

[2] Miller & Son *v.* Oliver and Boyd, 1901, 9 S. L. T. 287.

[3] Bogle *v.* Anderson, 1683, Mor. 5192; Mein *v.* Dunse, 1701, Mor. 2742.

[4] Marquis *v.* Marquis, 1822, 1 S. 450 (N. E. 418).

[5] Lebrun *v.* Ferguson, 1852, 14 D. 486.

[6] Shand's Practice, p. 636.

[7] Law *v.* Law's Trs., 1903, 11 S. L. T. 155.

[8] 13 & 14 Vict. cap. 36, sec. 8.

[9] 6 Geo. IV. cap. 120, sec. 28.

the exception of a patent granted for an invention, in relation to which a certificate has been given by the Secretary of State or the Admiralty, may be obtained in an action of reduction at the instance of the Lord Advocate, or at the instance of a person having interest with his concurrence, which concurrence may be given on just cause shown only.[1] This concurrence is not a matter of form. Thus, where a concurrence written on the summons was signed by the Lord Advocate's first clerk, his Lordship not having applied his mind to the case, the Court held the concurrence to be insufficient.[2] The fact that the Lord Advocate has concurred on just cause shown, however, does not necessarily mean that the pursuer has a good title to sue.[3]

The service of all writs and summonses is made according to the forms and practice existing at the commencement of the Patents and Designs Act, 1907.[4]

Every ground on which a patent might, immediately before the 1st day of January 1884, have been repealed by *scire facias*, or a patent may be revoked under the above-mentioned Act, either by the comptroller or as an alternative to the grant of a compulsory licence, is a ground of revocation.[5]

II. Reduction of Decrees.—(1) *Decree in Absence in the Court of Session.*—(a) *Where Appropriate.*—Where reponing is possible reduction is not a proper remedy. After the reponing days have elapsed, however, a decree in absence may be reduced, but such a remedy is not always appropriate. As the raising of an action of reduction does not stay diligence,[6] reduction of a decree is not appropriate except in cases where the decree has already been put to full execution or where the decree decerns nothing to be paid or performed, as in actions of declarator or of interdict.[7] It is, however, competent to reduce where the decree has been extracted but not implemented,[8] and where the decree can be put to execution without being extracted.[9] It is not competent to reduce where the decree is not extracted except in the foregoing case.[10]

[1] Patents and Designs Act, 1907 (7 Edw. VII. cap. 29), sec. 25 (1); 30 (9); 94 (3).

[2] Gillespie *v.* Young, 1861, 23 D. 1357.

[3] Melville *v.* Cummings, 1912, 2 S. L. T. 130.

[4] 7 Edw. VII. cap. 29, sec. 94 (3).

[5] 7 Ibid., sec. 25 (2) (*a*), (*b*).

[6] Holmes *v.* Tassie, 1828, 6 S. 394; M'Leod *v.* Collie, 1869, 42 Jur. 62, per Lord Ormidale.

[7] Erskine's Inst. iv. 3. 8.

[8] M'Leod *v.* Collie, 1869, 42 Jur. 62. See also Shand's Practice, pp. 613, 614; Broom *v.* Anderson, 1837, 15 S. 977.

[9] Jack *v.* Umpherston, 1837, 15 S. 833.

[10] Scoular *v.* M'Laughlan, 1864, 2 M. 955.

A decree in absence may be reduced by the pursuer at whose instance the decree was obtained.[1]

(b) *Period during which Reduction Competent.*—Under the old law a decree in absence could be opened up by reduction during the period of *forty* years. By the Court of Session Act, 1868, sec. 24, however, a decree in absence upon which a charge is competent becomes entitled to the privileges of a decree *in foro* if there has been personal service of the summons on the defender, or if appearance has been entered for the defender with his authority, and sixty days have elapsed since the expiry of a charge upon it not brought under review by suspension; and a decree of declarator, or any other decree on which a charge is not competent, obtained in absence after such personal service or appearance, is final after the lapse of *twenty* years from its date, unless before that time the decree has been lawfully recalled or brought under review by suspension or reduction.

(c) *Right to Reduce not Absolute.*—The fact that a decree in absence may be reduced during the respective periods set forth in the preceding paragraph does not imply that during these respective periods the pursuer has an absolute right to be reponed *de plano* against the decree complained of. On the contrary, the lapse of time, the fact of personal service, and *rei interventus*, along with other circumstances, may form a plea of personal exception against the pursuer in the action of reduction, or may have an important effect in determining whether the decree ought to be reduced, and before this can be determined the pursuer in the action of reduction is bound to state on record the objections which he would have stated in the original action, if he had appeared therein, and to make good these objections, and it is only after so making good that he can be reponed against the decree complained of.[2]

(d) *Grounds of Reduction.*—A reduction of a decree in absence is competent (i.) on the merits, *i.e.* on an averment that the facts and the law of the original action did not entitle the pursuer to his decree; and (ii.) on grounds independent of the merits, *e.g.* that the decree was obtained by fraud, that there was no jurisdiction, or that there was an essential informality in the procedure.[3]

[1] M'Neill's Trs. *v.* Campbell, 1872, 11 M. 211.

[2] Campbell *v.* Graham's Representatives, 1752, Mor. 9021; Sinclair *v.* Brown, 1835, 13 S. 594; 2 S. & M'L. 103; 1837, 15 S. 770; 1841, 3 D. 871; Barclay *v.* Alexander, 1846, 8 D. 549; Gillespie *v.* Dods, 1857, 19 D. 475; Mackenzie *v.* Smith, 1861, 23 D. 1201, per Lord Jerviswoode, p. 1209; Scott *v.* Handyside's Trs., 1868, 6 M. 753; Grieve or Dingwall *v.* Burns, 1871, 9 M. 582.

[3] Corbidge *v.* Somerville, 1913, S. C. 858, per Lord Kinnear, pp. 866, 867. See also Graham *v.* Graham, 1881, 9 R. 327; Walker *v.* Walker, 1911, S. C. 163.

(e) *Consistorial Causes.*—A husband upon whom a summons of separation and aliment was served personally, and who neither lodged defences nor appeared at the proof, was allowed to be reponed instead of having to reduce a decree against him.[1]

(f) *Prior Payment of Expenses of Decree in Absence.*—Payment or consignation of the expenses of the previous action is usually insisted on before being allowed to proceed with the reduction, at least if the defender in the previous action has been personally cited.[2] A plea to that effect is usually put forward as a preliminary plea in defence to the action of reduction. If the defender has not been personally cited, and if the pursuer is not able to bring home the existence of the action to the defender, or anyone acting for him, such expenses will not be exacted;[3] nor will they be exacted where the defender, during the period of the existence of the previous action, has been in jail,[4] or is on the poor's roll.[5] In one case it was expressly declared that the expense of the summons was not to be included in the expenses decerned for,[6] and in another case the expense of bringing the case into Court was not allowed.[7] Expenses have been reserved until the conclusion of the case in order that the Lord Ordinary may be in full possession of the facts;[8] and where a defender in a reduction, after production was satisfied, moved for such expenses, this was the course adopted.[9]

Where the pursuer in a reduction of a decree in absence has paid, as a condition of being allowed to insist in the action, the expenses decerned for in the decree sought to be reduced, and is successful in the reduction, with expenses, he is entitled to repayment of the expenses of the previous action paid by him, with the exception of those actually caused by his failure to appear.[10]

(2) *Decree in Foro in the Court of Session.*—(a) *On the Merits.*—A decree *in foro* of the Court of Session cannot be reduced on the merits, either upon grounds which a party has neglected to put forward before decree, which are called *Competent and Omitted*, or on grounds founded

[1] Whyte *v.* Whyte, 1891, 18 R. 469.

[2] Smyth *v.* Nisbet, 1826, 4 S. 538 (N. E. 546); Gibson *v.* Auld, 1831, 9 S. 685; Dewar *v.* Cruickshank, 1842, 4 D. 1446; Bradley *v.* Walls, 1894, 2 S. L. T. 354.

[3] Cameron *v.* Chapman, 1835, 13 S. 1047.

[4] Kirk *v.* Kirk, 1827, 5 S. 905 (N. E. 840).

[5] Paterson *v.* Burke, 1844, 6 D. 953.

[6] Eyre *v.* Skinner's Trs., 1825, 4 S. 332 (N. E. 337).

[7] Campbell *v.* Wilson and M'Intyre, 1826, 4 S. 397 (N. E. 400).

[8] Smyth *v.* Walker, 1863, 2 M. 126.

[9] Dutch *v.* Webster, 1835, 14 S. 68.

[10] Sceales *v.* Wighton, 1852, 14 D. 780.

on and declared insufficient by the Judge, which are named *Proponed and Repelled*.[1] The first grounds extend to cases where an heir of entail in possession omits from a defence a plea, and future heirs wish to be restored against the judgment in respect of the omission of such plea.[2]

There is an exception to the rule that a party who has neglected to put forward a plea is debarred on the ground of "competent and omitted" in the case where there is a sufficient and relevant averment of *res noviter veniens ad notitiam* in the action of reduction.[3] To entitle a fact to the character of *res noviter* it is necessary that the pursuer in the reduction should have been excusably ignorant of it,[4] or that he could not have recovered the fact by legal diligence.[5]

A defender in a second reduction is not entitled to plead "competent and omitted" in respect of *media concludendi* different from those in which the original reduction was founded.[6]

A reduction of a decree of absolvitor is competent.[7]

(b) *On Grounds Independent of the Merits.*—A decree *in foro* of the Court of Session may be reduced on grounds other than the merits.[8] Thus, where there is an inherent nullity;[9] where it is averred that appearance was made for the party without his consent;[10] or where there is forgery, fraud, collusion, or vitiation *in essentialibus*,[11] the decree may be reduced. Unlike a decree in absence, a reduction of a decree *in foro* on the ground of no jurisdiction would seem to be incompetent. If

[1] Erskine's Inst. iv. 3. 3; Vilant *v.* Blackwood, 1763, Mor. 12209; Cleland *v.* Paterson, 1842, 5 D. 345.

[2] Carmichael *v.* Anstruther, 1866, 4 M. 842.

[3] Stair, iv. 1. 44; Erskine's Inst. iv. 3. 3; Cheape *v.* Lord Advocate, 1871, 9 M. 377, per Lord Benholme, pp. 393, 394; Stewart *v.* Gelot, 1871, 9 M. 1057. See Oliver *v.* Wilkie, 1901, 4 F. 362, at p. 363 (note).

[4] Barbour *v.* M'Gauchie, 1828, 7 S. 18; North British Rly. Co. *v.* Brown, Gordon & Co., 1856, 18 D. 1283; 1857, 19 D. 840; Longworth *v.* Yelverton, 1865, 3 M. 645; Cheape *v.* Lord Advocate, 1871, 9 M. 377; Stewart *v.* Gelot, 1871, 9 M. 1057, per Lord Justice-Clerk Moncreiff, p. 1060.

[5] Macintosh *v.* Smith, 1878, 6 R. 206, per Lord Justice-Clerk Moncreiff, p. 210.

[6] M'Donald *v.* M'Donald, 1840, 2 D. 889; affd. 1842, 1 Bell's App. 819; Gillespie *v.* Russel, 1857, 19 D. 897; affd. 1859, 3 Macq. 757.

[7] Danish Asiatic Co. *v.* Earl of Morton, 24th February 1741, Elchies' Suspension, No. 5; Shand's Practice, p. 459.

[8] Corbidge *v.* Somerville, 1913, S. C. 858, per Lord Kinnear, pp. 866, 867.

[9] Munro *v.* Rose, 1855, 18 D. 292, per Lord Cowan, p. 295.

[10] Hamilton *v.* Marshall, 25th November 1813, F. C.; Hume's Dec. 497.

[11] Maule *v.* Maule, 1833, 6 W. & S. 586, per Lord Brougham, p. 662; Macpherson *v.* Tytler, 1839, 1 D. 718; Carmichael *v.* Anstruther, 1866, 4 M. 842, per Lord Deas, p. 850; Lockyer *v.* Ferryman, 1876, 3 R. 882, per Lord Justice-Clerk Moncreiff, p. 896, Lord Ormidale, p. 904, Lord Gifford, pp. 911, 913. See also Shedden *v.* Patrick, 1852, 14 D. 721; 17 D. (H. L.) 18; Earl of Breadalbane *v.* Trs. of Marquess of Breadalbane, 1868, 6 M. 807, per Lord President Inglis, p. 815; Cheape *v.* Lord Advocate, 1871, 9 M. 377.

raised by the pursuer in the original action on the ground that the defender in such action was not subject to the jurisdiction, the pursuer would be asking the Court to do an equally incompetent thing. If raised by the pursuer of a consistorial cause in which he has obtained decree on the ground that he was not subject to the jurisdiction, the fact that he had prorogated the jurisdiction would likely bar him from suing an action of reduction. If raised by the defender in the original action on the ground that he was not subject to jurisdiction, the plea of "competent and omitted" would be a good answer.[1]

It is not a sufficient ground of reduction to aver that the witnesses of the opposite party made false statements; it is necessary to aver that the opposite party was guilty of subornation of perjury;[2] nor will mere informality not amounting to inherent nullity justify a reduction.[3]

(c) *Decree by Default.*—A decree by default is a decree *in foro*.[4] The party against whom such a decree has been pronounced, however, may be reponed against it in certain circumstances (see *Reponing*); but if reponing is not available, as in the case where the Lord Ordinary will not grant leave to reclaim, or the reclaiming days have expired, the decree may be reduced. Thus a reduction may be brought on the ground of inadvertence, "in which case the Court, although it will require a strong statement of facts to support such an application, has the power to award substantial justice."[5] It may also be reduced where the decree by default has arisen in consequence of the inability of the pursuer through poverty to carry on his case.[6] A reduction must be raised, however, within a reasonable time. If there is delay a sufficient reason must be given.[7]

(3) *Consistorial Decrees.*—There seems now to be no good reason to doubt that the exception of *res judicata* is applicable to decrees in consistorial causes; that there is no finality in a decree in a consistorial cause after year and day from the date of the decree; and that there is

[1] Longworth *v.* Yelverton, 1868, 7 M. 70; Corbidge *v.* Somerville, 1913, S. C. 858.

[2] Forster *v.* Forster, 1871, 9 M. 445, per Lord Cowan; Lockyer *v.* Ferryman, 1876, 3 R. 882, per Lord Justice-Clerk Moncreiff, pp. 897, 898, Lord Gifford, p. 912; Begg *v.* Begg, 1889, 16 R. 550; 17 R. (H. L.) 60.

[3] Munro *v.* Rose, 1855, 18 D. 292, per Lord Cowan, p. 295.

[4] Forrest *v.* Dunlop, 1875, 3 R. 15.

[5] Ibid., per Lord Justice-Clerk Moncreiff, p. 16.

[6] Millie *v.* Millie, 1801, Mor. 12176; affd. 18th March 1807, F. C., p. 752 of vol. 1808-10; Leith *v.* Leith, 1822, 1 S. 469 (N. E. 435); Clark *v.* Newmarch and Grant, 1825, 4 S. 182 (N. E. 184); Steel *v.* Black, 1829, 7 S. 648; Sassen *v.* Campbell, 1829, 8 S. 102; Paterson *v.* Burke, 1844, 6 D. 953.

[7] Mackenzie *v.* Smith, 1861, 23 D. 1201.

no difference in any respect as regards reduction between consistorial decrees and other decrees.[1]

In a reduction of a decree of divorce where there is no appearance for the defender, the Court may look at the evidence, and the *onus* is upon the pursuer in the reduction to prove his case.[2]

In a recent case it was held that the trustee of a bankrupt defender, who was divorced in absence, could bring an action of reduction of the decree on the ground of "no jurisdiction."[3]

(4) *Teind Court Decrees.*—Reductions of decrees pronounced in the Teind Court may be brought in the same way as reductions of ordinary decrees in the Court of Session, only they must be brought before the Lord Ordinary on Teind causes.[4] They are similar to other actions of reduction, except that where there has been no appearance for the defender the decree so obtained is not treated as an ordinary decree in absence,[5] except in the case of a decree of approbation of a subvaluation.[6] Accordingly, except in the last case, they can only be reduced on the ground of fraud or other ground independent of the merits.[7] In the case of a decree of approbation of a subvaluation it can be reduced in the same way as any other decree in absence.[6]

Although heritors cannot pursue a reduction of a valuation of a co-heritor,[8] heritors who have acquired heritable rights may state objections to such valuation *ope exceptionis* in a locality.[9] The patron and minister, however, have a title to sue a reduction of a valuation.[9] Where the objections to a valuation appear *ex facie* of the valuation, it is unnecessary to sue a reduction.[10]

In an approbation of a decree of subvaluation a dereliction of the decree of subvaluation may either be pleaded in the action of approbation,[11] or may be the ground of a separate action of reduction of the decree of approbation in absence.[12]

[1] Menzies *v.* Menzies, 1835, 14 S. 47; Longworth *v.* Yelverton, 1865, 3 M. 645; 1867, 5 M. (H. L.) 144; Lockyer *v.* Ferryman, 1876, 3 R. 882; Corbidge *v.* Somerville, 1913, S. C. 858.

[2] Stewart *v.* Stewart, 1863, 1 M. 449.

[3] Corbidge *v.* Somerville, 1913, S. C. 858.

[4] 6 Geo. IV. cap. 120, sec. 54; C. A. S., H, iv. 1.

[5] Kinloch *v.* Bell, 1867, 5 M. 360, per Lord Neaves, p. 371.

[6] M'Neill's Trs. *v.* Campbell, 1872, 11 M. 211.

[7] Abercromby *v.* Erskine, 1800, Mor. App. *voce* Teinds, No. 8.

[8] Ibid.; Buccleuch *v.* Common Agent in Locality of St. Boswells, 1865, 3 M. 1111.

[9] Kinloch *v.* Bell, 1867, 5 M. 360.

[10] Ministers of Old Machar *v.* The Heritors, 1868, 6 M. 504. See also Baird *v.* Earl of Wemyss, 1906, 8 F. 669; Shairp *v.* Ewan, 1909, 2 S. L. T. 287.

[11] Cowan *v.* Cook, 1868, 6 M. 110 (note). See also Baird *v.* Earl of Wemyss, 1906, 8 F. 669.

[12] Fogo *v.* Colquhoun, 1867, 6 M. 105.

A judgment in one locality on a point fairly contested and having a material bearing on the process is *res judicata* in a subsequent locality in the same parish,[1] but not where the point has not been raised in the first process.[2]

A new locality may supersede an old locality without the necessity of a reduction,[3] and a locality localling lands on a wrong parish may be objected to and set right, without the necessity of a reduction, in a locality of the proper parish.[4]

A reduction of a final locality throws open the decree as to all the heritors, and stands as an *interim* rule of payment till a new locality is obtained.[5]

A decree of the Lord Ordinary on Teind causes under the Ecclesiastical Buildings Act, 1868, cannot be reduced.[6]

An action of reduction of a decree of locality is not required in order to enable a heritor to surrender his teinds.[7]

(5) *Decrees in Lands Valuation Appeal Court.*—This Court is a Supreme Court, and its proceedings cannot be set aside by reduction in the Court of Session on the ground that they are *ultra vires* and incompetent.[8] Where, however, a person cannot get a remedy by appealing to the Lands Valuation Appeal Court against an entry in the Valuation Roll, he can proceed by way of interdict,[9] or reduction and declarator.[10]

(6) *Decrees in Justiciary Court and Inferior Criminal Courts.*—The Justiciary Court is a sovereign Court, and its acts and decrees cannot be reviewed by the Court of Session.[11] As regards inferior Criminal Courts, the Court of Session claims a right to check such Courts when they exceed their powers.[12]

(7) *Decrees in Sheriff Ordinary Court.*—(a) *Decree in Foro.*—It is competent to raise a reduction of a decree in the Sheriff's Ordinary

[1] Bonar *v.* Lord Advocate, 1870, 9 M. 58 ; Thomson *v.* Lord Advocate, 1872, 10 M. 849 ; Dundas *v.* Waddell, 1880, 7 R. (H. L.) 19.

[2] Elder *v.* Fotheringham, 1869, 7 M. 341 ; Maclachlan *v.* Stuart, 1885, 12 R. 1107.

[3] Maxwell *v.* Jardine, 1827, Shaw's Teind Cases, 143, per Lord Glenlee, p. 147 ; Chisholm-Batten *v.* Cameron, 1873, 11 M. 292.

[4] Minister of Rescobie *v.* Carnegy, 1869, 7 M. 514.

[5] Weatherstone *v.* Marquis of Tweeddale, 1833, 12 S. 1.

[6] Earl of Camperdown *v.* Auchterarder Presbytery, 1902, 5 F. 61.

[7] Earl of Minto *v.* Pennell, 1873, 1 R. 156.

[8] Stirling & Sons *v.* Holm, 1873, 11 M. 480; Abercromby *v.* Badenoch, 1909, 47 S. L. R. 18.

[9] Sharp *v.* Latheron Parochial Board, 1883, 10 R. 1163 ; Abercromby *v.* Badenoch, 1909, 47 S. L. R. 18.

[10] Moss' Empires, Ltd. *v.* Walker, 1916, 1 S. L. T. 103.

[11] Strachan *v.* Commissioners of Justiciary, 1684, Mor. 7415.

[12] Phillips *v.* Steel, 1847, 9 D. 318, per Lord President Boyle and Lord Mackenzie.

Court for the purpose of having a review of its merits where the decree is not extractable[1] or where the decree is a final decree which has been extracted.[2] If the decree is an extractable decree and has not been extracted, reduction is incompetent, except where there is no other remedy available.[3]

A reduction is appropriate where a decree of absolvitor with expenses has been extracted and a charge given for expenses.[4] It is competent to reduce a decree of the Sheriff's Ordinary Court on the ground of incompetency, informality, or irregularity. Thus where a decree of default was granted without a formal order being pronounced,[5] or where a decree was pronounced before the expiry of the time for lodging defences,[6] reduction was competent. Reduction is the only method by which a decree can be set aside on the ground of fraud or other matter extrinsic to the decree.[7]

The Sheriff of the county is a proper defender in an action of reduction of a decree fixing fiar's prices.[8]

(b) *Decree in Absence.*—Although it is now competent for a Sheriff to repone a defender at any time before implement of a decree in absence,[9] the common law procedure of reduction of the decree is still competent.[10]

(8) *Decrees in Sheriff Small Debt Court.*—The Small Debt Act of 1837[11] provides that no decree is subject to reduction, or any form of review other than provided for by the said Act, either on account of any omission, or irregularity, or informality in the citation or proceedings, or on the merits, or on any ground or reason whatever. The form of review provided for by the Act is an appeal to the Justiciary Court on the ground of corruption or malice and oppression on the part of the Sheriff, or on such deviations in point of form from the statutory enactments as the Court may think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the Sheriff.[12]

[1] Holmes *v.* Tassie, 1828, 6 S. 394 ; Jack *v.* Umpherston, 1837, 15 S. 833.

[2] Taylor's Trs. *v.* M'Gavigan, 1896, 23 R. 945, per Lord Kincairney (Ordinary); Mathewson *v.* Yeaman, 1900, 2 F. 873.

[3] Buchanan *v.* Lumsden, 1837, 15 S. 958 ; Scoular *v.* M'Laughlan, 1864, 2 M. 955, per Lord President M'Neill, p. 961.

[4] Whyte *v.* Vallance, 1835, 13 S. 470.

[5] Macdonald *v.* Mackessack, 1888, 16 R. 168.

[6] Mackenzie *v.* Munro, 1894, 22 R. 45.

[7] Smith *v.* Kirkwood, 1897, 24 R. 872.

[8] Ritchie *v.* Littlejohn, 1899, 1 F. 1097.

[9] Sheriff Courts (Scotland) Act, 1907, rule 27 *et seq.*

[10] M'Lachlan *v.* Rutherford, 1854, 16 D. 937. See also Stephenson *v.* Dobbins, 1852, 14 D. 510.

[11] 7 Will. IV. and 1 Vict. cap. 41, sec. 30. [12] Ibid. sec. 31.

Notwithstanding this provision, it is competent to reduce a small debt decree on the ground of constitutional illegality or that the proceedings are null and void,[1] or on the ground of irregularities after the decree has been pronounced.[2] Irregularities in citation[3] or taking proof[4] are not relevant grounds of reduction, nor is an error in the sum decerned for,[5] and a reduction on the ground that what appeared to be a decree *in foro* was truly a decree in absence has been held to be incompetent.[6]

(9) *Decrees of Sheriff in a Ministerial Capacity.*—Where the Sheriff acting in a ministerial capacity departs from statutory procedure, his decree or order may be reduced by the Court of Session.[7]

(10) *Decrees in Service of Heirs.*—A decree refusing to serve a petitioner, or dismissing his petition, or repelling the objection of an opposite party may be brought under challenge by process of reduction in the Court of Session on any competent ground.[8] Where such a reduction has been brought, the Court may allow further or additional evidence to be taken, or appoint the cause to be tried by a jury.[9]

The judgment in a reduction of service is conclusive unless and until reversed by the House of Lords.[9]

A reduction of a service may be on the facts.[10]

In the undernoted case new evidence was allowed to be taken at a jury trial.[11] In the undernoted cases the new evidence was taken on commission.[12] Witnesses examined in a service have been allowed to be re-examined in a reduction and their depositions to lie *in retentis*, reserving all objections to their admissibility.[13] The *onus* of proof lies

[1] Manson *v.* Smith, 1871, 9 M. 492; Brown *v.* Rodger, 1884, 12 R. 340; *cp.* Spalding *v.* Valentine & Co., 1883, 10 R. 1092; Cruikshank *v.* Gow, 1888, 15 R. 326.

[2] Murchie *v.* Fairbairn, 1863, 1 M. 800.

[3] Lennon *v.* Tully, 1879, 6 R. 1253.

[4] Robertson *v.* Pringle, 1887, 14 R. 474.

[5] Wilson *v.* Scott, 1890, 18 R. 233. See also Tait and Crichton *v.* Anderson, 1905, 12 S. L. T. 825.

[6] Riach *v.* Wallace, 1899, 2 F. 149. See also Gray *v.* Macintosh & Co., 1906, 14 S. L. T. 403.

[7] Leith Police Commissioners *v.* Campbell, 1866, 5 M. 247; Anderson *v.* Widnell, 1868, 7 M. 81; Lord Advocate *v.* Police Commissioners of Perth, 1869, 8 M. 244; Stirling *v.* Hutcheon, 1874, 1 R. 935; Caledonian Rly. Co. *v.* Glasgow Corporation, 1905, 7 F. 1020.

[8] 31 & 32 Vict. cap. 101, sec. 42.

[9] Ibid., sec. 43.

[10] Whyte *v.* Stewart, 1806, 5 Pat. App. 60; Hunter *v.* Hunter, 1823, 1 Sh. App. 459; Officers of State *v.* Alexander, 1839, 1 D. 1188.

[11] Henderson *v.* Dick, 1848, 20 Jur. 562.

[12] Officers of State *v.* Alexander, 1835, 13 S. 1044; Matthew *v.* Wighton's Trs., 1843, 6 D. 305.

[13] Ramsay *v.* Cochrane, 1825, 3 S. 643 (N. E. 450).

on the pursuer of a reduction.[1] Additional evidence may be led in support of the service,[2] and the Court may call for more evidence than has been adduced.[3]

(11) *Decree of Confirmation in the Commissary Court.*—It is competent to reduce such a decree if there is a mis-statement of fact which is essential to its validity, such as, that the decree bore a false date, or that the person confirmed was not one of the next of kin of the deceased.[4] It is not a sufficient ground of reduction that the decree is written on an erasure.[4]

(12) *Decrees in Justice of Peace Court.*—A decree of the Justice of the Peace Small Debt Court cannot be reduced except on the ground of malice and oppression on the part of the Justices raised within one year from the date of the decree.[5] The limitation to one year applies in all cases.[6] It is only in cases of the most apparent iniquity that an action of reduction will be sustained.[7]

In other civil matters the judgment of the Justices can only be reduced where there is a clear departure from the terms of the statute conferring final jurisdiction or where they have assumed a jurisdiction to which they have no right.[8]

(13) *Decrees in Church Courts.*—It is competent to reduce proceedings in these Courts where they have exceeded their powers,[9] but the remedies open to the complainer in the Ecclesiastical Courts must first be exhausted.[10]

(14) *Licensing Courts.*—Judgments in the Licensing Courts may be reduced where the Justices or magistrates exceed their jurisdiction,[11] or act essentially illegal.[12]

(15) *Other Inferior Courts.*—It is always within the power of the

[1] Henderson *v.* Dick, 1848, 20 Jur. 562 ; Alexander *v.* Officers of State, 1868, 6 M. (H. L.) 54. See also Lindsay *v.* Kerr, 1824, 2 Sh. App. 147.

[2] Cochrane *v.* Ramsay, 1824, 3 S. 411 (N. E. 288); Thorburn *v.* Thorburn, 1827, 6 S. 93 ; Alexander *v.* Officers of State, 1868, 6 M. (H. L.) 54.

[3] M'Lean *v.* Officers of State, 1846, 5 Bell's App. 60.

[4] Dowie *v.* Barclay, 1871, 9 M. 726, per Lord President Inglis.

[5] 6 Geo. IV. cap. 48, sec. 14.

[6] Thomson *v.* Allan, 1852, 14 D. 479, per Lords Cuninghame and Ivory.

[7] Johnston *v.* Kellow, 19th January 1803, F. C.; Mor. 7634.

[8] Napier *v.* Robison, 1782, Mor. 7624 ; Lundie *v.* Mags. of Falkirk, 1890, 18 R. 60.

[9] Brown *v.* Heritors of Kilberry, 1825, 3 S. 480 (N. E. 334) ; 1829, 3 W. & S. 441, at p. 448 ; *cp.* Campbell *v.* Presbytery of Kintyre, 1843, 5 D. 657 ; Lockhart *v.* Presbytery of Deer, 1851, 13 D. 1296 ; Wight *v.* Presbytery of Dunkeld, 1870, 8 M. 921 ; Craig *v.* Anderson, 1893, 20 R. 941.

[10] Lang *v.* Presbytery of Irvine, 1864, 2 M. 823.

[11] Ashley *v.* Mags. of Rothesay, 1873, 11 M. 708. See also Lundie *v.* Mags. of Falkirk, 1890, 18 R. 60 ; Walsh *v.* Mags. of Pollokshaws, 1905, 7 F. 1009.

[12] Goodall *v.* Bilsland, 1909, S. C. 1152.

Court of Session to reduce the decrees of inferior Courts where they exceed their jurisdiction or do anything essentially illegal,[1] but the pursuer in the reduction must have availed himself first of every power of review given by the statute.[2]

(16) *Decree-Arbitral.*—A decree-arbitral may be reduced either partially or *in toto*.[3] The grounds of challenge may be in respect of the Act of Regulations, 1695, or common law. Under the former the grounds of challenge are corruption, bribery, or falsehood of the arbiters; under the latter the grounds are (i.) the award is improbative; (ii.) the award is *ultra vires* or *ultra fines compromissi;* (iii.) the award does not exhaust the commission; (iv.) the arbiter has refused proof or to hear parties; (v.) the award is ambiguous and inextricable; (vi.) the award has been impetrated by improper means or obtained by fraud; (vii.) the award has not been delivered; (viii.) the award is merely a compromise.[4]

(17) *Procedure.*—The procedure is the same as in ordinary reductions.

III. Reduction-Improbation.—(i.) *Generally.*—Reduction-improbation is an action raised in order to reduce a deed on real grounds of falsehood and forgery, or on the averment of falsehood and forgery, *fictione juris* only.[5] It is accordingly not only available where deeds have been forged, but is the proper form of setting aside important instruments when challenged on the ground of falsehood.[6] Apart from forgery, the most common use of reduction-improbation was where a vassal died after having disponed and the purchaser had not entered with the superior. In such a case the superior's usual remedy was an action of reduction-improbation against the purchaser with a declarator of non-entry.[7] Declarators of non-entry, however, are now unnecessary.[8] Reduction-improbation was also imperative in cases where the execution of a summons was challenged on the ground of falsehood,[9] but there is a probability that in the latter cases an action of simple reduction

[1] Campbell *v.* Brown, 1829, 3 W. & S. 441, at p. 448; Milne *v.* Aberdeen District Committee, 1899, 2 F. 220, per Lord M'Laren, p. 230.

[2] Crawford *v.* Lennox, 1852, 14 D. 1029.

[3] Stewart *v.* Ross, 1822, 1 S. 335 (N. E. 313); Cox Bros. *v.* Binning & Son, 1867, 6 M. 161.

[4] Bell on Arbitration, p. 34 *et seq.* and p. 327 *et seq.*

[5] Erskine's Inst. iv. 1. 18.

[6] M'Vitie *v.* Barbour, 1838, 16 S. 1184, per Lord Cuninghame, p. 1186.

[7] Mags. of Dundee *v.* Kid, 1829, 7 S. 801.

[8] Conveyancing (Scotland) Act, 1874 (38 & 39 Vict. cap. 94), sec. 4 (4).

[9] M'Vitie *v.* Barbour, 1838, 16 S. 1184; Balfour *v.* Robertson, 1839, 1 D. 458; Reid *v.* Clark, 1914, 2 S. L. T. 68. See also Stewart *v.* Macdonald, 1860, 22 D. 1514, at p. 1522; Tait *v.* Johnston, 1891, 18 R. 606, per Lord Kincairney (Ordinary).

would be considered sufficient.[1] Where the mistake in the execution is a mere blunder, a simple reduction is sufficient.[2]

(2) *Concourse.*—Formerly the consent of the Lord Advocate was required before raising an action of reduction-improbation, but this is not now necessary.[3]

(3) *Form of Summons.*—The form is similar to a summons of simple reduction as prescribed by the Court of Session Act, 1850, with this exception, that at the end of the will usual in actions of simple reduction there is inserted the following words:—"And also, as being false, forged, feigned, fabricated, simulate, devised, and made up by the said defender, and his cedents and authors, or one or other of them, civilly and lawfully improved, *per testes insertos et omni alio modo quo de jure,* and the forgers, users, and devisers thereof, censured, and punished in their persons, lands, and goods, to the terror of others to commit the like in time coming, for the reasons and causes," etc., and these words are repeated in the conclusions.

The word "improve" is the distinguishing characteristic of an action of reduction-improbation.[4]

(4) *Procedure.*—When preliminary objections are stated the procedure is the same as in a simple reduction prior to the Act of Sederunt, 20th March 1907.[5] Formerly, however, where the defender did not appear, the rules of procedure appropriate to actions of simple reduction were not so strictly applied, and decree of certification *contra non producta* was not pronounced until after the cause had been continued for a week and again enrolled, and even then the decree could not be extracted for four weeks. The reason was that it was considered impossible to set aside such a decree in absence, and every opportunity was given to obtain a decree *in foro.* This strictness would not, however, be observed at the present day.[6]

In a recent case a chemical examination of a recorded deed was allowed on the averment that it had been forged.[7]

(5) *Abiding by the Writing Challenged.*—Where forgery or falsehood is the real ground of reduction, the pursuer is entitled to call upon the

[1] Beaumont, Petr., 1894, 2 S. L. T. 30. See also Le Conte *v.* Douglas and Richardson, 1880, 8 R. 175.

[2] M'Lellan *v.* Graham, 1841, 16 Fac. 1209. See also M'Kinney *v.* His Creditors, 1864, 2 M. 889.

[3] Court of Session Act, 1868, sec. 17.

[4] Garden *v.* Earl of Aboyne, 1733, Mor. 6676; Balfour *v.* Robertson, 1839, 1 D. 458.

[5] Shand's Practice, p. 640 *et seq.*

[6] Ibid.; Stair, iv. 20. 6; Sinclair *v.* Brown, 1835, 13 S. 594; 1837, 15 S. 770.

[7] Irvine *v.* Powrie's Trs., 1915, S. C. 1006.

defender to declare whether he abides by the deed sought to be reduced as a genuine deed. This is in order to shorten investigation. If the defender refuses to abide by the writing, decree of certification is pronounced.[1] If he abides by the deed, he does so *sub periculo falsi*, and he will incur the punishment of forgery, even although there is no evidence that he knew the deed to be forged.[2] The defender requires to appear in person in Court for that purpose, although when under physical disability or abroad a commission may be appointed to take his declaration.[3]

At one time the defender was allowed to abide by the deed *qualificate*, but this went into desuetude.[4] He was, however, allowed, while abiding simply, to protest that he should prove the various facts and circumstances of how the deed came into his hands, in which case, if he proved that he came by the deed in an innocent manner, he was not liable to be punished as a forger.[5]

Where the deed was abidden by, a special record was made up containing a condescendence of articles improbatory and answers containing articles approbatory, and notes of pleas in law. The condescendence and answers, when revised, were signed by the parties respectively, except in special circumstances, as well as by their counsel, and the case proceeded to judgment on the point.[6]

This step of procedure seems now to be in desuetude, and the clause in the Act of Sederunt [6] prescribing the latter procedure has been omitted from the Codifying Act of Sederunt, 1913.

(6) *Plea by Way of Exception.*—Formerly, where the defence stated in an action founded upon a document was that the writ was a forgery, all that the defender required to do was to lodge in process a minute signed by counsel alleging forgery and proponing improbation, declaring at the same time his willingness to consign £40 Scots, to be forfeited in case it should turn out that the allegation was made without good cause. An interlocutor was thereupon pronounced ordering the £40 Scots to be consigned and the pursuer to appear and abide by the writing *sub vericulo falsi*. Thereafter the action proceeded as if a substantive action of reduction-improbation had been brought.[7]

[1] Henderson *v.* Henderson, 1672, Mor. 6755 ; Grant *v.* Grant, 1675, Mor. 6756.
[2] Erskine's Inst. iv. 4. 69.
[3] A. *v.* B., 1676, Mor. 6761.
[4] Shand's Practice, pp. 643, 644.
[5] Robertson *v.* Alisons, 1743, Mor. 6774 ; Bankton, iv. 28. 7.
[6] A. S., 11th July 1828, sec. 53.
[7] Shand's Practice, p. 649 ; Rathbones *v.* Glenny, 1833, 11 S. 574 ; Earl of Galloway *v.* Grant, 1857, 20 D. 230 ; Conacher *v.* Conacher, 1859, 21 D. 597.

(7) *Act of Sederunt, 20th March* 1907.[1]—This Act not only gives a new form of summons in actions of reduction but considerably modifies the procedure in such actions. Whether the Act applies to all actions of reduction, including actions of reduction-improbation on the ground of forgery or forgery *fictione juris*, has not been decided, but in view of the former practice regarding proof of forgery by way of exception as set forth in the preceding paragraph this seems unlikely. If, however, it should be held that the Act does apply to such actions, the practice and procedure set forth under the head of *Reduction-Improbation* will require to be modified in terms of the provisions of said Act, and will conform to the procedure in simple reduction.

[1] C A. S., C, iv. 4.

CHAPTER VI

CONSISTORIAL ACTIONS

I. GENERALLY.—(1) *Enumeration of Actions.*—Consistorial actions are so called because prior to the Reformation they were appropriate to the Consistorial Courts. Under this head are included actions of declarator of marriage, nullity of marriage, legitimacy, and bastardy, actions of divorce and of separation *a mensa et thoro*,[1] actions of adherence,[2] actions of putting to silence, and actions of aliment between husband and wife.[3]

The rules of the Commissary Court are not binding on the Court of Session.[4]

(2) *Jurisdiction.*—Consistorial actions, with the exception of actions of separation and aliment, adherence and aliment, and actions of *interim* aliment between husband and wife, are within the exclusive jurisdiction of the Court of Session. Actions of separation and aliment, adherence and aliment, and actions of *interim* aliment between husband and wife are now competent in the Sheriff Court and in the Court of Session.[5] (See *Jurisdiction, supra*, pp. 57, 79, and 123.)

(3) *Signing and Signeting Summons.*—The last page of the summons may be signed either by a Writer to the Signet or a Clerk of Court, and the summons need not pass the Signet.[6] (See *Summons, supra*, p. 291.)

(4) *Citation.*—Where the parties are resident in Scotland the summons may be served in any of the ordinary competent methods, but if the defender is not so resident, it must be served personally,

[1] 11 Geo. IV. and 1 Will. IV. cap. 69, sec. 33.

[2] 13 & 14 Vict. cap. 36, sec. 16.

[3] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 19.

[4] Corbidge *v.* Somerville, 1913, S. C. 858.

[5] 11 Geo. IV. and 1 Will. IV. cap. 69, sec. 33; 13 & 14 Vict. cap. 36, sec. 16; Conjugal Rights (Scotland) Amendment Act, 1861, sec. 19; Sheriff Courts (Scotland) Act, 1907, sec. 5 (2), as amended by the Sheriff Courts (Scotland) Act, 1913, First Schedule.

[6] 11 Geo. IV. and 1 Will. IV. cap. 69, sec. 40; 13 & 14 Vict. cap. 36, sec. 15; 31 & 32 Vict. cap. 100, sec. 13; Buxton *v.* Buxton, 1845, 7 D. 1063; Craig *v.* Craig, 1851, 14 D. 261.

unless it can be shown to the satisfaction of the Court that the defender cannot be found.[1] An affidavit by the law agent with other evidence of search was considered sufficient evidence that the defender could not be found.[2] Where a defender had left his residence in Scotland for less than forty days and left no information where he had gone, it was held that the Judicature Act created no presumption that the defender was still resident in Scotland, and therefore that there must be personal citation.[3]

It is sufficient compliance with sec. 10 of the Conjugal Rights (Scotland) Act, 1861, if the personal service therein required is made by the delivery to the defender personally of the summons by a person (although not a messenger-at-arms or other officer of the law) duly authorised by the pursuer for that purpose, and such person shall return a certificate that such delivery has been made.[4] If a defender who is not resident in Scotland cannot be found, edictal service is deemed sufficient; but in every case where service is edictal the pursuer shall also serve the summons on the children of the marriage, if any, and on one or more of the next of kin of the defender, exclusive of the children of the marriage, when the said children and next of kin are known, and resident within the United Kingdom, and such children and next of kin, whether cited or so resident or not, may appear and state defences to the action.[1]

(5) *Mandatary.*—See *Motion to Sist a Mandatary, supra*, p. 437.

(6) *Curator ad Litem.*—Although at one time a curator *ad litem* was appointed to a wife in consistorial causes, the practice has long since been departed from.[5]

(7) *Arrestment and Inhibition.*—In such consistorial causes as are purely declaratory there can be no arrestment or inhibition on the dependence.[6] Where, however, there are pecuniary conclusions, as where in an action of declarator of marriage there is an alternative conclusion for damages on account of seduction,[7] or where in an action of divorce a co-defender is called and damages sought against him,[8] or

[1] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 10.

[2] M'Callum *v.* M'Callum, 1865, 3 M. 550; Clark-Kennedy *v.* Clark-Kennedy, 1908, 15 S. L. T. 844.

[3] Laughland *v.* Laughland, 1882, 19 S. L. R. 645.

[4] Court of Session Act, 1868, sec. 100.

[5] Fraser, Husband and Wife, i. 571.

[6] Burns *v.* Burns, 1879, 7 R. 355, per Lord President Inglis, p. 356. See also Ketchen *v.* Grant, 1871, 9 M. 966.

[7] Gordon *v.* Duncan, 1827, 5 S. 544 (N. E. 511).

[8] Fraser *v.* Fraser and Hibbert, 1870, 8 M. 400.

in an action of separation and aliment,[1] or adherence and aliment,[2] arrestment and inhibition are competent.

Arrestments used by a wife on the dependence of an action of divorce against her husband and containing conclusions for her *jus relictæ*, in the event of her obtaining decree of divorce, were held to be bad.[3]

Arrestment or inhibition in security of future aliment is only competent where the debtor is *vergens ad inopiam* or on similar grounds.[4] (See *Summons, supra*, p. 309.)

(8) *Defences.*—It is in the discretion of the Court to allow defences in a consistorial cause to be received at any time, even after judgment for the pursuer in the Outer House, and to allow the defender to reclaim against the judgment of the Lord Ordinary granting divorce.[5]

(9) *Fee Fund Dues.*—In any consistorial action the Lord Ordinary, on cause shown, may declare that it shall not be subject, or shall be subject only to a modified extent, to payment of Court dues.[6]

(10) *Oath of Calumny.*—The oath *de calumnia* is an oath which is administered to the pursuer in actions of divorce, according to statute,[7] and in actions of nullity of marriage on the ground of impotence, according to practice,[8] in order to prevent collusion between the parties. In other consistorial causes it does not seem to be necessary.

The oath is usually taken before the Lord Ordinary, and is read over to the pursuer by the Clerk of Court, and signed both by the pursuer and the Lord Ordinary. It may, on cause shown, be taken on commission. (See *Commission and Diligence, infra*, Part x.)

The following is a form of the oath:—

At Edinburgh, the day of , before the Honourable Lord , in the action of at the instance of , against , Compeared the pursuer, who being solemnly sworn and examined *de calumnia*, Depones that he [*or* she] has just cause to insist in the present action of divorce against the defender, his spouse [*or* her

[1] Thomson *v.* Sharp, 1828, 7 S. 1; Symington *v.* Symington, 1875, 3 R. 205; Burns *v.* Burns, 1879, 7 R. 355.

[2] Millar *v.* Millar, 1907, 15 S. L. T. 205.

[3] Ellison *v.* Ellison, 1901, 4 F. 257.

[4] Symington *v.* Symington, 1875, 3 R. 205. See, however, James *v.* James, 1886, 13 R. 1153.

[5] Ross *v.* Ross, 1897, 24 R. 1029; Cathcart *v.* Cathcart, 1899, 1 F. 781. See also Paul *v.* Paul, 1896, 4 S. L. T. 124.

[6] 52 & 53 Vict. cap. 54, sec. 9; A. S., 18th December 1896, sec. 5; C. A. S., K, ii. 5; Kelly *v.* Kelly, 1906, 14 S. L. T. 221; Chalmers *v.* Chalmers, 1909, 1 S. L. T. 99.

[7] 11 Geo. IV. and 1 Will. IV. cap. 69, sec. 36.

[8] Fraser, Husband and Wife, ii. 1195

husband], because he [*or* she] believes that he [*or* she] has been guilty of adultery [*or* that he *or* she has wilfully deserted her *or* him], and that the facts stated in the libel, which has been read over to him [*or* her] are true; Depones that there has been no concert or collusion between him [*or* her] and the said defender in raising this action in order to obtain a divorce, nor does he [*or* she] know, believe, or suspect that there has been any concert or agreement between any other person on his [*or* her] behalf and the defender or any other person on her [*or* his] behalf, with the view or for the purpose of obtaining such divorce. All which is truth, as the deponent shall answer to God.

[*Signature of pursuer.*]
[*Signature of Judge.*]

(11) *Proof.*—In consistorial causes, whether they are defended or not, proof must be led to the satisfaction of the Lord Ordinary.[1]

These causes are not appropriate to trial by jury, but it is competent to either Division, or to a Lord Ordinary after advising with the Division of the Court to which the cause belongs, to direct that such causes, or any issue or issues of fact connected therewith, be tried by jury.[2] This provision, however, is not known in practice,[3] and accordingly a Lord Ordinary, without a jury, hears the proof, and the evidence is recorded in terms of the Conjugal Rights (Scotland) Amendment Act, 1861, sec. 13.

Parties in consistorial causes may be examined as witnesses.[4]

Formerly, a list of witnesses was required to be furnished by the opposite side, but this has been abolished.[5]

Where no defences have been lodged, a defender has been allowed to appear at the proof and take part in the examination.[6]

(12) *Havers.*—A commission may be granted to take the deposition of havers although they are resident in Scotland.[7]

(13) *Commission to Examine Witnesses.* — Commissions may be granted to examine and report in writing the evidence of any witness who is resident beyond the jurisdiction of the Court, or who, by reason of age, infirmity, or sickness, is unable to attend the diet of proof.[8]

[1] 11 Geo. IV. and 1 Will. IV. cap. 69, sec. 36; A. B. *v.* C. D., 1901, 8 S. L. T. 406; Williams *v.* Forsythe, 1909, 2 S. L. T. 252 (actions of putting to silence).

[2] 11 Geo. IV. and 1 Will. IV. cap. 69, sec. 37.

[3] Walker *v.* Walker, 1871, 9 M. 1091, per Lord President Inglis, p. 1092.

[4] Evidence (Scotland) Act, 1853 (16 Vict. cap. 20), secs. 3 and 4; as amended by the Evidence Further Amendment (Scotland) Act, 1874, secs. 1 and 2.

[5] Steuart *v.* Steuart, 1870, 8 M. 821.

[6] Paterson *v.* Paterson, 1848, 20 Jur. 459; Watts *v.* Watts, 1885, 12 R. 894.

[7] Court of Session Act, 1868, sec. 100; Conjugal Rights (Scotland) Amendment Act, 1861, sec. 13.

[8] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 13.

A commission may also be granted to take the pursuer's oath of calumny where the pursuer is abroad[1] or in ill health.[2]

It has also been granted previous to the calling of an action where the pursuer is a soldier,[3] or a sailor,[4] and about to go abroad. In a recent case a commission to take her oath of calumny and her evidence to lie *in retentis* was granted to the pursuer where the defender was in Australia, and it would take three months before the case would be called, and the pursuer had to return to her employment abroad.[5] In such cases the procedure is by petition to the Inner House.

In a recent case the whole evidence was taken on commission, but although the report does not say so, this was in respect that the witnesses were either beyond the jurisdiction, or for some of the above-mentioned reasons were unable to attend at the diet of proof.[6]

(14) *Identification of Defender.*—Where the Court has pronounced an order appointing the defender to appear for identification, and the defender being cited on that order fails to appear, a photograph of the defender may be used for purposes of identification.[7]

(15) *Reference to Oath.*—Formerly, parties to a consistorial cause were not competent as witnesses, and reference to oath, where competent, was an important mode of proof; but since the Evidence Further Amendment (Scotland) Act, 1874,[8] removed that disability and parties are now competent witnesses in consistorial causes, and can be compelled to give evidence except with regard to questions tending to show that the party has been guilty of adultery,[9] it has become of little importance. The only case where reference to oath would be of use is in an action of declarator of marriage on the ground of promise *subsequente copula* where there is no written evidence of the promise.[10]

(16) *Decree.*—Contrary to the rule of the canon law, a decree in a consistorial cause passes *in rem judicatam*, and consequently a plea of *res judicata* must be regulated by the general principles applicable

[1] A. B. *v.* C. D., 1838, 16 S. 1143.

[2] Orde *v.* Murray, 1846, 8 D. 535.

[3] Hook *v.* Hook, 1862, 24 D. 488.

[4] Scott, Petr., 1866, 4 M. 1103; Pringle, Petr., 1905, 7 F. 525; Neill, Petr., 1911, 48 S. L. R. 830.

[5] Anderson, Petr., 1912, S. C. 1144.

[6] A. B. *v.* C. B., 1911, 1 S. L. T. 264.

[7] Forbes *v.* Forbes, 1861, 24 D. 145; L. *v.* L., 1890, 17 R. 754; Cassidy *v.* Cassidy, 1893, 1 S. L. T. 358; Gray *v.* Gray, 1912, 1 S. L. T. 463. See, however, Grieve *v.* Grieve, 1885, 22 S. L. R. 647.

[8] 37 & 38 Vict. cap. 64, sec. 1.

[9] Ibid., sec. 2.

[10] Fraser, Husband and Wife, ii. 1243 (note (*a*)).

to ordinary civil causes.[1] With regard to the finality of a decree in a consistorial cause, the opinion of the Bench seems to favour the contention that such a decree does not become final after the lapse of year and day from its date.[2]

A decree in a consistorial cause, although pronounced after a proof, is still a decree *in absence* if the defender has not made appearance, and it may be opened up, and reduced, at any time within twenty years.[3] It is not sufficient to entitle a decree to be reduced that the evidence given at the proof was false; there must be subornation of perjury.[4] The same rules regarding reduction of such decrees apply as in ordinary civil causes.

II. Declarator of Marriage.—(1) *Generally.*—Marriage by the law of Scotland is constituted by simple consent of parties. *Primâ facie* evidence of this consent is furnished, in the case of regular marriages, by registration[5] of the marriage after proclamation of banns, or public notice in terms of the Act 41 & 42 Vict. cap. 43, and in the case of irregular marriages, by registration in terms of a warrant by the Sheriff.[6] Certified extracts of entries in the registers are admissible evidence of the facts they record,[7] but they are not *probatio probata* of them, and they may be impugned, not only on such grounds as forgery, collusion, force, or pupillarity, but also on the grounds of any errors which may be detected by comparing them with the original returns preserved in the General Registry Office.[8] The registers are prepared and preserved with such care, however, that the registers are records of very high trustworthiness.[8]

Where, therefore, a regular marriage has, from any cause, not been registered and has become incapable of being registered without the intervention of the Court, or where it has become impossible to apply to the Sheriff for the registration of an irregular marriage, or where either of the parties to a marriage, which has not been registered, denies that such a marriage has taken place, or where either of the parties to a marriage has died and the proper authority for registration

[1] Longworth *v.* Yelverton, 1867, 5 M. (H. L.) 144; Lockyer *v.* Ferryman, 1876, 3 R. 882; affd. 1877, 4 R. (H. L.) 32; L. R. 2 App. Cas. 519.

[2] Ibid.; Walker *v.* Walker, 1911, S. C. 163; Corbidge *v.* Somerville, 1913, S. C. 858.

[3] Fraser, Husband and Wife, ii. 1238; 31 & 32 Vict. cap. 100, sec. 24.

[4] Forster *v.* Grigor or Forster, 1871, 9 M. 445; Lockyer *v.* Ferryman, 1876, 3 R. 882.

[5] 17 & 18 Vict. cap. 80; 18 & 19 Vict. cap. 29; 23 & 24 Vict. cap. 85; 42 & 43 Vict. cap. 8, 10 Edw. VII. and 1 Geo. V. cap. 32.

[6] 19 & 20 Vict. cap. 96, sec. 2.

[7] 17 & 18 Vict. cap. 80, sec. 58; 19 & 20 Vict. cap. 96, sec. 2.

[8] Dickson on Evidence, sec. 1204.

has not been obtained, or has been lost, the proper method of setting up such marriage is by application to the Court of Session by way of a declarator of marriage.

(2) *Summons.*—(a) *The Parties.*—The usual pursuer is the spouse who seeks to have the marriage declared, and the usual defender is the other spouse. After the death of one of the spouses, however, an action may be raised by the surviving spouse against the representatives of the predeceaser,[1] except possibly in the case of a marriage where the mode of proof is by promise *subsequente copula.*[2]

Where the pursuer in an action of declarator of marriage dies *pendente processu,* an opinion has been expressed that the executor of the pursuer has a right to be sisted as a pursuer and to proceed with the action.[3]

Sometimes the pursuer inserts a conclusion to find and declare that any other marriage into which the defender has entered is null. In such a case the spouse of the other marriage must be called as a party;[4] but if such a conclusion is not inserted, such spouse cannot insist upon being made a party to the action of declarator,[5] although the Court *ex proprio motu* may have the case intimated to such spouse.[6]

A marriage may be proved incidentally in an action where a third party has an interest in proving it, although the party could not competently raise an action of declarator of marriage. Thus in actions of legitimacy,[7] or to substantiate claims founded on legitimacy,[8] or in actions by parish councils to establish a pauper's settlement,[9] the marriage of two parties may be declared, although as between the alleged spouses the decision in these cases will not be *res judicata.*

The Court has also by indulgence allowed incidental proof of marriage in cases of small value.[10]

(b) *Conclusions.*—Although it is competent and was formerly usual to conclude for a declaration that parties were legally married at a

[1] Fraser, Husband and Wife, ii. 1241; Sceales *v.* Sceales, 1866, 4 M. 300; Robertson *v.* Steuart, 1874, 1 R. 532; affd. 2 R. (H. L.) 80; Glass *v.* Glass' Trs., 1907, 15 S. L. T. 716; Petrie *v.* Petrie, 1911, S. C. 360.

[2] Fraser, Husband and Wife, i. 344, ii. 1241; Maloy *v.* Macadam, 1884, 12 R. 431.

[3] Green or Borthwick *v.* Borthwick, 1896, 24 R. 211, per Lord Young.

[4] Fraser, Husband and Wife, ii. 1240.

[5] Jolly *v.* M'Gregor, 1825, 4 S. 254 (N. E. 259); revd. 3 W. & S. 85.

[6] Longworth *v.* Yelverton, 1865, 3 M. 645, per Lord Curriehill.

[7] Wright *v.* Wright's Trs., 1837, 15 S. 767; Bosville *v.* Lord Macdonald, 1910, S. C. 597.

[8] Wood's Trs. *v.* Findlay, 1909, 1 S. L. T. 156; Deans' Judicial Factor *v.* Deans, 1912, S. C. 441 (not proved).

[9] M'Donald *v.* Mackenzie, 1891, 18 R. 502.

[10] Wright *v.* Sharp, 1880, 7 R. 460.

certain place and at a certain date, to which was added the mode in which the marriage was contracted, as by a clergyman, or by a simple consent proved by acknowledgment, promise *subsequente copula*, or habit and repute, the tendency of the present practice is to make the conclusion as simple as possible, and to ask that "the Lords of our Council and Session ought and should find facts, circumstances, and qualifications proven relevant to infer marriage between the pursuer and defender, and find and declare them married persons accordingly," leaving the other details to be set forth in the condescendence. Where, however, the parties have been married by a clergyman, or made or signed a specific declaration of marriage before witnesses, it may be as well to have in the conclusion the date and place of marriage. The defender is also asked to be ordained to adhere and cohabit with the pursuer. In special circumstances there may be added a conclusion for aliment,[1] or an alternative conclusion for damages for seduction,[2] or a conclusion for declarator that any other marriage is null.[3]

(c) *Condescendence.*—If the marriage is a regular one the fact of the proclamation or public notice, the name of the officiating clergyman, and the place and date of the celebration should be given.[4] Where a regular marriage was averred, and the name of the officiating clergyman was given, without a specification of the place and date of the celebration, the action was held to be irrelevant.[5]

Where the marriage is an irregular one it is not necessary that the averments should be so specific. Thus, if consent has been given *de præsenti*, the exact time and place of marriage or the precise words used need not be condescended on.[6] It is not a sufficient averment, however, of a declaration of consent *de præsenti* that the defender acknowledged on several occasions to different parties that he and the pursuer were man and wife, the pursuer not having been present on these occasions.[7] Where the declaration *de præsenti* is by written acknowledgment, this should be specifically averred and the writing produced along with specific averments of the surrounding circumstances and the conduct of parties, as it is not sufficient merely

[1] Sassen *v.* Campbell, 1823, 2 S. 193 (N. E. 171); 1826, 2 W. & S. 309; Elder *v.* M'Lean, 1831, 9 S. 393; Browne *v.* Burns, 1843, 5 D. 1288.

[2] Stewart *v.* Menzies, 1837, 15 S. 1198; 1841, 2 Robin. 547.

[3] Fraser, Husband and Wife, ii. 1240.

[4] Ibid., 1239.

[5] Hogg *v.* Hogg, 1853, 15 D. 340.

[6] Leslie *v.* Leslie, 1860, 22 D. 993, per Lord Deas; Longworth *v.* Yelverton, 1864, 4 Macq. 745, per Lord Westbury.

[7] Little *v.* Halliday, 1855, 17 D. 578.

to aver a written declaration of marriage in order to constitute marriage.[1]

If the declarator *de præsenti* has been made in presence of witnesses, their names and addresses should be set forth.

Where the consent is to be proved by promise *subsequente copula*, it does not seem necessary to aver the precise time and place of the promise.[2] If the promise is by writ, it should be set forth specifically and produced.[3] Of course, if possible, the place and date of the promise, and the surrounding circumstances, its acceptance, and the date and place of the *copula* should be given.[4] The place of the promise and *copula* should at least be averred as in Scotland, as it seems necessary to this mode of proof.[5] An averment of courtship followed by *copula* is not sufficient;[6] neither is an averment of a promise to marry in the event of the woman proving with child, which event occurred.[7]

If the marriage is sought to be proved by habit and repute, specific particulars should be condescended on as to both the requisites of this kind of proof.[8]

There is a relaxation of averments in actions by a child pursuing an action of legitimacy.[9]

It is quite competent to aver that consent has been given *de præsenti*, or that there was cohabitation with habit and repute, or a promise *subsequente copula* in the same action, but if so made these grounds must be kept distinct, as separate *media concludendi*, each to be made out by facts proper and competent for that purpose, and it will not do merely to give a detail of facts on one side and denials on the other, and then mixing the grounds together to say that they prove marriage in one way or another.[10]

(3) *Defences.*—The following defences have been set forth:—

[1] Imrie *v.* Imrie, 1891, 19 R. 185. See also Lockyer *v.* Sinclair, 1846, 8 D. 582, per Lord Justice-Clerk Hope, p. 607; Fleming *v.* Corbet, 1859, 21 D. 1034; Forster *v.* Forster, 1869, 7 M. 797.

[2] Campbell *v.* Honyman, 1830, 8 S. 1039; affd. 1831, 5 W. & S. 92.

[3] Ross *v.* Macleod, 1861, 23 D. 972.

[4] Fraser, Husband and Wife, ii. 1239.

[5] Ibid., i. 384; Yelverton *v.* Longworth, 1864, 4 Macq. 745, per Lord Chelmsford, p. 879, and Lord Kingsdown, p. 902.

[6] Harvie *v.* Inglis, 1837, 15 S. 964; Monteith *v.* Robb, 1844, 6 D. 934; Ross *v.* Macleod, 1861, 23 D. 972.

[7] Kennedy *v.* Macdowall, 1800, Ferg. Consist. Cases, 163.

[8] Fraser, Husband and Wife, ii. 1240.

[9] Lang *v.* Lang, 1841, 3 D. 980, per Lord Fullerton.

[10] Lowrie *v.* Mercer, 1840, 2 D. 953, per Lord Moncreiff; Forster *v.* Forster, 1869, 7 M. 797.

(a) *Where the Ground is Consent de Præsenti.*—That there was no consent.[1]

That the declaration was not serious.[2]

That the declaration was collusively granted[3] or granted for another purpose.[4]

That consent was obtained by force and fear,[5] or was induced by essential error.[6]

That the consent was not *de præsenti*, but a promise to marry in the future.[7]

Mora and taciturnity.[8]

(b) *Where the Ground is Promise Subsequente Copula.*—Denial of promise, or denial of *copula*, or both.

That the promise was conditional.[9]

That *copula* followed upon courtship, not promise.[10]

That the *copula* did not follow on the faith of a promise.[11]

That one of the spouses is dead.[12]

(c) *Where the Ground is Habit and Repute.*—That there was no cohabitation at bed and board.[13]

That there was no cohabitation in Scotland.[14]

That the parties at the commencement of the intercourse knew that there was an impediment to marriage and that no change in their relationship had taken place after the impediment had been removed.[15]

That there had been previous illicit intercourse.[16]

That the cohabitation had only been for a short period.[17]

(4) *Interim Aliment.*—Where a woman raises an action of declarator

[1] Petrie *v.* Petrie, 1911, S. C. 360.

[2] Kello *v.* Taylor, 1787, 3 Pat. App. 56 ; Lockyer *v.* Sinclair, 1846, 8 D. 582.

[3] Stewart *v.* Menzies, 1841, 2 Robin. 547.

[4] More *v.* M'Innes, 1782, 2 Pat. App. 598 ; Campbell *v.* Sassen, 1826, 2 W. & S. 309 ; Maloy *v.* Macadam, 1884, 12 R. 431 ; Imrie *v.* Imrie, 1891, 19 R. 185.

[5] Jolly *v.* M'Gregor, 1828, 3 W. & S. 85.

[6] Fraser, Husband and Wife, i. 448.

[7] A. B. *v.* C. D., 1844, 6 D. 1148, at p. 1150.

[8] Robertson *v.* Steuart, 1874, 1 R. 532.

[9] Stewart *v.* Menzies, 1833, 12 S. 179 ; Surtees *v.* Wotherspoon, 1873, 11 M. 384.

[10] Monteith *v.* Robb, 1844, 6 D. 934.

[11] Fleming *v.* Corbet, 1859, 21 D. 1034 ; Morrison *v.* Dobson, 1869, 8 M. 347 ; Surtees *v.* Wotherspoon, 1873, 11 M. 384.

[12] Fraser, Husband and Wife, i. 344, ii. 1241 ; Maloy *v.* Macadam, 1884, 12 R. 431.

[13] Stair, iv. 45. 19 ; Erskine's Inst. i. 6. 6 ; Lowrie *v.* Mercer, 1840, 2 D. 953.

[14] Dysart Peerage Case, 1881, 6 App. Cas. 489 ; MacCulloch *v.* MacCulloch, 1759, Mor. 4591 ; revd. 2 Pat. App. 33.

[15] Cunninghams *v.* Cunninghams, 1814, 2 Dow's App. 482 ; Lapsley *v.* Grierson, 1845, 8 D. 34 ; 1848, 1 H. of L. C. 498.

[16] Fleming *v.* Corbet, 1859, 21 D. 1034, per Lord Justice-Clerk Inglis, p. 1044.

[17] Wallace *v.* Fife Coal Co., Ltd., 1909, S. C. 682.

of marriage against a man, she is not entitled at the beginning of the case to an award of *interim* aliment.[1] Where, however, she has obtained a judgment in her favour in the Outer House, and the interlocutor is reclaimed against, an award of *interim* aliment may be given, especially if the defender is not her alleged spouse but his representative.[2]

(5) *Witnesses.*—The witnesses competent in a declarator of marriage are the same as in other consistorial actions, with this exception, that the agent of a party is not competent in an action of declarator founded on promise *subsequente copula.*[3]

(6) *Decree.*—The decrees of declarator of marriage and of absolvitor are in terms of the Act of Sederunt, 20th December 1823, and although this Act of Sederunt has not been included in the Codifying Act of Sederunt, there is nothing in the first-mentioned Act of Sederunt inconsistent with the latter, and accordingly the practice has not altered.

(a) *Decree of Declarator.*—

The Lord Ordinary finds facts, circumstances, and qualifications proved relevant to infer marriage betwixt the said *A. B.*, pursuer, and the said *C. D.*, defender, and hereby finds them married persons accordingly: Ordains the said *C. D.*, defender, to adhere to the said *A. B.*, pursuer, as his lawful wife, her society, fellowship and company, to treat, cherish, and entertain her at bed and board, and to perform the other conjugal duties as becometh a husband to his wife, and to cohabit with the said *A. B.*, pursuer, and nowise leave or desert her company in any time coming: Finds the said *A. B.* liable to the said *C. D.* in the expenses of the process, and decerns, etc.

(b) *Decree of Absolvitor.*—

The Lord Ordinary, etc., finds that the said *A. B.*, pursuer, has failed to instruct facts, circumstances, and qualifications relevant to infer marriage betwixt her and the said *C. D.*, defender; Therefore assoilzies *simpliciter* the said *C. D.*, defender, from the whole conclusions of the action, and decerns, etc.

These forms may be altered as the circumstances of each case require.

III. Declarator of Freedom and Putting to Silence.—Where there is a *fama* that two persons are married to each other, occasioned by the gossip or deliberate allegations of one of the persons, the other person may raise an action of declarator of freedom and putting to silence against such party.

The *conclusions* are, "that the Lords of our Council and Session

[1] Campbell *v.* Sassen, 1826, 2 W. & S. 309, at p. 327; Browne *v.* Burns, 1843, 5 D. 1288.

[2] Petrie *v.* Petrie, 1910, S. C. 136.

[3] 15 Vict. cap. 27, sec. 1; 16 Vict. cap. 20, sec. 2; 37 & 38 Vict. cap. 64, secs. 1 and 3; Statute Law Revision Act, 1883 (46 & 47 Vict. cap. 39).

ought and should find and declare that the pursuer is a free unmarried person and that the defender has falsely and calumniously given out and alleged to various persons that she (*or* he) is married to the pursuer: And therefore it ought and should be found and declared that the pursuer is free of any marriage with the defender, and the defender ought to be put to perpetual silence thereanent in all time coming." A conclusion for damages is sometimes asked, but they are never awarded if the pursuer has been in any way to blame for the defender's allegation of marriage.[1]

The *defence* may be—

(i.) A denial that the defender made such statements; or

(ii.) An averment of marriage.

In the latter event it is not necessary for the defender to raise an action of declarator of marriage, as the question whether parties are married may be decided in the action of declarator of freedom and putting to silence; and the decision will be *res judicata* between the parties.[2]

Proof must be led notwithstanding that the cause is undefended.[3]

IV. NULLITY OF MARRIAGE.—(1) *Parties.*—An action of declarator of nullity of marriage may be brought by either of the parties to the marriage, and also by anyone having a patrimonial interest, except the ground of the action of nullity is impotence, in which case the action can only be raised by the aggrieved party.[4]

There has been no decision whether an action will lie at the instance of the party under disability, but in a case where the ground of nullity was the non-residence of either party to an irregular marriage for the requisite number of days, decree was granted where both parties desired the marriage to be annulled.[5]

(2) *Grounds of Action.*—These are nonage,[6] insanity,[7] intoxication,[8] impotency,[9] prior marriage still subsisting,[10] propinquity of relation-

[1] Longworth *v.* Yelverton, 1862, 1 M. 161; 1864, 2 M. (H. L.) 49.

[2] H. *v.* R., 1844, 16 Jur. 576; Longworth *v.* Yelverton, 1862, 1 M. 161; 1864, 2 M. (H. L.) 49; Fraser, Husband and Wife, ii. 1245.

[3] A. B. *v.* C. D., 1901, 8 S. L. T. 406; Williams *v.* Forsythe, 1909, 2 S. L. T. 252.

[4] Fraser, Husband and Wife, i. 98, ii. 1244; Bell's Prin., sec. 1524; Hume's Comm. 456.

[5] Miller *v.* Deakin, 1912, 1 S. L. T. 253.

[6] Johnston *v.* Ferrier, 1770, Mor. 8931.

[7] Blair *v.* Blair, 1747, Mor. 6293; Graham *v.* Graham, 1907, 15 S. L. T. 33; A. B. or D. *v.* C. D., 1908, 15 S. L. T. 911; Park *v.* Park, 1914, 1 S. L. T. 88.

[8] Johnston *v.* Brown, 1823, 2 S. 495 (N. E. 437).

[9] A. B. *v.* C. D., 1863, 1 M. 1163; C. *v.* M., 1876, 3 R. 693; M. *v.* G., 1902, 10 S. L. T. 264; A. B. *v.* C. B., 1906, 8 F. 603.

[10] Fraser, Husband and Wife, i. 49; Polack *v.* Shiels, 1912, 2 S. L. T 239.

ship,[1] adultery of parties prior to marriage,[2] non-residence in cases of irregular marriage,[3] refusal to consummate,[4] fraudulent misrepresentation,[5] concealment of pregnancy to a man other than pursuer at the date of the marriage.[6]

(3) *Conclusions.*—The conclusions begin with a declarator of the particular ground of nullity as before set forth, and ask that the marriage between the parties was from the beginning, is now, and in all time coming should be declared null and void; that the pursuer is free to marry any free person; that the defender should be decerned and ordained to restore and deliver to the pursuer whatever was received by the defender from the pursuer on the occasion of, or by or through the said marriage. If the defender deliberately deceived the pursuer with regard to his condition or *status*, a conclusion for damages is sometimes added.[7]

If there has been a child of the marriage and the ground of declarator of nullity has been in respect of *bonâ-fide* ignorance on the part of the contracting parties of their prohibited relationship, there may be a conclusion for declarator that the child is legitimate, and in addition a conclusion for aliment.

(4) *Defences.*—The following defences may be propounded:—

Denial of impotency.[8]

Denial that impotency existed at the date of marriage or is incurable.[9]

Denial of prior marriage, or denial of the validity of a prior marriage in respect that it is null on any of the grounds already set forth.

Denial of adultery between the parties prior to marriage, or at least that the parties were not named in a decree of divorce as having committed adultery with each other.

Otherwise a general denial of the pursuer's averments.

Mora is not a good ground of defence.[10]

(5) *Lord Advocate.*—The Lord Advocate may enter appearance in

[1] Purves' Trs. *v.* Purves, 1895, 22 R. 513, (affinity equivalent to consanguinity).
[2] Act 1600, cap. 29 (record edition), cap. 20 (12mo edition); Lyle *v.* Douglas, 1670, Mor. 329; Fraser, Husband and Wife, i. 140.
[3] Miller *v.* Deakin, 1912, 1 S. L. T. 253.
[4] A. B. *v.* C. D., 1900, 38 S. L. R. 559.
[5] Wilson *v.* Horn, 1904, 41 S. L. R. 312.
[6] A. B. *v.* C. B., 1914, 2 S. L. T. 107; Stein *v.* Stein, 1914, S. C. 903.
[7] Mackenzie *v.* Macfarlane, 1891, 5 S. L. T. 292.
[8] A. B. *v.* C. B., 1884, 11 R. 1060; affd. 12 R. (H. L.) 36.
[9] Fraser, Husband and Wife, i. 86, 87.
[10] C. B. *v.* A. B., 1884, 12 R. (H. L.) 36, per Lord Chancellor Selborne, p. 40.

and defend actions of nullity in the public interest.[1] The Lord Ordinary may order intimation to the Lord Advocate.[2]

(6) *Sist of Action for Separation and Aliment.*—Where a husband raised an action of nullity of marriage and his wife raised an action of separation and aliment and both cases were put out together for adjustment, the Lord Ordinary closed both records and sisted the action of separation and aliment to await the decision on the declarator of nullity.[3]

(7) *Interim Aliment.*—A wife in an action of nullity of marriage is entitled to be alimented until the marriage is declared null. Accordingly, a motion for *interim* aliment to a wife who is the pursuer in an action of nullity will be granted.[4]

(8) *Interim Award of Expenses.*—See Maclaren on Expenses, p. 316.

V. Divorce for Adultery.—(1) *Parties.*—(a) *Pursuer.*—The pursuer is the injured spouse alone.[5] If the pursuer dies before a judgment in his or her favour, there is no express decision whether the pursuer's representatives can sist themselves and carry on the action, although there are expressions of opinion that might be so interpreted.[6] And also to the contrary.[7] If the pursuer dies after a judgment of the Lord Ordinary in his or her favour, the pursuer's representatives can sist themselves in order to support the judgment.[8]

A lunatic cannot be a pursuer in an action of divorce.[9]

(b) *Defender.*—The principal defender is the offending spouse. A co-defender or co-defenders may also be called.[10] If the *particeps criminis* is not called as a defender, he or she must have the action intimated to him or her, and is entitled to lodge a minute craving to be sisted as a party.[11] This intimation may be dispensed with if it is

[1] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 8.

[2] Paul *v.* Paul, 1896, 4 S. L. T. 171.

[3] A. B. *v.* C. B., 1911, 2 S. L. T. 99. See Sharp *v.* Sharp, 1898, 25 R. 1132.

[4] A. D. *v.* W. D., 1909, 1 S. L. T. 342; Fraser, Husband and Wife, i. 153, 154.

[5] Erskine's Inst. i. 6. 43; Walker *v.* Walker, 1871, 9 M. 1091, per Lord Ardmillan, p. 1095.

[6] Borthwick *v.* Borthwick, 1896, 24 R. 211, per Lord Young. See also Neilson *v.* Rodger, 1853, 16 D. 325; Darling *v.* Gray & Sons, 1892, 19 R. (H. L.) 31; Bern's Exr. *v.* Montrose Asylum, 1893, 20 R. 859; Riley *v.* Ellis, 1910, S. C. 934.

[7] Menzies *v.* Menzies, 1835, 14 S. 47, per Lord Medwyn, p. 51.

[8] Ritchie *v.* Ritchie, 1874, 1 R. 826.

[9] Thomson *v.* Thomson, 1887, 14 R. 634, per Lord Young.

[10] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 7.

[11] A. S., 17th July 1908, secs. 1, 2; C. A. S., C, iv. 2. See also Clark-Kennedy *v.* Clark-Kennedy, 1908, 16 S. L. T. 66. This has been extended to a case of divorce for desertion where the defence is that the pursuer committed adultery with a named person. Morton *v.* Morton, 18th December 1913, Lord Ormidale, unreported.

shown that such *particeps criminis* knows of the charges brought against him or her and does not desire to defend.[1]

Although by the practice of the commissaries creditors were entitled to appear in actions of divorce and state defences, the practice of the commissaries no longer is binding upon the Court.[2]

The Lord Advocate may enter appearance and defend for the public interest.[3]

Where the principal defender cannot be found, the children of the marriage, if any, and one or more of the defender's next of kin, if known and resident in Great Britain, must be made parties to the action, and such children and next of kin may appear and state defences.[4]

In a case where the defender was insane and confined in a lunatic asylum, the Lord Ordinary appointed a curator *ad litem*.[5]

(2) *Conclusions.*—The usual conclusions are—(1) To find facts and circumstances proven relevant to infer the defender's guilt of adultery with either a person or persons whose names and designations are given, or with a person or persons to the pursuer unknown, and to find the defender guilty of adultery with such person or persons accordingly; (2) to divorce and separate the defender from the pursuer in all time coming; (3) to find that the defender has forfeited all the rights and privileges of a lawful wife (*or* husband); and (4) to find that the pursuer is entitled to marry again.

If there are children of the marriage there may be a conclusion for their custody, though it has been held that the Court can determine as to custody without such a conclusion.[6] A conclusion for aliment to the children may also be inserted where the husband is defender or where the defending wife has separate estate. Where the wife is pursuer there is usually a conclusion for expenses. Where the wife is defender a conclusion for expenses will depend upon whether she has separate estate or not. If she has not separate estate, there should be no conclusion for expenses, as her expenses require to be paid by her husband whether she is successful or unsuccessful. If she has separate

[1] Thomson *v.* Thomson, 1912, 50 S. L. R. 8.

[2] Corbidge *v.* Somerville, 1913, S. C. 858. See also Greenhill *v.* Ford, 1824, 2 Sh. App. 435, and Ross *v.* Ross, 1909, 2 S. L. T. 117, where the trustee of a co-defender against whom a decree in absence for £250 damages was pronounced in absence was held entitled to appear and state defences.

[3] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 8. See also Ralston *v.* Ralston, 1881, 8 R. 371; Paul *v.* Paul, 1896, 4 S. L. T. 171.

[4] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 10.

[5] Rossie *v.* Rossie, 1899, 6 S. L. T. 357.

[6] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 9; Symington *v.* Symington, 1874, 1 R. 871.

estate, there is no reason why her separate estate should not be made liable for her husband's expenses.[1]

If a co-defender has been called, it is competent to insert a conclusion for damages against him.[2] A conclusion for expenses against him may also be inserted.[3]

Where the marriage has not been registered, it may be necessary to begin with a declaratory conclusion that the parties are married. In one case where a marriage on the ground of promise *subsequente copula* had been previously proved, but the date of the marriage had not been fixed, an action to dissolve the marriage on the ground of adultery was prefaced by a declaratory conclusion of the date of the marriage.[4]

It has not been decided whether it is competent for a wife to include in her summons a conclusion for accounting and for payment, upon decree of divorce being pronounced, of conventional and legal provisions which would in that event become due to her. There were expressions of opinion against the competency of such a proceeding.[5]

(3) *Will.*—In the will the messengers should be instructed to cite the defender, if abroad, *personally* or edictally in terms of section 10 of the Conjugal Rights (Scotland) Amendment Act, 1861.

(4) *Condescendence.*—There must be specific averments of—

(a) *The Marriage of Parties.*—Where the marriage has been registered, it is usual to make reference to an extract certificate of marriage and to produce it.[6] If the marriage is not registered, facts and circumstances must be set forth to show that the parties are married.

(b) *Domicile.*—Where it is likely that an objection will be taken by the Judge, or by the defender, to jurisdiction, there should be specific averment of facts and circumstances showing or tending to show that the husband's domicile is Scottish. (See *Jurisdiction, supra*, p. 706.)

(c) *Adultery.*—The same accuracy of statement is required in a divorce case as in a criminal libel.[7] Accordingly, the place and date of adultery should be set forth. Some latitude is allowed as to time; three months is not considered too long a period.[8] As regards place, an attempt should be made to be specific. Thus an averment that adultery was committed "in hotels and public-houses in Glasgow, the particular

[1] Bennet-Clark *v.* Bennet-Clark, 1909, S. C. 591.
[2] Glover *v.* Sampson, 1856, 18 D. 609.
[3] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 7.
[4] Sim *v.* Sim, 1834, 12 S. 633.
[5] Ellison *v.* Ellison, 1901, 4 F. 257.
[6] 17 & 18 Vict. cap. 80, sec. 58; 19 & 20 Vict. cap. 96, sec. 2.
[7] Tulloh *v.* Tulloh, 1861, 23 D. 639, per Lord Justice-Clerk Inglis, p. 644; Soeder *v.* Soeder, 1897, 24 R. 278, per Lord M'Laren.
[8] Steel *v.* Steel, 1835, 13 S. 1096; Walker *v.* Walker, 1871, 9 M. 1091; A. *v.* B., 1897, 5 S. L. T. 63.

places being to the defender unknown," was considered too wide.[1] Where possible, the person with whom adultery was committed should be mentioned.[2] If the person is unknown, it is quite relevant to make such an averment.[3]

Where the accusation of adultery by a wife proceeds upon an averment of the birth of a child which the pursuer avers to be illegitimate, it is necessary for the pursuer to condescend upon facts and circumstances to show that it was impossible for him to be the father.[4] Where the possibility of intercourse between the pursuer and defender is not excluded, the action will be held to be irrelevant.[5] In such circumstances, it is relevant to aver that the defender registered the birth as illegitimate.[6]

An averment that the defender infected the pursuer with venereal disease is a relevant averment of adultery.[7] An averment that the defender has committed rape, accompanied by an extract conviction for that crime, is relevant;[8] and so is an averment of antenuptial incontinence by the defender, if with the same person with whom it is alleged adultery was committed;[9] but an averment of loose conduct by the alleged paramour with other women is not competent.[10]

Where a pursuer has obtained separation founded upon acts of adultery, an averment of the same acts of adultery in an action of divorce is quite competent.[11]

(5) *Citation and Intimation.—Citation.*—See *supra*, p. 706.

Where the person with whom the defender is alleged to have committed adultery has not been called as a defender, *intimation* of the dependence of the action must be made to such person, who is entitled to lodge a minute craving to be sisted as a party;[12] and such party is entitled to a decision as to his guilt or innocence.[13] Such intimation

[1] Walker *v.* Walker, 1869, 41 Jur. 502.

[2] Nicolson *v.* Nicolson, 1770, Mor. 12639; Steel *v.* Steel, 1835, 13 S. 1096.

[3] Smith *v.* Smith, 1838, 16 S. 499; Gray *v.* Gray, 1865, 37 Jur. 566.

[4] Tulloh *v.* Tulloh, 1861, 23 D. 639, per Lord Justice-Clerk Inglis, p. 645; Fullerton *v.* Fullerton, 1873, 11 M. 720. See also Steedman *v.* Steedman, 1887, 14 R. 1066.

[5] Pegg *v.* Pegg, 1859, 21 D. 820.

[6] Fullerton *v.* Fullerton, 1873, 11 M. 720; Duncan *v.* Duncan, 1893, 30 S. L. R. 435.

[7] Fraser, Husband and Wife, ii. 1159.

[8] Galbraith *v.* Galbraith, 1902, 9 S. L. T. 346.

[9] Walton, Husband and Wife, 45.

[10] King *v.* King, 1842, 4 D. 590.

[11] Macpherson *v.* Macpherson, 1911, 2 S. L. T. 99. See also Geils *v.* Geils, 1850, 13 D. 321, per Lord Cuninghame, p. 333.

[12] A. S., 17th July 1908, secs. 1 and 2; C. A. S., C, iv. 2. See also Clark-Kennedy *v.* Clark-Kennedy, 1908, 16 S. L. T. 66.

[13] Raeside *v.* Raeside, 1913, S. C. 60.

may be dispensed with if it is shown that such person knows of the charges and does not desire to defend.[1]

(6) *Jurisdiction.*—See *supra*, p. 706.

(7) *Defences Upheld.*—(a) *Denial of Adultery.*

(b) *No Jurisdiction.*—See *Jurisdiction, supra*, p. 706.

(c) *Parties are not Married*, as where the marriage is null.[2]

(d) *Condonation.*—This is not a preliminary plea, but a defence on the merits.[3] Adultery does not annul the marriage, but is a just occasion upon which the injured party may annul it and be free; otherwise, if the parties please to continue, the marriage remains valid.[4] Accordingly, the offending spouse may plead condonation. Where the injured spouse condones the other spouse's adultery, there can be no conditions or qualifications. It is accordingly an absolute bar to divorce founded upon the condoned acts of adultery.[5]

The most complete proof of condonation is afforded by the injured spouse resuming cohabitation in the full knowledge of the wrong done to him.[6] Whether or not condonation can be inferred from any act short of cohabitation is doubtful. The canon law says that it can;[7] the law of England says that it cannot;[8] and although the point has not been expressly decided in Scotland, the trend of judicial opinion seems to be in favour of the English view.[9]

The injured spouse must be proved to have known of particular acts of adultery such as could found a divorce, and thereafter to have cohabited with the offending spouse.[10] Accordingly, where the alleged act of condonation was not proved to be subsequent to the act of adultery averred, and where the defender, though he had made inquiries about his wife's conduct and was full of suspicion, was not proved to have known of his wife's adultery when he slept with her on the occasion libelled, the defence was repelled.[11]

[1] Thomson *v.* Thomson, 1912, 50 S. L. R. 8.

[2] C. B. *v.* A. B., 1885, 12 R. (H. L.) 36, at p. 39.

[3] Taylor *v.* Binnie, 1832, 10 S. 680.

[4] Stair, i. 4. 7.

[5] Collins *v.* Collins, 1884, 11 R. (H. L.) 19. See also Watson *v.* Cruikshank, 1681, Mor. 330; Macfarlane *v.* Macfarlane, 1849, 11 D. 533, per Lord Fullarton, p. 541.

[6] Ralston *v.* Ralston, 1881, 8 R. 371, per Lord Craighill, p. 380; Hunt *v.* Hunt 1893, 31 S. L. R. 244.

[7] Fraser, Husband and Wife, ii. 1176.

[8] Keats *v.* Keats, 1859, 28 L. J. Mat. Cases, 57.

[9] Ralston *v.* Ralston, 1881, 8 R. 371; Collins *v.* Collins, 1884, 11 R. (H. L.) 19, per Lord Watson.

[10] Legrand *v.* Legrand, 1782, 2 Pat. 596; Fairlie *v.* Fairlie, 1815, 6 Pat. 121.

[11] Wemyss *v.* Wemyss, 1866, 4 M. 660, per Lord Justice-Clerk Inglis, p. 663. See also Duncan *v.* Maitland, 9th March 1809, F. C.; A. *v.* B., 1870, 8 S. L. R. 258; Ralston *v.* Ralston, 1881, 8 R. 371.

Where the spouses resided in the same house, but ate and slept separately, it was held that there was no condonation.[1]

There can be no condonation pleaded after decree of divorce in the Outer House if that judgment is upheld in the Inner House, but it may be pleaded if the Inner House recalls the judgment of the Lord Ordinary.[2]

In a case where the Lord Advocate appeared to defend for the public interest, it was not decided whether he had a right to take up and pursue a plea of condonation which had been set forth and withdrawn, but the opinion of the Judges was against the advisability of his so doing.[3]

Although a man condones his wife's adultery, this does not debar him from claiming damages from a co-defender.[4]

(e) *Lenocinium or Connivance.*—It is not advisable to attempt to frame a definition of what amounts to *lenocinium*, as each case depends upon its own facts.[5] It is sufficient to say that where a husband is accessory of the crime of adultery by his wife, or is participant in her crime, or is the direct occasion of her lapse from virtue, he will be obnoxious to the plea of *lenocinium*.[6] It is not necessary in order to found the plea that the husband should make gain from the adultery of his wife which he occasions or encourages.[7] It is not enough if a husband having suspicions of his wife's conduct sets a watch upon her movements.[8] Thus where a husband, who had reason to suspect his wife's conduct, was informed that she intended to visit a man at Gateshead with whom she corresponded, and when she asked him to be allowed to visit friends at Stirling and asked for money to go there, said, "Certainly, go," and gave her £2, and thereupon set a watch upon her movements, and was informed that she had gone to Gateshead and committed adultery there, a plea of *lenocinium* was repelled.[9] It is necessary that the husband should have done something to arrange the occasion of the adultery or expose his wife to what he knew would be great temptation. Accordingly, where a man who had married a

[1] Stedman *v.* Stedman, 1742, 6 Pat. 675 ; Lord Cloncurry's Case, 1811, Macqueen's Appellate Jurisdiction, 606 ; Edgar *v.* Edgar, 1902, 4 F. 632.

[2] Robertson *v.* Robertson, 1888, 15 R. 1001.

[3] Ralston *v.* Ralston, 1881, 8 R. 371.

[4] Macdonald *v.* Macdonald, 1885, 12 R. 1327.

[5] Thomson *v.* Thomson, 1908, S. C. 179, per Lord President Dunedin, p. 185.

[6] Wemyss *v.* Wemyss, 1866, 4 M. 660, per Lord Justice-Clerk Inglis, p. 662.

[7] Mackenzie *v.* Mackenzie, 1745, Mor. 333 ; Wemyss *v.* Wemyss, 1866, 4 M. 660, per Lord Justice-Clerk Inglis, p. 662.

[8] M'Intosh *v.* M'Intosh and Blair, 1882, 20 S. L. R. 117.

[9] Thomson *v.* Thomson, 1908, S. C. 179.

prostitute deserted her, and deliberately suggested that she should return to her former life, the plea was sustained.[1] Such a suggestion, however, must be proved to have been made by the husband, with the intent that it should be acted upon, that the wife understood that it was so meant, that she acted upon it, and that it was the immediate cause of her subsequent adultery. Thus, where a suggestion was made *in rixa* by a husband to his wife who had been a prostitute that she should return to her former life,[2] and where a husband after a quarrel left his wife late at night in the street to look after herself and she met her paramour and stayed with him all night at an hotel,[3] the plea was repelled.

The temptation to which a husband exposes his wife must be the immediate cause of her adultery. Accordingly, where a husband took his wife to a brothel, but the wife's adultery was not committed for several years afterwards and was quite unconnected with their visit;[4] and where a husband took his wife to a brothel and slept with her there for the purpose of ascertaining by personal inquiry and exhibition of her to the keeper of the house whether she had been in the house and committed adultery there,[5] the plea was repelled.

Lenocinium should always be pleaded on record and there should be appropriate averments to raise the plea.[6]

(f) *Mora.*—Where there has been such long delay after the adultery of the offending spouse has been brought to the knowledge of the injured spouse as to import acquiescence, the latter is barred from obtaining divorce.[7] Thus, where an action of divorce on the ground of adultery was raised by a husband thirteen years after the acts of adultery relied on had come to his knowledge, and his explanation of the delay was not considered satisfactory, the plea of *mora* was taken by the Court *ex proprio motu* and the action was dismissed.[8] Where there is a good reason for the delay, as where the husband was in Australia and came to the knowledge of his wife's adultery in Scotland ten years before raising an action of divorce, but the wife continued her course of adultery during all these years until shortly before her

[1] Marshall *v.* Marshall, 1881, 8 R. 702. See also M'Intosh *v.* M'Intosh and Blair, 1882, 20 S. L. R. 117, per Lord Young, p. 118.

[2] Hunter *v.* Hunter, 1883, 11 R. 359.

[3] Munro *v.* Munro, 1877, 4 R. 332. See also Fletcher *v.* Fletcher, 1902, 10 S. L. T. 296; Erskine *v.* Erskine, 1907, 15 S. L. T. 144.

[4] Donald *v.* Donald, 1863, 1 M. 741.

[5] Wemyss *v.* Wemyss, 1866, 4 M. 660.

[6] Munro *v.* Munro, 1877, 4 R. 332, per Lord Justice-Clerk Moncreiff, p. 344.

[7] Bell's Prin., sec. 1531.

[8] A. B. *v.* C. D., 1853, 15 D. 976.

husband's return, when the latter raised his action, the defence of *mora* will be rejected.[1] In a case where a husband raised an action of divorce in respect of acts of adultery reported to him shortly after their date thirteen years previously, and he had cohabited with her for some time thereafter, as he did not believe the reports, it was held that he was not entitled to divorce, owing to the lapse of time alone.[2]

Where the injured spouse has been ignorant of the wrong done, mere lapse of time from the acts complained of will not be a good defence.[3]

(g) *Collusion.*—Collusion is the permitting of a false case to be substantiated, or keeping back a just defence.[4] It must be an action of both husband and wife, and not one of these parties alone.[5] There can never be collusion unless you can aver facts which, if proved, would show that the oath of calumny had been falsely sworn.[6] It is not collusion if one of the parties offer the other party an opportunity of divorce and the latter takes advantage of it;[7] nor does it seem to be collusion that a husband seeking divorce on grounds which he believes to be true promises his wife a provision on condition that she shall abstain from maintaining a false defence;[8] nor is it collusion that a wife, who was unaware that intercourse with her husband after the latter's knowledge of her adultery constituted condonation on his part, did not defend the case in consequence of her husband agreeing not to publish the name of her paramour.[9]

It is a defence which may be put forward by the Lord Advocate in the public interest,[10] or by a co-defender,[11] and circumstances may be imagined in which a principal defender might state such a plea, as where he or she repented at the last moment of the fraudulent scheme.

A defender who did not appear to defend the action of divorce has been allowed to state such a plea in justification of an action of reduction of the decree,[12] but it is doubtful whether the Court would give effect

[1] Hellon *v.* Hellon, 1873, 11 M. 290.

[2] Duncan *v.* Maitland, 9th March 1809, F. C. See also A. B. *v.* C. D., 1853, 15 D. 976, per Lord Justice-Clerk Hope, p. 979.

[3] Gatchell *v.* Gatchell, 1898, 6 S. L. T. 218; Robertson *v.* Robertson, 1901, 9 S. L. T. 332.

[4] Walker *v.* Walker, 1911, S. C. 163, per Lord President Dunedin, p. 169.

[5] Ibid., at p. 168.

[6] Fairgrieve *v.* Chalmers, 1912, S. C. 745, per Lord President Dunedin, p. 747.

[7] Walker *v.* Walker, 1844, 17 Jur. 87.

[8] Graham *v.* Graham, 1881, 9 R. 327, per Lord Young, p. 334.

[9] Walker *v.* Walker, 1911, S. C. 163.

[10] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 8.

[11] Fairgrieve *v.* Chalmers, 1912, S. C. 745.

[12] Stewart *v.* Stewart, 1863, 1 M. 449; Walker *v.* Walker, 1911, S. C. 163.

to such a plea on the part of either a pursuer or a defender who had fraudulently allowed the Court to pronounce a decree of divorce.[1]

It does not seem to be a plea which could be put forward by creditors of the parties in the action of divorce,[2] although a creditor has been allowed to sue an action of reduction of a divorce obtained in absence upon grounds other than on the merits.[3]

In an early case it was held that a plea of collusion could not be admitted to probation after the oath *de calumnia* had been taken,[4] but this rule is not now in force.[5]

(h) *Marriage in the Bonâ-Fide Belief that her First Husband was Dead.*—There has been no express decision upon this point, but there is every reason to believe that this would now be considered to be a good defence.

In Erskine's view the first husband has it in his power "either to take his wife home to his family or to sue for a divorce against her on the head of adultery, for bigamy ought, as to this question, to be accounted adultery; but the woman, if she had probable grounds to believe her husband dead, is not subjected to any criminal trial, upon an accusation either of bigamy or of adultery."[6] This view, however, is hardly borne out by subsequent cases.

In an Outer House case where a husband deserted his wife and was absent for years abroad and believed to be dead, his wife married again. The first husband returned and raised an action of divorce for adultery, which his wife resisted on the ground that she was in the *bonâ-fide* belief that he was dead when she married again and that he himself spread reports about his death. This defence was considered relevant and a proof allowed.[7] Where, however, the wife in such circumstances did not marry again but had illicit intercourse, and there was no proof of *bonâ-fide* belief, although there was a report of the husband's death, the plea was repelled.[8] In an action of multiple-poinding where the legitimacy of a claimant was at issue, it was averred that he was illegitimate in respect that his father and mother were

[1] Graham *v.* Graham, 1881, 9 R. 327, per Lord Young; Walker *v.* Walker, 1911, S. C. 163, per Lord Dunedin, p. 169.

[2] Corbidge *v.* Somerville, 1913, S. C. 858, per Lord President Dunedin and Lord Kinnear. See also Greenhill *v.* Ford, 1822, 1 S. 296 (N. E. 275); affd. 1824, 2 Sh. App. 435.

[3] Corbidge *v.* Somerville, 1913, S. C. 858.

[4] Greenhill *v.* Ford, 1822, 1 S. 296 (N. E. 275).

[5] Fraser, Husband and Wife, ii. 1196.

[6] Erskine's Inst. i. 6. 44.

[7] Thomson *v.* Bullock, 1836, 12 Fac. 215.

[8] Donald *v.* Donald, 1863, 1 M. 741.

within the prohibited degrees and unable to contract a valid marriage, and the judgment of the Court holding the claimant to be illegitimate proceeded upon the ground that his parents, though they had made a *bonâ-fide* mistake with regard to the *law* of Scotland regarding forbidden degrees, had made no mistake *in fact* of their relationship, and therefore declared the claimant to be illegitimate.[1] In a later case, where a man married a woman under the *bonâ-fide* belief that her first husband was dead, and finding that he was still alive, raised an action of nullity of marriage, the Lord Ordinary, following an unreported case decided by Lord Wellwood,[2] granted decree of nullity, but at the same time declared the only child of the union to be legitimate.[3]

From these decisions and the authorities therein quoted it is thought that where a wife marries again in the *bonâ-fide* belief that her first husband is dead, and there is a child of the second marriage, the said child will be declared legitimate; and as this can only be done on the assumption that the child's mother had not committed adultery, it follows that her first husband cannot succeed in an action of divorce for adultery founded upon her second marriage. It is also thought that the same result follows where there has been no child of the second union.

(8) *Defences Repelled.*—(a) *Desertion.*—As there is a statutory remedy for desertion, desertion is not a valid defence to an action on the ground of adultery,[4] although if there are circumstances to found a plea of *lenocinium* the desertion may be of importance in aid of that defence.[5]

(b) *That the Defender has been Separated from the Pursuer.*[6]

(c) *Refusal of Conjugal Intercourse.*[7]

(d) *Recrimination.*—Although at one time recrimination was a good defence to an action of divorce for adultery,[8] it is so no longer.[9] It can only be stated in a counter action,[10] and when so stated, the

[1] Purves' Trs. *v.* Purves, 1895, 22 R. 513. See also Balfour's Practicks, p. 112; Craig, *De Feudis*, ii. 18. 18; Stair, iii. 3. 42; Ersk. Inst. i. 6. 51; Campbell *v.* Cochran, 1747, Mor. 10456.

[2] Fullerton *v.* Fullerton, 1893, unreported.

[3] Petrie *v.* Ross, 1896, 4 S. L. T. 63.

[4] Donald *v.* Donald, 1863, 1 M. 741.

[5] Ibid., per Lord Deas, p. 748.

[6] Macpherson *v.* Macpherson, 1911, 2 S. L. T. 99; *cp.* Allison *v.* Allison, 1839, 1 D. 1025; Geils *v.* Geils, 1850, 13 D. 321, per Lord Cuninghame, p. 333; 1852, 1 Macq. 255.

[7] Fraser, Husband and Wife, ii. 1165.

[8] Bankton, i. 5. 128; Balfour's Practicks, p. 99; Logan *v.* Wood, 1561, Mor. 339.

[9] Lockhart *v.* Henderson, 1799, Mor. App. *voce* Adultery, No. 1; Donald *v.* Donald, 1863, 1 M. 741, per Lord Ormidale, p. 742; Bridges *v.* Bridges, 1911, S. C. 250, per Lord Johnston, p. 252.

[10] Warrender *v.* Warrender, 1836, 14 S. 1099.

action first raised will be sisted until the two cases can be decided together.[1]

(9) *Procedure.*—If the action is defended a record is made up in the usual way, and thereafter a motion is made to find the libel relevant and to fix a diet of proof. If there is a plea of "no jurisdiction" or other preliminary plea, a preliminary proof upon such plea may first be ordered,[2] or the proof on jurisdiction or other preliminary pleaded, may be ordered to take place at the same time as the proof on the merits.[3] If the action is not defended, the case may be enrolled on the expiry of the days within which appearance may be entered, and a motion made to hold the libel relevant and to fix a diet of proof.

(a) *Fixing a Diet of Proof.*—A diet of proof in an undefended case will not be fixed for a date less than ten days from the date of calling.[4] If the cause is ready for proof at the end of the winter or summer session it shall be tried at sittings to be held by the Lord Ordinary before whom the cause depends, or by some other Judge acting for him at his request, during the ensuing vacation, at such time as may be fixed by the Lord Ordinary.[5]

(b) *Proof.*—In every case a proof must be taken whether it is defended or not. (See *Proof, supra,* p. 709.)

At the diet of proof the pursuer is first called upon to take the oath of calumny. The oath may, however, along with the pursuer's evidence, be taken on commission on cause shown. (See *Oath of Calumny, supra,* p. 708; *Commission to Examine Witnesses, supra,* p. 709.) Thereafter the proof proceeds in the usual way, except that no witness, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.[6] This has been interpreted to mean that the witness shall not be put in the position of refusing to answer. If, therefore, the question is put, it is the duty of the Judge to object and allow nothing to be taken down. If the witness volunteers to answer the question or to make a statement he

[1] Donald *v.* Donald, 1863, 1 M. 741, per Lord Ormidale, p. 744, and Lord President M'Neill, p. 745; Brodie *v.* Brodie, 1870, 8 M. 854; Walker *v.* Walker, 1871, 9 M. 1091, per Lord President Inglis, p. 1091; Bridges *v.* Bridges, 1911, S. C. 250, per Lord President Dunedin, p. 251.

[2] Pitt *v.* Pitt, 1861, 24 D. 1444; M'Leod *v.* Tancred, Arrol & Co., 1890, 17 R. 514; Barkworth *v.* Barkworth, 1913, 1 S. L. T. 299.

[3] Carswell *v.* Carswell, 1881, 8 R. 901; Main *v.* Main, 1912, 1 S. L. T. 493.

[4] Ramsay *v.* Ramsay, 1909, 1 S. L. T. 288.

[5] Court of Session Act, 1868, sec. 33.

[6] Evidence Further Amendment (Scotland) Act, 1874, sec. 2.

must, of course, be allowed to do so, and what he says may be recorded, but it is not allowed for a witness to be obliged even to decline to answer such a question.[1] It is not intended to prevent a witness who is willing to be examined from giving evidence on the question whether he or she has been guilty of adultery, and it is the duty of the Judge before whom the proof is being led to inform himself that the witness understands the line of examination proposed and the statutory protection, and to ascertain whether the witness is or is not willing notwithstanding to be so examined.[2]

(10) *Interim Aliment.*—(a) *Wife with Separate Estate.*—The practice of awarding *interim* aliment rests entirely upon necessity. Accordingly, a wife who has separate estate[3] is not entitled to an award of *interim* aliment.[4]

(b) *Wife without Separate Estate.*—The award depends upon whether the wife is pursuer or defender, and whether the cause is in the Outer House or Inner House.

(i.) *Wife Defender—Outer House.*—She is entitled to an award of *interim* aliment.[5]

(ii.) *Wife Defender—Inner House.*—A wife is entitled to have her award of *interim* aliment whether her husband has been successful or unsuccessful in the Outer House.[6]

(iii.) *Wife Pursuer—Outer House.* — There is no incompetency in applying for an award of *interim* aliment at the earliest stage of the case, and the determination of this matter lies entirely in the discretion of the Court.[7]

(iv.) *Wife Pursuer—Inner House.*—If the wife is successful and the judgment is reclaimed against, the *interim* aliment will be continued until the decision of the Inner House. If the wife is unsuccessful in the Outer House and reclaims against the judgment, it is very unlikely that she will obtain a renewal of her award of *interim* aliment.[8]

[1] Cook *v.* Cook, 1876, 4 R. 78. See also Kirkwood *v.* Kirkwood, 1875, 3 R. 235; Hunt *v.* Hunt, 1893, 1 S. L. T. 157.

[2] Bannatyne *v.* Bannatyne, 1886, 13 R. 619.

[3] Henderson *v.* Henderson, 1888, 16 R. 84.

[4] M'Farlane *v.* M'Farlane, 1844, 6 D. 1220.

[5] Hoey *v.* Hoey, 1883, 11 R. 25; Dryburgh *v.* Dryburgh, 1894, 2 S. L. T. 170; Robertson *v.* Robertson, 1905, 13 S. L. T. 114; Juner *v.* Juner, 1908, 15 S. L. T. 732.

[6] Ritchie *v.* Ritchie, 1874, 1 R. 826; Montgomery *v.* Montgomery, 1880, 8 R. 26; Hoey *v.* Hoey, 1883, 11 R. 25; Johnston *v.* Johnston, 1903, 5 F. 336. See, however, Kirk *v.* Kirk, 1875, 3 R. 128; Dalgleish *v.* Dalgleish, 1878, 5 R. 679.

[7] Currie *v.* Currie, 1833, 12 S. 171; Borthwick *v.* Borthwick, 1848, 10 D. 1312 at p. 1316 (note).

[8] Bonnar *v.* Bonnar, 1911, S. C. 854.

(11) *Interim Expenses.*—See Maclaren on Expenses, p. 302 *et seq.*

(12) *Decree.*—The decree is in the following terms:—

The Lord Ordinary, having considered the summons, with the proof adduced, productions, and whole process, finds facts, circumstances, and qualifications proved relevant to infer the defender *C. D.'s* guilt of adultery with , mentioned in the libel and proof; Finds him guilty of adultery accordingly, and therefore divorces and separates the said *C. D.*, defender, from the said *A. B.*, pursuer, her society, fellowship, and company, in all time coming; Finds and Declares that the said *C. D.*, defender, has forfeited all the rights and privileges of a lawful husband, and that the said *A. B.*, pursuer, is entitled to live single, or marry any free man, or as if she had never been married to the said *C. D.*, or as if he were naturally dead, and decerns.[1]

If it is desired that there should be a conclusion in terms of sec. 7 of the Guardianship of Infants Act, 1886, there may be added:—

Finds and declares the said defender to be a person unfit to have the custody of the children of the marriage of the pursuer and defender.

If there is desired a conclusion for the custody of the children:—

Finds the pursuer entitled to the custody of the pupil children of the marriage.

This is not competent after final decree.[2]

Where expenses are desired against husband:—

Finds the defender [*or* pursuer] liable in expenses to the pursuer [*or* defender].

Where a co-defender has been called and has been unsuccessful in his defence, the finding for expenses is as follows:—

Finds the co-defender liable to the pursuer in expenses, as well those incurred by the pursuer himself as those for which the pursuer may be liable in respect of the expenses of the principal defender; Further, finds the pursuer liable to pay the expenses incurred by the principal defender, and remits to the Auditor to tax the expenses now found due as between agent and client and to report, and decerns.

(13) *Effect of Divorce.*—(a) *On the Person.*—(i.) The *pursuer* is entitled to live single or to marry any free man as if he or she had not been married to the defender, or as if the latter were naturally dead.[3]

(ii.) The *defender* is also free to marry anyone except the party

[1] A. S., 20th December 1823.

[2] Lang *v.* Lang, 1869, 7 M. 445.

[3] See *Decree, supra*, sec. (11).

with whom the adultery, which was the ground for divorce, was committed, and whose name appears in the decree of divorce.[1] If the name of the *particeps criminis* does not appear in the decree, the defender can marry that person.

(b) *On Property.*—(i.) *Donations Inter Virum et Uxorem.*—If the *donee* is divorced, the divorce operates as a revocation of the donation.[2] If the *donor* is the guilty party, he or she cannot revoke the donation except the revocation has been made not only before the decree of divorce,[3] but also before the adultery was committed.[4] Where a provision was made by the wife's father, it was held not to be a donation *inter virum et uxorem*, but a contractual obligation between the father and the husband, and when the latter was divorced and became bankrupt his trustee could not revoke it *quoad excessum*.[5]

(ii.) *Aliment to Wife.* — This ceases when the decree of divorce becomes final, whether the wife is the innocent or the guilty party.[6]

(iii.) *Legal Provisions.*—If the wife is the guilty party she loses all the legal rights to which she is entitled, or to which she would become entitled on survivance of her husband, and the husband can claim his legal rights as if she were dead.[7] He cannot, however, claim *jus relicti*.[8] If the wife is the innocent party, she is entitled, upon the decree becoming final, to all the legal rights which would fall to her upon the death of her husband, even though her husband has, since the date of the decree, acquired a domicile in another country which does not recognise these rights.[9]

(iv.) *Tocher.*—Where divorce has been obtained on the ground of the husband's *desertion*, there is no doubt that he loses the tocher as well as *donationes propter nuptias*.[10] Where divorce has been obtained on the ground of the husband's *adultery*, however, the result is different. It is true that in an early case it was held that in such circumstances the husband required to restore the tocher, with the profits thereof, to

[1] Act 1600, cap. 29 (record edition), cap. 20 (12mo edition).

[2] Erskine's Inst. i. 6. 31 ; Johnston *v.* Roreson, 1624, 1 Brown's Supp. 21; Ritchie *v.* Ritchie's Trs., 1874, 1 R. 987.

[3] Murray *v.* Livingston, 1575, Mor. 328.

[4] Murray *v.* Livingston, 1576, Mor. 328. See also Spencer *v.* Spencer, 1909, 1 S. L. T. 49.

[5] Corbidge *v.* Somerville's Trs., 1911, S. C. 1326.

[6] Donald *v.* Donald, 1864, 2 M. 843 ; Stewart *v.* Stewart, 1872, 10 M. 472.

[7] Stair, i. 4. 20 ; Erskine's Inst. i. 6. 46.

[8] Eddington *v.* Robertson, 1895, 22 R. 430.

[9] Manderson *v.* Sutherland, 1899, 1 F. 621.

[10] Act 1573, cap. 1 (record edition), cap. 55 (12mo edition).

the wife,[1] but in two later cases the Court reversed this decision.[2] The latter of these two cases was referred to in a comparatively recent case where one of the parties attempted to cast doubt upon the soundness of the decision therein arrived at, but the Lord Ordinary (Kinloch) in his judgment remarked that "a decision of the Supreme Court, which has stood without any opposite judgment for more than a century, is not to be lightly set aside," and Lord President Inglis, in referring to it, did not attempt to detract from its authority.[3] In a more recent case both of these decisions are referred to as being rightly decided.[4]

It is clear from a House of Lords decision that if there have been *donationes propter nuptias* as well as tocher, the wife, upon her husband's divorce for adultery, cannot take the tocher as well as these donations.[5]

(v.) *Conventional Provisions.* — Where such provisions are made *propter nuptias*, whether derived from the spouses or third parties, divorce puts the guilty party in the same position as if he or she were dead. Thus, where by antenuptial contract a father conveyed lands to his daughter and her husband in conjunct fee and liferent, and to the longest liver of the two in liferent, but for the husband's liferent use only, and the husband divorced his wife, the husband was held entitled to the liferent of the whole;[6] where a father, by antenuptial contract, bound himself to pay an annuity of £200 to his son, whom failing to his son's wife, and the son's wife divorced her husband, it was held that the son's wife was entitled to payment of the annuity as if her husband was dead;[7] where a wife had power by a marriage contract to appoint her lands by a writing "during the subsistence of the marriage or after its dissolution by the death of the husband," it was held that the divorce of the husband was equivalent to death;[8] where, by antenuptial contract, the annual interest of certain funds provided partly by the husband and partly by the bride's father should be paid to the husband during the survivance of both spouses, and after the dissolution of the marriage by death to the survivor, it was held that the husband having been divorced for adultery, his wife was entitled to the whole interest of the trust funds as if her husband were dead;[9] where a husband, by *inter vivos* irrevocable deed, provided an annuity to his wife should she

[1] Auchinlech *v.* Stewart, 1540, Mor. 339.
[2] Anderson *v.* Welsh, 1734, Mor. 333; Justice *v.* Murray, 1761, Mor. 334.
[3] Johnstone-Beattie *v.* Dalzell, 1868, 6 M. 333.
[4] Ferguson *v.* Jack's Exrs., 1877, 4 R. 393, per Lord Ormidale, p. 396.
[5] Harvey *v.* Farquhar, 1872, 10 M. (H. L.) 26, per Lord Westbury, p. 33.
[6] Thom *v.* Thom, 1852, 14 D. 861.
[7] Johnstone-Beattie *v.* Johnstone, 1867, 5 M. 340.
[8] Macleod *v.* Cunninghame, 1841, 3 D. 1288; affd. 1846, 5 Bell's App. 210.
[9] Harvey *v.* Farquhar, 1872, 10 M. (H. L.) 26.

survive him, and he afterwards divorced his wife, the latter forfeited the provision as if she were dead;[1] and where a husband during marriage handed over to trustees a sum of money, the income of which he made payable to his wife during her lifetime, and after her death to the children of the marriage, and the husband subsequently divorced his wife, it was held that she had forfeited the provision.[2]

Where, however, a father left a share of his estate to his married daughter for her alimentary liferent use allenarly and for her children in fee, but declared that in the event of her husband predeceasing her the provisions of liferent and fee should cease, and directed his trustees to make payment to her of her whole share and interest in the estate absolutely, it was held that the word "predecease" was not equivalent to divorce;[3] and where an heir of entail in possession granted a bond of provision to his wife under the Aberdeen Act, and the wife agreed by antenuptial contract that it should not be recorded during the husband's lifetime, and the wife subsequently divorced her husband, it was held that the divorce operated so that she could record the bond, but that the annuity did not become payable until her husband's death.[4]

Divorce only forfeits provisions *propter nuptias* in favour of the guilty spouse in a question with the innocent spouse, but not in a question with third parties, such as children.[5]

There can be no forfeiture of property in favour of the innocent party which has not vested in the guilty party at the date of the divorce, and which is only acquired after the decree of divorce.[6]

The acceptance of conventional provisions by the injured spouse prevents a claim for his or her legal rights.[7]

Rights granted by third parties not *propter nuptias* are not affected by divorce.[8]

(vi.) *Restriction upon Divorced Wife's Power of Disposition.*—Where a divorced wife marries the co-defender mentioned in the decree, or lives with him plainly and openly at bed and board, she has no power to dispone her lands, heritages, tacks, rooms, or possessions either to

[1] Ritchie *v.* Ritchie's Trs., 1874, 1 R. 987.

[2] Hedderwick *v.* Morison, 1901, 4 F. 163.

[3] Taylor's Trs. *v.* Barnett, 1893, 20 R. 1032.

[4] Somervell's Tr. *v.* Dawes, 1903, 5 F. 1065.

[5] Harvey's Factor *v.* Spittal's Curator, 1893, 20 R. 1016; Dawson *v.* Smart, 1903, 5 F. (H. L.) 24.

[6] Earl of Elgin *v.* Fergusons, 1827, 5 S. 243 (N. E. 226).

[7] Cunninghame Fairlie *v.* Cunninghame Fairlie, 15th June 1819, F. C.; Harvey *v.* Farquhar, 1872, 10 M. (H. L.) 26, per Lord Westbury, p. 33.

[8] Lacy *v.* Morrison, 1869, 7 S. L. R. 45. See also Countess of Argyle *v.* Tenants of Dollar, etc., 1573, Mor. 327.

said pretended husband or to the issue of such pretended marriage, or to any person whatever, in prejudice of the issue of her first marriage, or, failing them, of her other lawful heirs whatever, all deeds of this nature being declared null.[1]

This restriction only applies to dispositions of heritage, and, accordingly, an assignation by an adulteress to her adulterous son was not found null on that score at the instance of the cedent's executor.[2]

(14) *Cross-Actions of Divorce.*—(a) *Generally.*—Where a husband and wife raise cross-actions of divorce for adultery, the one first raised is sisted until the other is ripe for judgment, and judgment is delivered in both cases at the same time.[3] In a case where counter actions of divorce were raised and resulted in decrees of divorce against each party, and the husband did not appeal, but the wife stated that she had appealed to the House of Lords against the decree of divorce against her at her husband's instance, the Inner House refused her aliment in respect that as the decree of divorce against her husband at her instance was not appealed by him, she was no longer his wife.[4] Where counter actions of divorce resulted in a decree of divorce at the husband's instance against his wife and a decree of absolvitor in the action at the wife's instance, and the wife reclaimed against the decree of absolvitor pronounced in her action, but allowed the other decree to become final, the Court held that as the marriage had been dissolved by final decree, the wife could not insist further in her action.[5]

(b) *Effect of Decree of Divorce in Both Actions.*—When both parties are guilty, neither can take any benefit through the marriage or the dissolution of the marriage.[6] Thus a wife who had no property of her own was held not entitled to any share of the *communio bonorum.*[6] Mutual guilt may affect the patrimonial interests of the parties in a very different way from a single decree,[7] but what effect divorce in counter actions would have upon any property which the wife had of her own and which fell within the *jus mariti* of her husband or of his right of administration, or both, or of the separate estate of either spouse over which the other had rights during marriage, has not been determined.

[1] Act 1592, cap. 11 (record edition), cap. 119 (12mo edition); Erskine's Inst. ii. 3. 13 and 16.

[2] Irvine *v.* Skene, 1707, Mor. 9471.

[3] Brodie *v.* Brodie, 1870, 8 M. 854; Walker *v.* Walker, 1871, 9 M. 460.

[4] Donald *v.* Donald, 1864, 2 M. 843.

[5] Bridges *v.* Bridges, 1911, S. C. 250.

[6] Fraser *v.* Walker, 1872, 10 M. 837, per Lord President Inglis, p. 843.

[7] Lockhart *v.* Henderson, 1799, Mor. *voce* Adultery, Appendix No. 1; Brodie *v.* Brodie, 1870, 8 M. 854, per Lord President Inglis and Lord Deas.

(15) *Co-defender.*—In every action of divorce for adultery at the instance of the husband it is competent to cite, either at the commencement or during the dependence thereof, as a co-defender along with his wife the person with whom she is alleged to have committed adultery, and it is competent to decern against such co-defender for the payment of the whole or any part of the expenses of process as the same shall be taxed as between agent and client.[1] (See Maclaren on Expenses, p. 308.)

The husband may also have a conclusion for damages against the co-defender, even though he has condoned his wife's adultery.[2]

The *particeps criminis*, although named in the condescendence, need not necessarily be called as a party. If he or she is named in the condescendence and not called as a party, the Lord Ordinary in undefended cases must, and in defended cases may, order the action to be intimated to such alleged *particeps criminis*, and he or she may appear and defend, subject to the same rights and liabilities as to expenses as if he or she had been called as a party.[3]

The confession by a wife that she has committed adultery with the co-defender is not evidence against the latter,[4] except in circumstances which would amount in law to a corroboration of the wife's story.[5]

Where the wife has been found guilty of adultery, but the co-defender has been assoilzied, the proper form of interlocutor is as follows:—

Finds facts, circumstances, and qualifications proven relevant to infer the guilt of the defender , therefore finds her guilty of adultery accordingly, and divorces and separates the defender from the pursuer and from his society, fellowship, and company; Finds and Decerns and Declares in terms of the conclusions of the summons for divorce; Finds that no evidence has been adduced relevant and sufficient to infer the guilt of adultery of the co-defender with the defender, therefore assoilzies the defender from the conclusions of the action so far as laid against him, and decerns.[6]

See *Proof, supra*, pp. 709, 729; *Decree, supra*, p. 731.

(16) *Date of Divorce.*—If the Lord Ordinary grants decree of divorce, and his judgment is reclaimed against and affirmed, the date of divorce is the date of the Lord Ordinary's judgment.[7]

[1] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 7.
[2] Macdonald *v.* Macdonald, 1885, 12 R. 1327.
[3] A. S., 17th July 1908; C. A. S., C, iv. 2.
[4] Laidlaw *v.* Laidlaw, 1894, 2 S. L. T. 168; Leitch *v.* Leitch, 1906, 14 S. L. T. 396. See also Rattray *v.* Rattray, 1897, 25 R. 315.
[5] Ramsay *v.* Ramsay, 1880, 17 S. L. R. 793.
[6] Leitch *v.* Leitch, 1906, 14 S. L. T. 396.
[7] Robertson *v.* Robertson, 1888, 15 R. 1001.

VI. Divorce for Desertion.—(1) *Generally.*—Divorce for desertion was introduced by the Act of 1573,[1] which, as amended by the Statute Law Revision Act of 1906,[2] is as follows:—

"Quhatsumeuer persoun or persounis Joyint in lauchfull Matrimonie husband or wife diuertis fra utheris companie without ane ressonabill caus alledgit or deducit befoir ane Judge and remanis in thair malicious obstinacie be the space of four yeiris and in the meane time refusis all preuie admonitiounis The husband of the wife or the wife of the husband for dew adherence And in case na sufficient causis be alledgeit quhairfoir na adherence suld be the malicious and obstinat defectioun of the partie offendar to be ane sufficient caus of diuorse and the said partie offendar to tyne and lois thair Tocher *Et donationes propter Nuptias.*"

Previous to raising an action of divorce for desertion it was formerly necessary that the party deserted should pursue an action of adherence before the Judge Ordinary, and that decree of adherence should be enforced by charge and denunciation. Thereafter an application required to be made to the Church for an order to admonish the defender privately to adhere, and if this were disregarded, the archbishop, bishop, or superintendent directed charges to the minister of the parish where the defender resided to proceed against the defender with public admonitions, and if they were contemned, the defender was excommunicated.[1] By the Conjugal Rights (Scotland) Amendment Act, 1861,[3] however, it is enacted that "it shall not be necessary, prior to any action of divorce, to institute against the defender any action of adherence, nor to charge the defender to adhere to the pursuer, nor to denounce the defender, nor to apply to the presbytery of the bounds, or any other judicature, to admonish the defender to adhere." There is no mention in the latter statute of a dispensation with the sentence of excommunication, but it has since been decided that such is not now required.[4] Accordingly an action of divorce for desertion may now be raised by simply instituting and following out the action of divorce itself without going through any intermediate forms.[5]

(2) *Conclusions.*—The summons concludes for declarator that the defender has been guilty of wilful, obstinate, and malicious non-adherence to and desertion of the pursuer for the space of four years; that the defender should be divorced and separated from the pursuer

[1] Act 1573, cap. 1 (record edition), cap. 55 (12mo edition).
[2] 6 Edw. VII. cap. 38.
[3] 24 & 25 Vict. cap. 86, sec. 11.
[4] M'Callum *v.* M'Callum, 1865, 3 M. 550; Watson *v.* Watson, 1890, 17 R. 736, per Lord President Inglis, p. 739.
[5] M'Callum *v.* M'Callum, 1865, 3 M. 550, per Lord Deas, p. 554.

and from his, or her, society, fellowship, and company in all time coming; that the pursuer is freed of the marriage contracted between the pursuer and defender; and that the pursuer is free to live single, or marry any free man. If the defender is the husband there is usually a conclusion to the effect that he has lost and amitted all *dos* and tocher and all goods, gear, etc., whatsoever which the defender received with or on account of the pursuer, or which were anyways contracted or agreed to be paid to the defender *causa matrimonii, nomine dotis,* and *propter nuptias.* If the defender is the wife, the conclusion is to the effect that she has lost and amitted whatever she would have a right to claim *jure relictæ* or otherwise as the pursuer's wife.

There may also be inserted conclusions for (1) the custody of the children of the marriage and interdict against interference; and (2) aliment for said children and expenses of process if the defender is the husband or is the wife with separate estate.

(3) *Requisites in Order to Obtain Divorce.*—The pursuer must have been willing during the time of the defender's desertion to adhere to the latter,[1] except where there was good reason on the part of the pursuer for non-adherence, such as that there was cruelty on the part of the defender which was intended to put an end to cohabitation.[2] An offer by the pursuer to cohabit at board but not at bed is not sufficient.[3]

The pursuer must have made some privy remonstrance or genuine attempt to induce the defender to return to live with the pursuer or to take up house together.[4] This, however, is a matter depending upon the circumstances of each case.[5] Where a husband wrote to his wife saying that he adhered to his former requests to her to return to live with him, and desired that she should do so, the Court held that it was a standing offer to the wife to return and needed no repetition, and that he had not failed in his duty to give "privy admonitions for due adherence" in terms of the Act of 1573.[6]

There must be malicious non-adherence for four years.[7] It will interrupt the running of that period if the defender has been in jail,[8]

[1] Bowman *v.* Bowman, 1866, 4 M. 384; O'Hara *v.* O'Hara, 1894, 1 S. L. T. 532; Munro *v.* Munro, 1895, 2 S. L. T. 598.

[2] Winchcombe *v.* Winchcombe, 1881, 8 R. 726; Gow *v.* Gow, 1887, 14 R. 443; Murray *v.* Murray, 1894, 21 R. 723.

[3] Stair *v.* Stair, 1905, 12 S. L. T. 788.

[4] Barrie *v.* Barrie, 1882, 10 R. 208.

[5] Watson *v.* Watson, 1890, 17 R. 736; Shaw *v.* Shaw, 1908, 16 S. L. T. 371; Robertson *v.* Robertson, 1908, 16 S. L. T. 641; Hutchison *v.* Hutchison, 1909, S. C. 148.

[6] M'Ewan *v.* M'Ewan, 1908, S. C. 1263.

[7] Act 1573, cap. 1 (record edition), cap. 55 (12mo edition).

[8] Young *v.* Young, 1882, 10 R. 184.

or is insane;[1] but it will not interrupt the running if during that time the defender has raised an action of separation against the pursuer.[2] The four years do not require to be absolutely continuous where part of the time the defender has been compulsorily absent.[3]

If the four years have not been completed at the date of raising the action, an opinion has been expressed that the Court will not sist the action until that period has elapsed.[4]

It is desertion if the defender, though living in the same house, refuses to have marital relations with the pursuer.[5]

Non-adherence must not be of consent.[6]

A wife who had previously obtained decree of separation and aliment has been granted decree of divorce for desertion.[7]

(4) *Condescendence.*—The pursuer should aver—(1) marriage of parties; (2) cohabitation; (3) birth of children, if any; (4) malicious desertion of defender, either by defender leaving the pursuer, or by the pursuer being compelled to leave the defender, for four years; (5) willingness of pursuer to adhere; (6) privy remonstrance by pursuer, where such remonstrance is possible.

(5) *Defences Upheld.*—No jurisdiction;[8] or other appropriate preliminary plea.

Denial of desertion, or denial that desertion was malicious.[9]

Cruelty, and bodily fear arising from past cruelty.[10]

Mental anxiety preying upon a wife's health and caused by her husband's treatment of her; well-founded fear of physical restraint, and an act of personal violence.[11]

Adultery of pursuer prior to raising the action.[12]

[1] Gilfillan *v.* Gilfillan, 1902, 10 S. L. T. 295. See also Scott *v.* Scott, 1908, S. C. 1124.

[2] M'Ewan *v.* M'Ewan, 1908, S. C. 1263.

[3] Hunter *v.* Hunter, 1898, 35 S. L. R. 659.

[4] Ross *v.* Ross, 1899, 1 F. 963, per Lord Moncreiff, p. 969.

[5] Stair *v.* Stair, 1905, 12 S. L. T. 788; A. *v.* B., 1905, 13 S. L. T. 532; X. *v.* Y., 1914, 1 S. L. T. 366.

[6] Gibson *v.* Gibson, 1894, 21 R. 470. See also Barkworth *v.* Barkworth, 1912, 2 S. L. T. 274.

[7] Horsley *v.* Horsley, 1914, 1 S. L. T. 92.

[8] Stavert *v.* Stavert, 1882, 9 R. 519.

[9] A. *v.* B., 1868, 5 S. L. R. 562; Irvine *v.* Irvine, 1884, 21 S. L. R. 493; Ross *v.* Ross, 1899, 1 F. 963.

[10] Stevens *v.* Stevens, 1881, 18 S. L. R. 601. See also Kinnear *v.* Kinnear, 1882, 20 S. L. R. 52.

[11] Mackenzie *v.* Mackenzie, [1895] A. C. 384; 22 R. (H. L.) 32.

[12] Auld *v.* Auld, 1884, 12 R. 36. See also Mackenzie *v.* Mackenzie, 1883, 11 R. 105; Hunter *v.* Hunter, 1900, 2 F. 771 (pursuer married again in *bonâ-fide* belief that first husband was dead).

No privy remonstrance or effort made by pursuer to induce defender to return.[1]

Defender in prison during part of the four years.[2]

Defender insane during the four years.[3]

A *bonâ fide* offer by the defender to adhere.[4]

(6) *Defences Repelled.*—

Mora.[5]—

That the pursuer had superseded the defender in the management of a shop belonging to the former.[6]

That the pursuer made a *bonâ-fide* attempt to have defender confined in a lunatic asylum.[7]

That the pursuer did not dismiss a nurse who had looked after a child of the marriage from its infancy, but to whom the defender objected.[8]

That the pursuer in his conversation and letters was pedantic and injudicious.[9]

That the pursuer had attempted to have intercourse with a relative of the defender, the information regarding which occurrence not being in the defender's knowledge until after the closing of the record.[10]

No defence is good which would not have been a sufficient answer to an action of adherence.[11]

(7) *Jurisdiction, Citation and Intimation,*[12] *Oath of Calumny, Procedure, Proof, Interim Aliment, Interim Expenses,* etc., same as in *Divorce for Adultery, supra,* p. 719 *et seq.*

(8) *Effect of Decree.*—The effect of a decree of divorce for desertion is the same as the effect of a decree of divorce for adultery, except that

[1] Barrie *v.* Barrie, 1882, 10 R. 208; Watson *v.* Watson, 1890, 17 R. 736; Shaw *v.* Shaw, 1908, 16 S. L. T. 371; Robertson *v.* Robertson, 1908, 16 S. L. T. 641; Hutchison *v.* Hutchison, 1909, S. C. 148; *cp.* Willey *v.* Willey, 1884, 11 R. 815.

[2] Young *v.* Young, 1882, 10 R. 184.

[3] Gilfillan *v.* Gilfillan, 1902, 10 S. L. T. 295; *cp.* Scott *v.* Scott, 1908, S. C. 1124.

[4] Auld *v.* Auld, 1884, 12 R. 36, per Lord President Inglis, p. 40, and Lord Shand, p. 41; *cp.* Muir *v.* Muir, 1879, 6 R. 1353; Winchcombe *v.* Winchcombe, 1881, 8 R. 726, per Lord Justice-Clerk Moncreiff.

[5] Mackenzie *v.* Mackenzie, 1883, 11 R. 105.

[6] Gould *v.* Gould, 1887, 15 R. 229.

[7] Cathcart *v.* Cathcart, 1900, 2 F. 404.

[8] M'Ewan *v.* M'Ewan, 1908, S. C. 1263.

[9] Barkworth *v.* Barkworth, 1912, 2 S. L. T. 274.

[10] A. *v.* B., 1896, 23 R. 588.

[11] Mackenzie *v.* Mackenzie, [1895] A. C. 384; 22 R. (H. L.) 32.

[12] It has been held that, where the defence is that the pursuer has committed adultery with a person named, intimation of the dependence of the action must be made to such person as in actions of divorce for adultery.—Morton *v.* Morton, 18th December 1913, per Lord Ormidale (not reported).

in the former case the husband, if defender, requires to return the tocher.[1] (See *Tocher, supra*, p. 732.)

VII. Judicial Separation and Aliment.—(1) *Grounds for Obtaining Decree.*—The grounds upon which judicial separation may be obtained are (*a*) Adultery; and (*b*) Cruelty.

(a) *Adultery.*—At one time it was thought that the only remedy for adultery was divorce, but now, upon the principle *majori inest minus*, the remedy of judicial separation and aliment is allowed.[2]

(b) *Cruelty.*—Actions on the ground of cruelty are usually at the instance of a wife, but there is no reason why they should not be at the instance of a husband.[3]

It is difficult to define precisely what amounts to cruelty justifying a judicial separation, but cruelty to a wife has been thus expressed:—"Personal violence, as assault upon the woman; threats of violence which induce the fear of immediate danger to her person; maltreatment of her person so as to injure her health; these are both by the law of Scotland and the law of England a sufficient ground" for the remedy of separation and aliment.[4]

The question, therefore, is—"Is it safe for the wife to live in the same house as her husband, or will not the result of her doing so be the risk of some very aggravated act of violence?"[5] Accordingly, acts of personal violence accompanied by threats,[6] and even a single act of personal violence following upon frequent and long-continued threats,[7] have been found sufficient to entitle a pursuer to a judicial separation.

Actual Physical Violence, however, is not Necessary.—"If the husband without any violence, or threat of violence to the wife, without any maltreatment endangering life or health, or leading to an apprehension of danger to life or health, were to exercise mere tyranny, constant insult, vituperation, scornful language, charges of gross offences entirely groundless; charges of this kind made before her family, her children, her relations, her friends, her servants; insulting her in the face of the world or of her own domestics; calling upon them to join in those insults, and to treat her with contumely and with scorn; if such a case were to

[1] Act 1573, cap. 1 (record edition), cap. 55 (12mo edition).

[2] Fergusson's Consistorial Law, pp. 190, 191; Letham *v.* Letham, 1823, 2 S. 284 (N. E. 250); Wilson *v.* Wilson, 1866, 4 M. 732; Symington *v.* Symington, 1874, 1 R. 871; Taylor *v.* Taylor, 1903, 11 S. L. T. 487.

[3] Nisbet *v.* Nisbet, 1896, 34 S. L. R. 229.

[4] Paterson *v.* Paterson, 1850, 7 Bell's App. 337, per Lord Brougham, p. 363.

[5] Graham *v.* Graham, 1878, 5 R. 1093, per Lord President Inglis, p. 1096.

[6] Macfarlane *v.* Macfarlane, 1849, 11 D. 533.

[7] Steuart *v.* Steuart, 1870, 8 M. 821. See also Strain *v.* Strain, 1885, 13 R. 132, per Lord Shand, p. 138.

be made out, or even short of such a case, any injurious treatment which would make the marriage state impossible to be endured, rendering life itself almost unbearable," the remedy of separation might be extended to such a case.[1] Thus, threats and attempted violence combined with the use of brutal and shocking expressions,[2] and false charges of criminal immorality where there has been injury or reasonable apprehension of injury to health,[3] have been held sufficient to secure separation.

The reckless communication of *venereal disease* acquired before marriage has been held to be cruelty.[4]

At common law *habitual intoxication* alone on the part of the defender is not sufficient to entitle a pursuer to judicial separation,[5] and it requires habitual intoxication combined with such conduct as to induce reasonable fear of personal injury to obtain this remedy.[6] The subject has been dealt with by statute. By the Licensing (Scotland) Act, 1903,[7] it is enacted that "where a husband or wife is an habitual drunkard as defined by section 3 of the Habitual Drunkards Act, 1879, and this fact is established in a consistorial action instituted by either spouse according to the existing law and practice in Scotland, such fact shall be held to be equivalent in law to and shall have and be treated by the Court as having the same legal consequences and effects as cruelty and bodily violence by the habitual drunkard towards his or her spouse." The Habitual Drunkards Act, 1879,[8] defines an habitual drunkard thus—"Habitual drunkard means a person who, not being amenable to any jurisdiction in lunacy, is notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others, or incapable of managing himself or herself and his or her affairs."

Since the passing of the first-mentioned Act there have been three cases in which these sections were founded on for separation and aliment. In the first the defender was held to be an habitual drunkard in circumstances which came up to what would be sufficient at common law to entitle the Court to grant separation, and separation was accordingly granted.[9] In the second the defender was held to be an habitual drunkard

[1] Paterson *v.* Paterson, 1850, 7 Bell's App. 337, per Lord Brougham, p. 366.
[2] Fulton *v.* Fulton, 1811, Fergusson's Consistorial Law, 185.
[3] Aitchison *v.* Aitchison, 1902, 10 S. L. T. 331; *cp.* Russell *v.* Russell, [1897] A. C. 395.
[4] Strain *v.* Strain, 1885, 13 R. 132.
[5] Fulton *v.* Fulton, 1850, 12 D. 1104, per Lords Mackenzie and Cuninghame.
[6] Fulton *v.* Fulton, 1850, 12 D. 1104; M'Gaan *v.* M'Gaan, 1880, 8 R. 279.
[7] 3 Edw. VII. cap. 25, sec. 73.
[8] 42 & 43 Vict. cap. 19, sec. 3 (3) (*b*).
[9] Isles *v.* Isles, 1906, 14 S. L. T. 118.

in terms of the Act, in respect that, when intoxicated, he was dangerous to himself and incapable of managing himself and his own affairs, and that knowing this he had three times voluntarily entered a Keeley Institute for the cure of drunkenness.[1] In the third case the defender had voluntarily entered a home and was out on probation and anxious to give the curative treatment a proper trial, and the Lord Ordinary was of opinion that he could not hold that he was an habitual drunkard.[2]

The renewal of marital intercourse after acts of cruelty is not *remissio injuriarum* in the same sense as is intercourse after knowledge of adultery in actions for divorce. In the former case the reconciliation is only conditional and dependent upon the permanent forbearance from violence by the party who had been formerly guilty.[3]

(2) *Conclusions.*—The conclusions are first for declarator that the defender has been guilty of adultery, or that the defender has been guilty of maltreating the pursuer, or both. Then follows a finding that the pursuer has full liberty to live apart from the defender and that the defender should separate himself from the pursuer *a mensa et thoro* in all time coming. A conclusion for custody of the children of the marriage is usually thereafter inserted, although the Court has granted such custody without a conclusion to that effect.[4] Conclusions for aliment to the pursuer and to each of the children of the marriage follow, along with interdict against the defender interfering with his said children or with the pursuer as their custodier. In conclusion, expenses are asked for. If the husband is pursuer the conclusions for aliment and expenses are omitted, except where the wife has separate estate.

(3) *Condescendence.*—Where the ground of action is adultery, the averments are similar to the averments in actions of divorce for adultery. (See *supra*, p. 721.)

Where the ground of action is cruelty, the charges must be specific, otherwise the action may be dismissed. The pursuer may, however, be allowed to open up her record and make specific averments.[5] Condoned charges of adultery or of cruelty cannot alone be founded on to make a relevant case;[6] and care should be taken that where there

[1] A. B. *v.* C. D., 1911, 1 S. L. T. 407.

[2] X. Y. *v.* Z. Y., 1911, 1 S. L. T. 459.

[3] Macfarlane *v.* Macfarlane, 1849, 11 D. 533; Martin *v.* Martin, 1895, 3 S. L. T. 150.

[4] Symington *v.* Symington, 1874, 1 R. 871.

[5] Borthwick *v.* Borthwick, 1848, 10 D. 1312.

[6] Watson *v.* Watson, 1874, 12 S. L. R. 78; Graham *v.* Graham, 1878, 5 R. 1093; Smeaton *v.* Smeaton, 1900, 2 F. 837; Smith *v.* Smith, 1904, 12 S. L. T. 341 and 560; Jackson *v.* Jackson, 1906, 14 S. L. T. 331.

is not actual physical violence, the conduct of the defender should be set forth as affecting the pursuer's health, or at least that there is a reasonable apprehension that her health will be affected thereby.[1]

(4) *Defences.*—Where the ground of action is *adultery*, defences are in similar terms to defences in an action of divorce for adultery, even including condonation.[2]

Where the ground of action is *cruelty*, the defences may be—

(*a*) Denial of acts condescended on.

(*b*) Admission of acts condescended on, and averment that they were deserved.[3]

(*c*) *Remissio injuriarum* or condonation. Condonation is only forgiveness conditional upon cruelty not being repeated, and, therefore, is only a good defence where there are no acts of cruelty subsequent to condonation. If there are such, the whole history of the parties may be inquired into.[4]

(*d*) *Mora.*—This is not an absolute bar, but, taken with other circumstances, may infer *remissio injuriarum.*[5]

(*e*) Aliment claimed is too much.

(*f*) The pursuer has separate estate, or can aliment herself by her own industry.[6]

(5) *Interim Aliment and Expenses.*—(a) *Aliment.*—In cases where the wife is living apart from her husband and has no means for her own subsistence, an *interim* award of aliment will likely be given.[7] If, however, she is residing in family with her husband, no such award will be given.[8] *Interim* aliment, however, is a question entirely in the discretion of the Court,[9] and may be given *in initio litis.*[10] Where in an action at her instance against her husband a wife was unsuccessful and reclaimed, an award of *interim* aliment was refused.[11]

(b) *Expenses.*—See Maclaren on Expenses, p. 312.

[1] Aitchison *v.* Aitchison, 1902, 10 S. L. T. 331.

[2] Watson *v.* Watson, 1874, 12 S. L. R. 78; Smith *v.* Smith, 1904, 12 S. L. T. 341 and 560.

[3] Fraser, Husband and Wife, ii. 898.

[4] Ibid., 901; Macfarlane *v.* Macfarlane, 1849, 11 D. 533; Watson *v.* Watson, 1874, 12 S. L. R. 78; Graham *v.* Graham, 1878, 5 R. 1093; Martin *v.* Martin, 1895, 3 S. L. T. 150; Smeaton *v.* Smeaton, 1900, 2 F. 837.

[5] Fraser, Husband and Wife, ii. 902.

[6] M'Farlane *v.* M'Farlane, 1844, 6 D. 1220. See also Henderson *v.* M'Callum, 1794, Hume's Dec. 202.

[7] Borthwick *v.* Borthwick, 1848, 10 D. 1312, at p. 1316 (note); Stuart Brown *v.* Stuart Brown, 1911, 2 S. L. T. 35.

[8] Munro *v.* Munro, 1841, 16 Fac. 884.

[9] Currie *v.* Currie, 1833, 12 S. 171.

[10] Tibbetts *v.* Tibbetts, 1862, 24 D. 599.

[11] Bonnar *v.* Bonnar, 1911, S. C. 854.

(6) *Reponing.*—A husband may be reponed where he has failed to lodge defences and allowed judgment to be pronounced against him in the Outer House. On a reclaiming note by the husband in such circumstances the Inner House remitted to the Lord Ordinary to repone the defender on such terms as to his Lordship should seem fit.[1]

(7) *Proof.*—A proof must be led in every case.[2] Decree cannot be given of consent,[3] nor are the admissions of the defender sufficient.[4] Where a wife was successful in her defence of cruelty to an action of divorce for desertion at the instance of her husband, the fact of cruelty was held not to be *res judicata*, and that she must prove it again in an action of separation and aliment at her instance.[5]

The pursuer may not prove, as substantive grounds for separation, acts of cruelty which have been condoned, although she may be allowed to prove them in order to colour acts of cruelty subsequent to condonation.[6] In the same way the pursuer is not allowed to prove condoned acts of adultery as substantive grounds for separation.[7] Accordingly, where a pursuer averred that her husband had struck her prior to an action of adherence which she had raised against him, and had also accused her of immoral acts, which were disproved in an action of divorce at the instance of her husband, but did not aver that he had repeated either of these acts after these respective judicial proceedings, the action was held to be irrelevant.[8]

The oath of calumny is not insisted upon now.[9]

(8) *Decree.*—The terms of the decree are regulated by Act of Sederunt, 20th December 1823, and are usually as follows:—

Finds it proved that the said *C. D.*, defender, has been guilty of grossly abusing and maltreating the said *A. B.*, pursuer, his wife [*or*, of adultery, *as the case may be*]; Therefore Finds the said *A. B.* has full liberty and freedom to live separate from the said *C. D.*, her husband; Decerns and Ordains him, the said *C. D.*, to separate himself from the said *A. B.*, pursuer, *a mensa et thoro* in all time coming; Finds the pursuer entitled to the custody of the

[1] Whyte *v.* Whyte, 1891, 18 R. 469. See also Paterson *v.* Paterson, 1848, 20 Jur. 459.

[2] 11 Geo. IV. and 1 Will. IV. cap. 69, sec. 36.

[3] Macfarlane *v.* Macfarlane, 1847, 9 D. 500.

[4] Muirhead *v.* Muirhead, 1846, 8 D. 786.

[5] Stevens *v.* Stevens, 1882, 9 R. 730.

[6] Watson *v.* Watson, 1874, 12 S. L. R. 78; Graham *v.* Graham, 1878, 5 R. 1093; Smeaton *v.* Smeaton, 1900, 2 F. 837. See also Sinton *v.* Irvine, 1833, 11 S. 402.

[7] Smith *v.* Smith, 1904, 12 S. L. T. 341 and 560. See also Watson *v.* Watson, 1874, 12 S. L. R. 78.

[8] Jackson *v.* Jackson, 1906, 14 S. L. T. 331.

[9] Fraser, Husband and Wife, ii. 1195.

pupil children of the marriage;[1] Decerns and Ordains the said *C. D.*, defender, to make payment to the said *A. B.*, pursuer, of the sum of £ yearly for aliment to her and the said children of the marriage, being the sum of £ for herself, and the sum of £ for each of the said children, so long as they are in pupillarity and they continue to reside with her, and until the further orders of the Court, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said aliment at for the half year immediately following, and so forth half yearly thereafter during their joint lives. *Item*, of the lawful interest on each half year's aliment from the term of payment until paid, and decerns, reserving to either party at any time to apply to the Court for any further or other orders which may become necessary; Finds the pursuer entitled to expenses, etc.

(9) *Effect of Decree.*—"After a decree of separation *a mensa et thoro* obtained at the instance of the wife, all property which she may acquire, or which may come to or devolve upon her, shall be held and considered as property belonging to her, in reference to which the *jus mariti* and husband's right of administration are excluded, and such property may be disposed of by her in all respects as if she were unmarried, and on her decease the same shall, in case she shall die intestate, pass to her heirs and representatives, in like manner as if her husband had been then dead; provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, and the *jus mariti* and right of administration of her husband shall be excluded in reference thereto, subject, however, to any agreement in writing made between herself and her husband; and the wife shall, while so separate, be capable of entering into obligations, and be liable for wrongs and injuries, and be capable of suing and being sued, as if she were not married; and her husband shall not be liable in respect of any obligation or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as pursuer or defender of any action, after the date of such decree of separation, and during the subsistence thereof; provided that where upon any such separation aliment has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use."[2]

(10) *Amount of Aliment.*—See *Aliment, infra*, p. 750.

[1] For other forms regulating custody, see Lang *v.* Lang, 1869, 7 M. 445; Steuart *v.* Steuart, 1870, 8 M. 821; Symington *v.* Symington, 1874, 1 R. 871; 1875, 2 R. (H. L.) 41; 1875, 2 R. 974; Lilley *v.* Lilley, 1877, 4 R. 397; Bloe *v.* Bloe, 1882, 9 R. 894; Beattie *v.* Beattie, 1883, 11 R. 85; Beedie *v.* Beedie, 1889, 16 R. 648. See also Guardianship of Infants Act, 1886 (49 & 50 Vict. cap. 27), sec. 7.

[2] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 6.

(11) *Revision of Aliment.*—See *Aliment, infra*, p. 751.

VIII. ADHERENCE.—(1) *Generally.*—Since the abolition of a decree of adherence as an indispensable preliminary to an action of divorce for desertion,[1] an action of adherence *simpliciter* has been unknown in practice. It is, however, quite competent, and there may be cases in which the proper course to adopt is an action of adherence, although no longer a statutory necessity.[2] It would appear that the proper time to raise such an action is after the expiry of one year's desertion by the defender.[3]

(2) *Conclusions.*—The summons concludes for a declarator that the parties are married persons; that the defender should be decerned to adhere, and a conclusion for aliment and expenses may also be inserted.[4]

(3) *Condescendence.*—The usual averments are the marriage of the parties, then cohabitation, and the time, place, and manner of the desertion.[5]

(4) *Defences.*—The ordinary defences are adultery or cruelty, or both, on the part of the pursuer. Whether or not there may be other grounds of defence open to a defender of an action of adherence than would found an action of separation and aliment has not been decided.[6] It seems to be thought that antenuptial incontinence unknown to the defender may be held to be a good defence to an action for adherence at the instance of the wife.[7] For other defences, see Lothian's Consistorial Law, p. 98 *et seq.*

It is not a good defence that there is an agreement to live separate.[8]

(5) *Proof.*—Although the action is not among the enumerated actions requiring proof to be led whether appearance is entered for the defender or not,[9] proof is always adduced.[10]

IX. ADHERENCE AND ALIMENT.—(1) *Generally.*—This is an action for aliment at the instance of a wife founded upon the desertion of the defender. (See *Divorce for Desertion, supra*, p. 737.)

[1] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 11.

[2] Mackenzie *v.* Mackenzie, 1892, 20 R. 636, per Lord Young, p. 664; 1895, 22 R. (H. L.) 32.

[3] Shand's Practice, p. 435; Lothian's Consistorial Law, p. 97.

[4] Shand's Practice, p. 436; Lothian's Styles, p. 102 *et seq.*

[5] Shand's Practice, p. 436.

[6] Jolly *v.* M'Gregor, 1828, 3 W. & S. 85, at p. 189; A. B. *v.* C. D., 1853, 16 D. 111, at p. 113 (interlocutor); Chalmers *v.* Chalmers, 1868, 6 M. 547, per Lord President Inglis, p. 550.

[7] Fraser, Husband and Wife, ii. 875.

[8] Lawson *v.* Macculloch, 1797, Mor. 6157; A. B. *v.* C. D., 1853, 16 D. 111; Martin *v.* Martin, 1895, 3 S. L. T. 150.

[9] 11 Geo. IV. and 1 Will. IV. cap. 69, secs. 33 and 36.

[10] Anderson *v.* Anderson, 1842, 4 D. 615.

(2) *Conclusions.*—The conclusions are for declarator that, as the pursuer is the lawful wife of the defender, the latter is bound to adhere to the pursuer and to cohabit with her and treat and entertain her at bed and board, and for an order upon the defender to adhere to the pursuer. This is followed by a conclusion for aliment during the joint lives of the pursuer and defender, or until the said parties adhere to each other, and for expenses.

A conclusion for custody of the children of the marriage is incompetent.[1]

(3) *Condescendence.*—The pursuer should aver—(*a*) the marriage; (*b*) cohabitation; (*c*) the desertion of the husband; and (*d*) the means of the husband to enable the Court to fix the aliment.

(4) *Defences.*—(a) *Adultery of Pursuer.*—To enable this to be proved the action of adherence and aliment may be sisted pending the decision of an action of divorce for adultery at the instance of the defender.[2]

(b) *Cruelty of the Pursuer.*—This is not an absolute bar to obtaining aliment, though it is a bar to adherence. Accordingly, the action of adherence and aliment may be sisted until an action of separation at the instance of the defender is decided. If the defender is successful the action of adherence will be at an end, but the wife will still be entitled to aliment,[3] though the fact of her cruelty will be taken into account when fixing the amount of the aliment.[4]

(c) *Offer to Adhere.*—The Court may supersede the consideration of the case to see if the defender will carry out his offer.[5] An offer to aliment a wife in lodgings, and for the defender not to eat, sleep, or stay in the same house,[6] or to do his best to provide a home for his wife abroad,[7] is not an offer sufficient to exempt a husband from liability in a separate aliment. If the offer is a clear evasion, the Court will repel the defence.[8]

(d) *Separate Estate of the Pursuer*, or that she is earning wages sufficient to support herself.[9]

(5) *Proof.*—As the mere admission of defender is not sufficient there

[1] Heriot-Hill *v.* Heriot-Hill, 1906, 14 S. L. T. 182.
[2] Liddell *v.* Liddell, 1903, 11 S. L. T. 488.
[3] Nisbet *v.* Nisbet, 1896, 34 S. L. R. 229.
[4] Taylor *v.* Taylor, 1903, 11 S. L. T. 487.
[5] Paterson *v.* Paterson, 1861, 24 D. 215; Macdonald *v.* Macdonald, 1903, 10 S. L. T. 578.
[6] Arthur *v.* Gourlay, 1769, 2 Pat. App. 184.
[7] Hood *v.* Hood, 1871, 9 M. 449.
[8] Chalmers *v.* Chalmers, 1868, 6 M. 547.
[9] Macfarlane *v.* Macfarlane, 1844, 6 D. 1220; Fraser, Husband and Wife, i. 860.

must be a proof,[1] except the action is restricted *quoad* the conclusion for adherence.[2]

(6) *Amount of Aliment.*—See *infra*, p. 750.

(7) *Revision of Aliment.*—See *infra*, p. 751.

X. ALIMENT.—(1) *Generally.*—While procedure by way of separation and aliment or adherence and aliment is the correct method to adopt where a wife desires permanent aliment on the ground that she is entitled to live separate from her husband on account of his misconduct, or to be alimented apart on account of his desertion, the Court has sanctioned in certain circumstances an action with conclusions for aliment alone and without conclusions for separation or adherence.[3] Such aliment is, however, only temporary aliment, and accordingly the conclusion is for aliment "so long as the defender shall refuse to receive and entertain the pursuer."[4]

The Court will not, however, in such an action enter into questions whether the defender has been guilty of cruelty, adultery, or desertion, where these accusations have been denied and a *bonâ fide* offer to take the pursuer to live with him has been made. Thus, where a wife, who averred that she was compelled to live apart from her husband owing to his cruelty, raised an action for aliment alone and the husband entered appearance and pleaded that he was willing to receive her back, the Court refused to entertain the action.[5] On the other hand, where a wife averred that her husband had deserted her and the husband answered that he was willing to take her back (an averment which the pursuer denied and explained), the Court allowed the question whether the offer was a *bonâ-fide* one to be investigated.[6]

If there is no appearance for the husband,[7] or if the husband does not offer to take back his wife, or refuses to receive her, or if the action has been brought immediately after the alleged acts of cruelty have been committed, or if a voluntary agreement has been broken, the Court will entertain the action.[8]

It is no answer to an action for simple aliment that the pursuer has committed adultery and that the defender has a right to refuse

[1] Sleigh *v.* Sleigh, 1893, 1 S. L. T. 30.
[2] Wright *v.* Wright, 1894, 2 S. L. T. 29.
[3] Kelly *v.* Kelly, 1831, 9 S. 872.
[4] Williamson *v.* Williamson, 1860, 22 D. 599; Pearce *v.* Pearce, 1898, 5 S. L. T. 338. See also Hicks *v.* Hicks, 1899, 6 S. L. T. 261.
[5] Coutts *v.* Coutts, 1866, 4 M. 802.
[6] Crombie *v.* Crombie, 1868, 6 M. 776.
[7] Kelly *v.* Kelly, 1831, 9 S. 872; Williamson *v.* Williamson, 1860, 22 D. 599.
[8] Coutts *v.* Coutts, 1866, 4 M. 802, per Lord President M'Neill, p. 803.

aliment accordingly. If such a plea in defence is stated and no action of divorce on the ground of adultery is raised by the defender, the pursuer will obtain decree.[1] If, however, the defender raises an action of divorce, the aliment action will be sisted pending its decision, and if the divorce proceedings are successful, the action for aliment is at an end.[2]

It is competent to raise an action for aliment to enforce a tacit arrangement[3] or a regular contract;[4] but, while the latter exists and is unrevoked, an action by a wife for increased aliment is not competent.[5]

(2) *Procedure.*—"Actions of aliment in the Court of Session between husband and wife shall not be considered Inner House causes, but shall be considered and disposed of in like manner as other consistorial causes, except as hereinafter provided as to decrees in absence; and actions of aliment at the instance of other parties shall not be considered Inner House causes, but shall be disposed of by the Lord Ordinary (subject in both cases to reclaiming note in common form against his interlocutors) in the same way as such causes are at present disposed of by the Judges of the Inner House: Provided always that all actions for aliment shall be deemed summary causes both in the Outer and in the Inner House, and that where no appearance is entered for the defender decreet shall be pronounced in absence without proof, as in other cases before the Court of Session."[6] This provision has been extended to the case where the defender enters appearance but states no relevant defence.[1]

(3) *Amount of Aliment.*—The amount depends upon circumstances, and the Court will look at the income of the husband, the degree and mode of life of the wife, and, if there has been a contract of voluntary separation, the terms on which parties have agreed to live apart.[7]

In one case *one-fourth* of the husband's income was allowed, without reference to the number of children living with the wife.[8] In another case, where the husband's income was £640 per annum, his wife was allowed £140 per annum.[9] Where a husband's income was £243 and his wife had an annuity of £30 from other sources, he was required to

[1] Milne *v.* Milne, 1901, 8 S. L. T. 375.
[2] Gatchell *v.* Gatchell, 1898, 6 S. L. T. 224.
[3] Tibbetts *v.* Tibbetts, 1862, 24 D. 599.
[4] Hood *v.* Hood, 1871, 9 M. 449.
[5] Pearce *v.* Pearce, 1898, 5 S. L. T. 338.
[6] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 15.
[7] Thomson *v.* Thomson, 1890, 17 R. 1091.
[8] Lang *v.* Lang, 1868, 7 M. 24.
[9] Macmillan *v.* Macmillan, 1871, 9 M. 1067.

pay £55 per annum;[1] and where the husband had a free income of £200 per annum, £65 per annum was allowed.[2] For special cases, the undernoted cases may be mentioned.[3]

More than one-third of the husband's income does not seem ever to have been allowed.[4]

(4) *Revision of Aliment.*—If the aliment proceeds upon a decree of separation, the Court will at any time, and notwithstanding any previous agreement of parties, adjust the aliment payable by a husband to his wife, from whom he is judicially separated, so as to meet the equities of the case; and aliment fixed by a contract is not less liable to revision on a change of circumstances than if it had been found due and fixed by a decree.[5] Accordingly, aliment has been restricted,[6] and it has also been increased.[7]

Where the changed circumstances must have been in the contemplation of parties when a contract was made, there will be no alteration in the amount of aliment.[8]

(5) *Arrears of Aliment.*—As a general rule a wife has no claim for past aliment, but if she has incurred debts in order to aliment herself the husband will be liable either to her or to her creditors.[9]

(6) *Defences.*—See *Defences, Separation and Aliment, supra,* p. 744; and *Adherence and Aliment, supra,* p. 748.

XI. Declarator of Legitimacy.—It is competent for a person to raise an action either of his own legitimacy[10] or of the legitimacy of one of his ancestors.[11] The declarator is often followed by petitory conclusions, but this is not necessary, as it is a sufficiently legitimate interest to establish the *jus sanguinis.*[12] The defenders to call are those whose interest it is to declare the pursuer illegitimate. Where a service has

[1] Wotherspoon *v.* Wotherspoon, 1869, 8 M. 81.

[2] Jameson *v.* Jameson, 1886, 23 S. L. R. 402.

[3] Graham *v.* Graham, 1827, 6 S. 254; Kelly *v.* Kelly, 1831, 9 S. 872; Syme *v.* Syme, 1833, 11 S. 305; Mackellar *v.* Mackellar, 1838, 16 S. 1149; Macnaughton *v.* Macnaughton, 1850, 12 D. 703.

[4] Scott *v.* Scott, 1894, 21 R. 853, per Lord M'Laren, p. 857.

[5] M'Keddie *v.* M'Keddie, 1902, 9 S. L. T. 381.

[6] Macdonald *v.* Macdonald, 1881, 8 R. 985; Stewart *v.* Stewart, 1887, 15 R. 113.

[7] Donald *v.* Donald, 1862, 24 D. 499; Hay *v.* Hay, 1882, 9 R. 667; Rowat *v* Rowat, 1904, 12 S. L. T. 449.

[8] Scott *v.* Scott, 1894, 21 R. 853.

[9] Alexander *v.* Alexander, 1849, 12 D. 117; Macnaughton *v.* Macnaughton, 1850, 12 D. 703; Donald *v.* Donald, 1860, 22 D. 1118; Cowper *v.* Cowper, 1860, 23 D. 68; M'Millan *v.* M'Millan, 1871, 9 M. 1067.

[10] Morley *v.* Jackson, 1888, 16 R. 78.

[11] Bosville *v.* Lord Macdonald, 1910, S. C. 597.

[12] Sir A. Moncrieff *v.* Lord Moncreiff, 1904, 6 F. 1021; Bosville *v.* Lord Macdonald, 1910, S. C. 597, per Lord President Dunedin, p. 608.

been granted to another person than the pursuer, or the pursuer's service has been reduced on the ground of illegitimacy, this is not *res judicata* in an action of declarator of legitimacy.[1] In fact, it is doubtful whether judgments in regard to *status* and to rights of blood ever pass into *res judicata*.[2] Arrestment to found jurisdiction is not competent in an action of declarator of legitimacy.[3]

Where a claim is made by children of a deceased person in respect of the latter's death against his employers, and the defenders do not admit the relationship, the case will be sisted until the relationship of the pursuers is established by an action of declarator of legitimacy.[4]

[1] Norris *v.* Gilchrist, 1847, 9 D. 466; Coutts *v.* Wear, 1914, 2 S. L. T. 86.
[2] Norris *v.* Gilchrist, 1847, 9 D. 466, per Lord Justice-Clerk Hope, p. 477.
[3] Scruton *v.* Gray, 1772, Mor. 4822; Morley *v.* Jackson, 1888, 16 R. 78.
[4] Lenaghan *v.* Monkland Iron and Steel Co., 1857, 19 D. 975.

CHAPTER VII

SPECIAL CASES

(1) GENERALLY.—"Where any parties interested, whether personally or in some fiduciary or official character, in the decision of a question of law shall be agreed upon the facts, and shall dispute only on the law applicable thereto, it shall be competent for them, without raising any action or proceeding, or at any stage of an action or proceeding, to present to one of the Divisions of the Court a special case, signed by their counsel, setting forth the facts upon which they are so agreed, and the question of law thence arising upon which they desire to obtain the opinion of the Court; and which case may set forth alternatively the terms in which the parties agree that judgment shall be pronounced according to the opinion of the Court upon the question of law aforesaid."[1]

(2) VALUE OF CAUSE.—By the Act 50 Geo. III. cap. 112, sec. 28, the Sheriff Court had a privative jurisdiction in all causes not exceeding the value of £25 sterling. Accordingly a special case in the Court of Session not exceeding the value of £25 sterling was dismissed as incompetent.[2] By the Sheriff Courts (Scotland) Act, 1907, sec. 7, as amended by the Sheriff Courts (Scotland) Act, 1913, the privative jurisdiction of the Sheriff Court has been extended to causes not exceeding £50 in value, exclusive of interest and expenses, competent in the Sheriff Court, and accordingly a special case to be competent must exceed the value of £50 sterling, exclusive of interest and expenses.

(3) OPINION AND JUDGMENT.—An opinion may be asked from the Court and also an opinion and judgment, but it is not quite correct in point of form to ask for "opinion and judgment" where the parties agree that the successful party shall obtain decree for an agreed-upon amount.[3]

(4) CONTENTIONS OF PARTIES.—These must be set forth.[4]

[1] Court of Session Act, 1868, sec. 63.
[2] Bruce, 1889, 17 R. 276.
[3] Halliday and Others, 1869, 8 M. 112, per Lord President Inglis, p. 117.
[4] Stewart's Trs. *v.* Stewart, 1895, 23 R. 93.

(5) Method of Stating Questions of Law.—In a recent special case the following observations upon this subject were made by Lord Dundas:—"I desire merely to add a few observations which occur to me, arising out of the way in which the questions of law have been here stated. They are nominally thirteen in number, but, if regard is had to divisions and subheads, amount to at least two dozen. One of your Lordships, I think, remarked during the discussion that they resemble an examination-paper set to the Court more than anything else. It may be that such prodigality of interrogation (which seems to me to be growing more and more common in practice) is the outcome of an over-zealous attempt to satisfy some supposed requirement or *desideratum* of the Court; but I think it is both unnecessary and undesirable. There ought not to be any undue difficulty about stating the questions of law in special cases within reasonable compass if broad considerations of sense and expediency are kept in view. Each of the questions should, of course, embody a proposition of law, and not (as sometimes occurs) more or less of fact, or mere arithmetic. The questions come substantially in place of the pleas in law which counsel for the various parties would have had to frame if the dispute had arisen in the form of an action of some sort. It is generally convenient that they should be capable of a categorical answer—yes or no; but this is not indispensable; and if, for any sufficient reason, another form is adopted, the answer can be (and often is) given by way of a finding in appropriate terms. The questions ought to raise the legal issues which the parties wish to have determined; but I do not think it is necessary or desirable for counsel to endeavour (as was perhaps intended in this case) to anticipate and cover in specific detail the whole gamut of possible contingencies which may arise as affecting the individual interests of each and every party to the case. On the other hand, it would obviously not do for counsel to table to the Court a deed or deeds of some sort, with a few relative dates and facts, and a bare general question of law, such as 'Upon a sound construction of the said deeds, who are the parties amongst whom the estate should be distributed, and at what time or times, and in what shares or proportions, and subject to what (if any) conditions, restrictions, or limitations?' Between the two extremes indicated a reasonable medium must, in each case, be aimed at. It sometimes happens that, during the arguments, a suggestion from the Bench may indicate, as the true legal solution of some point, one which is not specifically covered by any of the questions stated, and the parties agree in adjusting and adding a

new question to meet the situation. But I do not think it is necessarily the Court's duty or function to investigate and determine, *ex proprio motu*, all the possible legal aspects of a special case; it is for the parties to present the questions of law which they seek to have decided, and for the Court (primarily at least) to answer these, and these only. It would not, I apprehend, be difficult to point to reported cases where a solution—I do not say the correct solution, but at least a very plausible and attractive one — of some problem of vesting or the like has apparently escaped the notice of all concerned—a solution which, if the parties had suggested it, might have affected the result of the decision. The proper statement of questions in a special case, just as of pleas in law, or of declaratory (or other) conclusions of the summons of an action, is a matter requiring skill, care, and discrimination; but I do not see why it should present any special or peculiar difficulty. . . ."[1]

(6) Signing Special Cases.—Where a special case is signed by counsel, it should be signed by the counsel by whom it has been adjusted, and not by other counsel for them.[2]

(7) Adverse Interests.—The same agent should not represent parties having conflicting interests.[3] In the same way, parties should not appear in one capacity for their own interests and in another capacity as tutors for pupil children with an adverse interest.[4] Where, however, a special case to decide the rights of pupil and minor members of a family was presented by and with the concurrence respectively of their father, it was held competent, but the Court appointed curators *ad litem* to the children.[5]

(8) Competency.—As a general rule there must be a controversy,[6] although it has been held to be competent to bring a case to determine whether trustees have a power to sell certain heritable estates, there being no real question between the parties;[7] and also whether trustees have power to divest themselves of the trust estate in a particular manner.[8]

[1] Davidson's Trs., 1912, S. C. 693.
[2] Hope, 1870, 8 M. 699.
[3] Ellis' Trs. *v.* Ellis, 1898, 1 F. 4.
[4] Park *v.* Park, 1876, 3 R. 850. See also Reid, 1871, 9 S. L. R. 156.
[5] Ross *v.* Tennant's Trs., 1877, 5 R. 182.
[6] Renfrew County Council *v.* Trs. of Orphan Homes of Scotland, 1895, 23 R 166.
[7] Thomson's Trs. *v.* Thomson, 1897, 25 R. 19; Galloway *v.* Campbell's Trs., 1905, 7 F. 931; Mitchell Innes' Trs. *v.* Mitchell Innes, 1912, S. C. 228.
[8] Gray *v.* Gray's Trs., 1877, 4 R. 378.

There must be a proper contradictor,[1] and all parties interested must be represented.[2]

The questions must not be hypothetical,[3] or premature,[4] or inferences from fact,[5] and must be such as could be decided in some other mode of procedure known to the law.[6]

Where a testator makes his trustees sole judges on certain special points connected with his trust estate, it is incompetent to present a special case to have these points decided.[7]

It is incompetent in a special case to decide a point which is specially appropriated to another tribunal, or to issue a decree of declarator or grant an interdict.[8]

The Court has entertained special cases in which the respective questions were:—Whether certain resolutions of a company were *ultra vires* or not, the parties being the company and a shareholder;[9] whether certain writings produced were the writ of a debtor to prove the constitution and resting-owing of a debt;[10] and what were the rights of various lenders on the security of trust funds which had been found inadequate to repay their loans.[11]

(9) Questions not Argued.—These will not be decided.[12]

(10) Curator ad Litem.—Where minors and pupils who have no curators or tutors are parties to a special case, the Court appoints a curator *ad litem* to each of them.[13] Where a curator *ad litem* had been appointed to a party to a special case, and the curator *ad litem* informed the Court that his client was insane, the Court allowed the case to proceed without the appointment of a *curator bonis*.[14]

[1] Roxburgh County Council *v.* Melrose District Council, 1897, 24 R. 657; Baillie's Trs. *v.* Whiting, 1910, S. C. 887; Smith *v.* M'Coll's Trs., 1910, S. C. 1121, per Lord President Dunedin, p. 1128.

[2] Mackie's Trs. *v.* Martins, 1875, 2 R. 621; Trustees of Gray's Hospital, Elgin *v.* Elgin Mags., 1903, 5 F. 650; Baillie's Trs. *v.* Whiting, 1910, S. C. 887; Scott's Trs. *v.* Bruce, 1912, S. C. 105.

[3] Bothwell Parochial Board *v.* Pearson, 1873, 11 M. 399; Scott's Trs. *v.* Aiton, 1891, 28 S. L. R. 673.

[4] Cuthbert *v.* Cuthbert's Trs., 1908, S. C. 967. See also Cairns' Trs. *v.* Cairns, 1907, S. C. 117.

[5] Lawson's Trs. *v.* Lawson, 1883, 10 R. 1278.

[6] Bothwell Parochial Board *v.* Pearson, 1878, 11 M. 399; Cairns' Trs. *v.* Cairns, 1907, S. C. 117.

[7] Low's Trs., 1871, 8 S. L. R. 638.

[8] Morton *v.* Gardner, 1871, 9 M. 548.

[9] Ramsbotham *v.* Scottish-American Investment Co., Ltd., 1891, 18 R. 558.

[10] Campbell's Trs. *v.* Hudson's Exr., 1895, 22 R. 943.

[11] Greenock Harbour Trs., 1888, 15 R. 343.

[12] Mackinnon's Trs. *v.* Macneill, 1897, 24 R. 981.

[13] Christie, 1873, 1 R. 237. See also Ranken, 1870, 8 M. 878.

[14] Swan's Trs. *v.* Swan, 1912, S. C. 273.

The whole subject of the appointment of curators *ad litem* will likely be reconsidered in consequence of a statement made by Lord Johnston to the Court in a recent case.[1]

(11) Transmission of Documents.—Where documents necessary for the decision of a special case lay in the hands of a Sheriff-Clerk, the Court granted warrant for their transmission.[2]

(12) English Law.—This is a statement of fact upon which the parties must be agreed.[3]

(13) Death of a Party.—Where a party to a special case died after the case was sent to the roll, Lord President Inglis stated that the proper course to pursue was for the representative of the deceased party or his counsel to sign the case as a party taking up the contract thereby constituted.[4]

(14) Roll for Hearing.—It was originally provided that special cases should be heard on the Summar Roll;[5] but as it was found inconvenient and unjust to many suitors before the Court that special cases should have such a priority or preference, it was subsequently enacted that unless otherwise directed the parties to any special case should be heard only in the ordinary course of the rolls of the Division to which the special cases had been presented.[6]

(15) Rehearing.—If the Court shall think fit, a special case may be appointed to be heard in terms of sec. 60 of the Court of Session Act, 1868, *i.e.* before a Court of seven Judges.[5]

(16) Amendment.—A special case may be amended of consent.[7]

(17) Review.—If only an opinion is asked for, this is not appealable to the House of Lords.[8] If, however, a judgment is asked for and obtained, such judgment shall be liable to review by the House of Lords, unless such review shall be excluded by consent of parties.[9]

A curator *ad litem* in a special case against whom a judgment by a majority had been pronounced was granted a sum in order to appeal to the House of Lords.[10]

(18) Expenses.—See Maclaren on Expenses, p. 297 *et seq.*

[1] Macdonald's Tr. *v.* Medhurst, 1915, S. C. 879.
[2] Jamieson's Trs. *v.* Jamieson, 1899, 2 F. 96.
[3] Campbell's Trs. *v.* Campbell, 1903, 5 F. 366.
[4] Beattie, 1884, 11 R. 405.
[5] Court of Session Act, 1868, sec. 63.
[6] A. S., 9th June 1870; C. A. S., D, ii. 1.
[7] Court of Session Act, 1868, sec. 63; Lawson's Trs. *v.* Lawson, 1883, 10 R. 1278.
[8] Macdougall and Others, 1869, 7 M. 976.
[9] Court of Session Act, 1868, sec. 63; Macdougall and Others, 1869, 7 M. 976.
[10] Crum Ewing's Trs. *v.* Bayly's Trs., 1910, S. C. 994; *cp.* Walker *v.* Whitwell, 1914, S. C. 560.

CHAPTER VIII

ACTION OF CHOOSING CURATORS AND MAKING UP INVENTORIES

(1) GENERALLY.—Although at *common law* a father has power to nominate by his testament tutors to his children during their pupillarity, he has no power to impose curators upon them after that period.[1] Accordingly, a minor *pubes* had formerly an absolute right to choose curators for himself.[2] By an early *statute*, however, "considering that the father can make a better choice of curators for his children who are minors than the minors could make for themselves," power was given to the father "by ane act or deed in his liege poustie to make a nomination of such persons as he thinks fit . . . to be curators to his children during their minority."[3] Accordingly, if a father has not by an act or deed in liege poustie nominated curators to his minor children, or the curators nominated have not accepted,[4] or, having accepted, have failed, the right of the minor *pubes* to choose his own curators is undoubted,[5] as no other person than the father can interfere with a minor's right to choose curators;[6] and the Court will only interfere in the most exceptional circumstances.[7]

The fact that a factor *loco tutoris* had been appointed to a child and when the latter reached minority the factor became *ipso facto curator bonis* to the minor did not prevent the minor from choosing curators.[8]

There are usually combined with the action of choosing curators conclusions for making up curatorial inventories in terms of the Act 1672, cap. 2 (both editions).

[1] Stair, Inst. i. 6. 32.

[2] Act 1555, cap. 8 (record edition), cap. 35 (12mo edition).

[3] Act 1696, cap. 8 (both editions).

[4] Bruce *v.* Hamilton, 1854, 17 D. 265, per Lord Curriehill.

[5] Harvey *v.* Harvey, 1860, 22 D. 1198, per Lord Justice-Clerk Inglis, p. 1208; Macdonald, Petr., 1895, 4 S. L. T. 4; Ferguson *v.* Blair, 1908, 16 S. L. T. 284.

[6] Harpers *v.* Hamilton, 1633, Mor. 16262; Scot *v.* Kennedy, 1675, Mor. 16291; Wilson *v.* Campbell, 10th March 1819, F. C.

[7] Macdonald, Petr., 1895, 4 S. L. T. 4, per Lord Kyllachy.

[8] Ferguson *v.* Blair, 1908, 16 S. L. T. 284; Judicial Factors (Scotland) Act, 1889 (52 & 53 Vict. cap. 39), sec. 11.

Although an action of choosing curators is the more appropriate form to adopt, a petition to the Junior Lord Ordinary for the appointment of a *curator bonis* is sometimes, in special circumstances, allowed. The most usual case is where there are some members of a family who are pupils and require a factor *loco tutoris* and also minor children who require a curator. In such cases, especially where the estate is of small value and to save expense, the person appointed factor *loco tutoris* is often also appointed *curator bonis* to the minors.[1] In the case where a factor *loco tutoris* becomes *ipso facto* a *curator bonis* by the arrival of the pupil at the age of puberty, the latter appointment only exists until the minor desires to choose curators.[2] An appointment of a *curator bonis* is also made where the minor is illegitimate,[3] and where there is urgency or necessity.[4] In all such petitions the minor must be a consenting party.[5]

Where there is no special cause shown the Court will not make the appointment of a *curator bonis*, but will leave the minor to institute an action of choosing curators.[6]

(2) The Parties.—(a) *Pursuer.*—The pursuer is the minor himself.

(b) *Defenders.*—If the summons is for choosing curators alone, it is only necessary to call as defenders "twa at leist of the maist honest and famous of the minouris kin and all uthers hauand interes."[7] If, however, the summons is (*a*) for choosing curators, and (*b*) for making up inventories, the practice has been to call in the combined action two of the nearest of kin on the father's side and two on the mother's side,[8] the reason being that the statute authorising the action for making up inventories provides for the calling of "the neirest of kin that are majors and within the countrey upon either side."[9]

Where the persons nominated to be curators are themselves of the nearest of kin of the pursuer, it is proper that the parties next in degree should be called in their stead.[10]

[1] Arnot, Petr., 1849, 12 D. 912; Irvine, Petr., 1850, 12 D. 912; M'Whirter, Petr., 1852, 14 D. 761; Reid, etc., Petrs., 1882, 19 S. L. R. 546.

[2] Ferguson *v.* Blair, 1908, 16 S. L. T. 284.

[3] Wood, Petr., 1834, 12 S. 663; Ogilvy, Petr., 1849, 11 D. 1029; M'Neill, Petr., 1849, 11 D. 1030.

[4] Mayne, etc., Petrs., 1853, 15 D. 554.

[5] Hutchison, Petr., 1881, 18 S. L. R. 725; Macdonald, Petr., 1895, 4 S. L. T. 4; Hutcheon *v.* Alexander, 1909, 46 S. L. R. 714.

[6] Mathew, etc., Petrs., 1851, 14 D. 312; Mather, Petr., 1853, 25 Jur. 460; Barron, etc., Petrs., 1854, 17 D. 61.

[7] Act 1555, cap. 8 (record edition), cap. 35 (12mo edition).

[8] Wallace *v.* Kennedy, 1674, Mor. 16290.

[9] Act 1672, cap. 2 (both editions).

[10] Guthrie *v.* Edgarton, 1701, Mor. 16319. See, however, Blantyre, etc., Petrs., 1832, 10 S. 702.

Where the nearest of kin are outwith Scotland, the practice is to call as defenders the nearest relatives of the minor resident in Scotland, and to petition the Inner House to dispense with the citation of the next of kin resident abroad.[1] (See *infra*, paragraphs (5) and (6).)

(3) Conclusions.—The conclusions are—(*a*) to ordain the persons nominated by the pursuer to be curators to him during his minority; (*b*) that the defenders and all having interest should be summoned to hear and see the said curators nominated and chosen by the pursuer and authorised by the Lords of Council and Session to manage the estate of the pursuer with the usual powers; (*c*) to concur with the said curators in making up inventories of the estate belonging to the pursuer; (*d*) to subscribe three copies thereof; and (*e*) to hear and see faith made and caution received for the faithful administration of such curators, all in terms of the Acts 1555, cap. 8 (record edition), cap. 35 (12mo edition), and 1672, cap. 2 (both editions).

(4) Will.—In the will there is a certification that if the parties cited fail the said Lords will decern and authorise such persons to be curators to the pursuer as shall be nominated and chosen by him, and will concur, or delegate some proper person to concur, with the said curators in making up the said inventories, and interpone their authority to such measures as are necessary in the premises.

(5) Citation.—The defenders specially called require to be cited personally or at their dwelling-places; the others having interest are cited edictally.

(6) Petition to Dispense with Citation.—Where the nearest of kin are outwith Scotland, it is usual to petition to dispense with their citation, and to call and cite the nearest relatives of the minor resident in Scotland in their stead.[2]

An illegitimate minor has no nearest of kin who can be cited. There does not seem to be any precedent for citing relatives of the father to the election of curators and the making up of inventories. The nearest of kin of the mother, however, have been cited when resident within the kingdom, the prayer of the petition being to dispense with the citation of the nearest of kin of the father and to authorise the appointment of curators to be made on the citation of two of the nearest of kin of the mother, and all others having interest, edictally, as use is, and to make up and complete inventories at the sight of two of the mother's nearest of kin.[3] When the relatives

[1] Buchan, Petr., 1873, 11 M. 662.

[2] Ibid., and the cases cited in the report therein by Mr. Archibald Broun P.C.S. See also M'Clement, etc., Petrs., 1867, 5 M. 944.

[3] A. B., Petr., 1838, 16 S. 1209.

of the mother are outwith the kingdom, their citation has been dispensed with, and the appointment of curators made on the citation edictally of all having interest, and inventories made up at the sight of a delegate to be appointed by the Court.[1]

Formerly these petitions were in writing,[2] but they must now be printed,[3] and presented to the Inner House. Intimation on the walls and in the Minute-Book in common form is always made.[4] Personal intimation was ordered to be made in one case where the addresses of the next of kin abroad were known.[5]

(7) Who May be Curators.—This is a question which falls to be decided by the common law.[6] Accordingly, all persons may be curators to minors who are fit for the management of an estate, and are not debarred by law or custom.[7] Married women are not available,[8] and in one case it rather appears as if a stepfather is not a suitable person.[9]

A mother may be appointed,[10] but not if she is married again.[11]

A person resident outwith Scotland may be accepted provided he binds himself and finds caution to fulfil all orders of the Court in the matter of the curatory and prorogates the jurisdiction of the Court to that effect.[12]

(8) Procedure.—(a) *Choosing Curators.*—After the expiration of an *inducia* of fourteen days the summons is called. If no objection is taken, the minor may either appear personally at the Bar and in presence of the Lord Ordinary choose his curators, and sign a minute to that effect, which is countersigned by the Judge; or a deed of nomination of curators, signed by the minor, may be lodged along with a minute signed by his counsel craving the Court to sustain the nomination and to remit to the Clerk of Process or to any Justice of the Peace, if the curators are out of Edinburgh, to take their acceptance and their respective declarations *de fideli administratione officii.* The deed of

[1] Kyle, Petr., 1861, 23 D. 1104.
[2] De Maria *v.* De Maria, 1831, 3 Jur. 536.
[3] Duthie, Petr., 1854, 17 D. 143.
[4] Wilson and Alexander, Petrs., 1859, 21 D. 736; Kyle, Petr., 1861, 23 D. 1104.
[5] Thomson, etc., Petrs., 1855, 18 D. 193.
[6] Chalmers' Trs. *v.* Sinclair, 1897, 24 R. 1047.
[7] Erskine's Inst. i. 7. 12.
[8] Stair, i. 6. 24; Erskine's Inst. i. 7. 29; Kerbechill *v.* Kerbechill, 1586, Mor. 9585; Stuart *v.* Henderson, 1636, Mor. 9585; Stoddart *v.* Rutherford, 30th June 1812, F. C., per Lord Glenlee; Chalmers' Trs. *v.* Sinclair, 1897, 24 R. 1047.
[9] Fergusson *v.* Dormer, 1870, 8 M. 426.
[10] Johnstoun *v.* Johnstoun, 1550, Mor. 16222.
[11] Marquis of Montrose, 1695, 4 Brown's Supp. 277.
[12] Lord Macdonald *v.* His Next of Kin, 1864, 2 M. 1194; *cp.* Fergusson *v.* Dormer, 1870, 8 M. 426.

nomination is usually a tested document, and being a judicial paper does not require a stamp.

In both the minute and deed of nomination the minor declares his curators not liable for omissions nor *singuli in solidum*. These exemptions are mere words of style, as it is *ultra vires* of a minor to grant them.[1] The minor has a right, however, to regulate the form of appointment, by making the nomination simple or joint; with a *sine qua non* or a quorum; conditionally or the reverse.[2]

A minor can only make one choice of curators,[3] unless the curators first chosen die or are removed.[4]

(b) *Undue Influence on the Minor in Choosing.*—Where the Court has reason to suspect that the minor is being unduly influenced in his choice of curators, a reasonable opportunity will be afforded him of deliberately making a free choice. The Court may proceed on a petition by the relatives of the minor or others having an interest, presented prior to an action being raised by the minor for choosing curators, and containing specific and substantial averments of undue and improper influence.[5] If, however, the minor has raised his action for choosing curators, the application to the Court should be made in such action itself.[6]

(c) *Acceptance of Office by Curators.*—The curators may attend personally at the bar and accept office by subscribing along with the Judge a minute to that effect, and thereafter take the oath *de fideli*, which is also subscribed along with the Judge, or, as is more usual, a remit is made to the Clerk of the Process, or to a Justice of the Peace where the curators are outwith Edinburgh, to take their acceptance and oath. The form of acceptance in the latter case is usually in the following terms:—

At [*date*]. In presence of *A. B.*, Depute-Clerk of Session [*or A. B.*, Justice of the Peace for the county of], acting under authority of a remit by Lord , Ordinary, for taking the acceptance and declaration of *C.*, one of the curators chosen by *D. E.* [*designation*], in an action for choosing curators against *G.* and *H.*, etc.

Compeared the said *C.*, who, having read over the deed of nomination

[1] Erskine's Inst. i. 7. 27; Rankine *v.* Johnston, 1710, Mor. 16327; Watson *v.* Rae, 1773, Mor. 16369; Mathie *v.* Watson, 1775, 5 Brown's Supp. 631.

[2] Fraser, Parent and Child (3rd ed.), 463.

[3] Adam *v.* Fairholm, 1627, Mor. 16247.

[4] A. *v.* B., 1545, Mor. 16221; Heriot *v.* Libertoun, 1564, Mor. 16229.

[5] Bargany *v.* Hamilton, 1702, Mor. 16319; Wilson *v.* Campbell, 10th March 1819, F. C.

[6] Grant *v.* Innes, 1844, 7 D. 226.

extant in process, did declare his acceptance of the said office of curator in and upon him, and gave his declaration *de fideli administratione officii.*

(*Signed*) , Curator.
, D.-C.S. [*or* J.P.].

(d) *Appointment of Delegate and Inventories Ordered.*—Where there is no appearance for the next of kin or persons having interest, the Lord Ordinary, on the motion of the minor, appoints a delegate, who is usually a member of the legal profession in Edinburgh, by an interlocutor in the following terms:—

The Lord Ordinary, in respect of the failure of the next of kin to compear and concur with the curators chosen by the minor in making up inventories, nominates, authorises, and appoints to be delegate, at whose sight the inventories are to be made up, and that in triplicate, each one whereof to be signed by the curators and delegate, and thereafter signed by the Clerk of Process, all in terms of the Act of Parliament; Appoints said inventories to be so prepared and lodged *quam primum.*

(e) *Inventories.*—After the inventories have been made up and lodged in triplicate, the Lord Ordinary is asked to approve of the same, which he does, and "ordains the Clerk of Process to docquet and sign the said inventories in triplicate; Ordains the said curators before extract to find caution in due form of law; Ordains two of the triplicates of the said inventories so signed and docqueted to be closed up and sealed, and to lie in the clerk's hands for the use of the next of kin upon the father's side and mother's side of the said minors respectively, in terms of the Act of Parliament; and the remaining triplicate to be given up to the curators, along with an extract of the act of curatory now pronounced, upon the up-giving of said inventories,[1] and this act to go out and be extracted accordingly."

An eik of an inventory may be made within the space of two months after the curators shall have knowledge and possession of any other lands, debts, sums of money, or other goods and gear belonging to the minor.[2]

The form of docquet is as follows:—

Edinburgh [*date*]. The foregoing inventory, consisting of pages, is signed and docqueted by me, one of the Depute-Clerks of Session, in pursuance of an order to that effect contained in an interlocutor of this date, pronounced by Lord , Ordinary, in the action of choosing curators at the instance of *A. B.* against *C. D.*

(*Signed*) *E. F.*, D.-C.S.

[1] Wallace *v.* Kennedy, 1674, Mor. 16290.
[2] Act 1672, cap. 2 (both editions).

(f) *Caution.*—Until caution is found the act of curatory cannot be extracted, and consequently the curators cannot act.

Formerly it was not unusual, where there were several curators, for the latter to be taken as cautioners for each other.[1] This proceeding has been found to be objectionable, and the curators must now find independent cautioners.[2]

Where the curators are resident outwith Scotland, the practice is, before sustaining their nomination, to have a draft bond of caution approved of by the Principal Clerk of Session lodged in process, and in the interlocutor sustaining the nomination the Lord Ordinary appoints a bond of caution in terms of the draft to be executed before extract by the curators. The draft bond is docqueted and initialed by the Lord Ordinary of the same date as this interlocutor.

(9) Act of Curatory.—The act of curatory, which cannot be extracted until the inventories are made up[3] and caution has been found, contains the inventories and all the procedure in the action, and is the curators' authority for exercising the office.

(10) Liability of Curators.—Curators are liable each for his own intromissions and also *singuli in solidum*, notwithstanding the minute or deed of nomination.[4]

(11) Failure to Make up Inventories and Eiks thereto.—If curators fail to make up inventories and eiks thereto—

(*a*) The debtors of the minor are not obliged to make payment to the curators.[5]

(*b*) The curators are liable both for intromission and omission.[5]

(*c*) The curators are not entitled to any "allowance or defalcation of the charges and expenses waired out be them in the affaires of the minors."[5]

This clause of the Act of Parliament has been interpreted by an Act of Sederunt[6] to mean that no expenses will be allowed, though necessary and profitable, expended in lawsuits and legal diligences, but

[1] Lillie *v.* Foret, 1558, Mor. 16226; M'Briar *v.* Maitland, 1711, 4 Brown's Supp. 828.

[2] Grant, Petr., 1848, 10 D. 1052.

[3] Wallace *v.* Kennedy, 1674, Mor. 16290; Paterson *v.* Moncrieff, 1866, 4 M. 706.

[4] Erskine's Inst. i. 7. 27; Rankine *v.* Johnston, 1710, Mor. 16327; Watson *v.* Rae, 1773, Mor. 16369; Mathie *v.* Watson, 1775, 5 Brown's Supp. 631.

[5] Act 1672, cap. 2 (both editions).

[6] A. S., 25th February 1693. See also Burnet *v.* Johnston, 1685, Mor. 16307; Yeaman *v.* Grieves, 1707, Mor. 16323; Bruce *v.* Forsyth, 1709, Mor. 16327 and 3512; Kennedy *v.* Cumming, 1686, Mor. 16309; Parkhill *v.* Chalmers, 1771, Mor. 16365; Thomson *v.* Waddell, 16th June 1812, F. C.; Erskine's Inst. i. 7. 22 (Ivory's note, 216).

that all expenses incurred in regard to the entertainment of the minor or expended upon his houses and estate will be admitted.

(*d*) The curators are removeable from their office as suspect curators if they fail in making up the eiks from time to time.[1] This has been held to apply to inventories also.[2] The Court judges each case according to its circumstances,[3] as every act done by the curator prior to making up inventories does not presume fraud.[4]

These penalties can only be sued for by the minor himself,[5] and during the lifetime of the curators, unless there has been litiscontestation during the lifetime of the latter.[6]

The neglect to make up inventories does not bar the curator of the privilege of the decennial prescription,[7] and if the minor attain majority and settle accounts with his curator, he cannot thereafter challenge the settlement on the ground that no inventories have been made up.[8]

(12) Vacation Court.—The Lord Ordinary sitting in the Vacation Court can, *inter alia*, grant decree in absence in a choosing of curators.[9]

[1] Act 1672, cap. 2.

[2] Gibson *v.* Sharp, 21st December 1811, F. C. ; Austin *v.* Wallace and Dunn, 1826, 5 S. 177 (N. E. 164).

[3] Rob *v.* Rob, 22nd December 1814, F. C.

[4] Morrison *v.* Morrison, 1841, 4 D. 337, per Lord President Boyle.

[5] Harkness *v.* Graham, 1836, 14 S. 1015.

[6] Graham *v.* Earl of Hopeton, 1798, Mor. 5599 ; Macturk *v.* Greig, 1830, 8 S. 995 ; Mollison *v.* Murray, 1833, 12 S. 237, at p. 241 (interlocutor).

[7] Gowans *v.* Oswald, 1831, 10 S. 144.

[8] Williamson *v.* Williamson, 30th June 1815, F. C.

[9] Hay *v.* Hay, 1887, 15 R. 1 ; Court of Session Act, 1868, sec. 93 ; A. S., 20th March 1907, sec. 10 ; C. A. S., A, i. 3.

CHAPTER IX

BRIEVE OF COGNITION

(1) GENERALLY.—Although the usual method now adopted of putting under guardianship the estate of persons incapable of managing their own affairs, especially in cases where incapacity,[1] or the appointment of guardian,[2] is of a temporary nature, is by the judicial appointment of a *curator bonis* without cognition, it is competent to have a person suspected of being insane or otherwise incapable of managing his affairs cognosced by brieve and inquest.[3]

The Court has no power to compel a person to sue out a brieve of cognition, and accordingly, if the Court make an appointment of a *curator bonis*, they cannot limit the appointment to any definite period.[4]

A person to whom a *curator bonis* has been sought has no right to demand a cognition.[5] Where, however, one of the petitioners for the appointment of a *curator bonis*, which was opposed by the respondent, was the nearest male agnate of the latter, the Court refused the petition, as the said petitioner could cognosce.[6] In a case decided immediately after the passing of the Court of Session Act, 1868, a petition for the appointment of a *curator bonis* was superseded to await the decision of a pending brieve of cognition;[7] but in a more recent case the Court appointed the nearest agnate, who was prosecuting a brieve of cognition, *curator bonis* in the meantime.[2] The procedure is a matter for the discretion of the Court in the circumstances of each individual case.

(2) FORMER PRACTICE.—Cognition was formerly the only method by which the insanity of a person could be determined and a guardian for his property appointed. The procedure was by a verdict of an inquest proceeding upon a brieve purchased from Chancery, either of idiotry or furiosity, directed to the Judge Ordinary of the bounds within which the person resided. In a brieve of idiotry the question for the inquest

[1] A. B. *v.* C. B., 1890, 18 R. 90, per Lord President Inglis, p. 94.
[2] Simpson *v.* Simpson, 1891, 18 R. 1207.
[3] Court of Session Act, 1868, sec. 101; Simpson *v.* Simpson, 1891, 18 R. 1207.
[4] Bryce *v.* Grahame, 1828, 6 S. 425; affd. 3 W. & S. 323.
[5] A. B. *v.* C. B., 1890, 18 R. 90; affd. 18 R. (H. L.) 40.
[6] Lockhart *v.* Ross, 1857, 19 D. 1075.
[7] Irving *v.* Swan, 1868, 7 M. 86.

was—*Si sit incompos mentis, fatuus, et naturaliter idiota, sic quod timetur de alienatione tam terrarum suarum quam aliarum rerum mobilium et immobilium?* In a brieve of furiosity the question was—*Si sit incompos mentis, prodigus et furiosus, viz. qui nec tempus, nec modum impensarum habet, sed bona delaceranda profundit?* The jury was also required to state in either case the date at which insanity commenced—*Et quamdiu sustinuit istam fatuitem—illam furiositatem?* and who was the nearest male agnate—*Quis sit tunc propinquior consanguineus ex parte patris?* and if he was of lawful age—*Si sit legitimæ ætatis?* If the verdict of the jury was satisfactory, the Clerk of Court obtained a bond of caution from the tutor served to the insane person, and the service, along with the bond of caution, was retoured to Chancery, and an extract given out and letters of curatory granted.[1]

(3) Present Practice.—(a) *Generally.*—The present practice is governed by sec. 101 of the Court of Session Act, 1868, which is in the following terms:—"It shall no longer be competent to direct a brieve for the cognition of a person alleged to be *incompos mentis prodigus et furiosus*, or of a person alleged to be *incompos mentis fatuus et naturaliter idiota*, to the Judge Ordinary; and the brieves of furiosity and idiotry hitherto in use are hereby abolished; and in lieu thereof it is enacted that a brieve from Chancery, written in the English language, shall be directed to the Lord President of the Court of Session, directing him to inquire whether the person sought to be cognosced is insane, who is his nearest agnate, and whether such agnate is of lawful age; and such person shall be deemed insane if he be furious or fatuous or labouring under such unsoundness of mind as to render him incapable of managing his affairs; and such brieves shall be served upon the persons sought to be cognosced, on *inducie* of fourteen days; and the brieve shall be tried before the said Lord President and a special jury, or before any other Judge of the Court of Session to whom the said Lord President may remit the same, and a special jury; and the trial shall be conducted in the same manner as jury trials in civil causes in Scotland are conducted, with all the like remedies as to motions for new trials and bills of exceptions which are competent with reference to such jury trials; and the Court shall have power to award expenses against either party; but they shall not award expenses against the party prosecuting the brieve unless they are of opinion that the same was prosecuted without reasonable or probable cause; and the verdict and service of the jury shall be retoured to Chancery, and shall, unless set aside on any ground,

[1] Fraser, Parent and Child (3rd ed.), p. 654 *et seq.*

have the like force and effect, and be followed by the like procedure, as a retour of the verdict and service of the jury before the Judge Ordinary according to the present law and practice."

(b) *Service and Publication.*—When a brieve from Chancery, under the provisions of the Court of Session (Scotland) Act, 1868, is presented to the Lord President, he shall issue a precept directed to messengers-at-arms commanding them to summon, warn, and charge the person sought to be cognosced to compear at a time and place to be specified, being not less than fourteen days from the date of service, to hear and see the matter of the said brieve duly cognosced and determined. And the person presenting the brieve shall also, within the said fourteen days, give public notice of the said brieve and precept, once in the *Edinburgh Gazette*, and by advertisement twice at least in a newspaper published within the county—or if there be none such, in the county next adjoining to that—in which the person sought to be cognosced resides. And no further or other service or publication of the brieve shall be necessary, either at the market cross of the head burgh of the county within which the person sought to be cognosced resides, or otherwise.[1]

(c) *Claim and Answers.*—At the time and place specified in the said precept, the Lord President shall, after hearing parties, appoint the person claiming the office of curator to lodge his claim to the said office within a certain specified time, and the person sought to be cognosced, or those acting on his behalf, to answer the said claim within a specified time thereafter, which claim and answer shall be prepared in the form of condescendence and answers, and shall state all the facts which are necessary to be disclosed, in order to prevent surprise at the trial.[2]

(d) *Fixing Date and Place of Trial.*—The Lord President, if no valid objection be stated to the brieve or to the regularity of the procedure, shall, by the same order as is set forth in the preceding paragraph, fix the time and place for the trial of the said brieve, and shall give such directions as may be necessary for securing that the person sought to be cognosced shall be in attendance at the trial, or shall otherwise be seen and examined by or in presence of the jury, or of some of them.[3]

(e) *Clerk of Court.*—The Principal Clerk of Session in the First Division shall act as clerk in the said proceedings and trial, but with

[1] A. S., 3rd December 1868, sec. 1 ; C. A. S., D, vi. 1.
[2] A. S., 3rd December 1868, sec. 2 ; C. A. S., D, vi. 2.
[3] Ibid. ; Dewar *v.* Dewar and Reid, 25th February 1809, F. C.

power to the Lord President to appoint any other Principal or Depute-Clerk of Session to act in his place.[1]

(f) *Jury.*—The order of the Lord President fixing the time and place of trial, or a certified copy thereof, shall be sufficient warrant and authority to the Sheriff of the county of Edinburgh, or to the Sheriff of the county within which the trial is appointed to take place, to summon a special jury in common form. And the reducing of the jury to twenty, and the calling and balloting of the special jury at the trial, shall be conducted according to the ordinary rules in the trial of civil causes in the Court of Session. The number of jurors empanelled to try the brieve shall be twelve, and they shall return their verdict either unanimously or by such majority, and under such conditions as are provided in the case of verdicts returned by juries in the trial of civil causes in the Court of Session.[2]

(g) *Postponement of Trial.*—The Lord President, or the Judge to whom the brieve may be remitted, shall proceed to the trial of the brieve at the time and place appointed in the order of the Lord President, unless the Lord President, or said other Judge, shall postpone the same on cause shown, which he is hereby empowered to do, on such conditions regarding expenses as may seem to him just.[3]

(h) *Verdict.*—When the jury return their verdict the clerk shall receive it in common form, engross it on the interlocutor sheet, read it over and subscribe it in the presence of the jury, who shall thereafter be dismissed. Thereafter the clerk shall make out and subscribe a formal writing embodying the verdict and answering the several heads of the brieve, and also setting forth whether the claim (if any) of the party suing the brieve is sustained or dismissed; which writing shall, as hereinafter provided, be either retoured to Chancery or entered in the Minute-Book, according as the verdict shall be for or against cognition.[4]

(i) *Bill of Exceptions or Motion for a New Trial.* — Any bill of exceptions or motion for a new trial shall be presented or made in the Division of the Court to which the Judge who tried the cause belongs; but in the event of the Judge who tried the cause being a Lord Ordinary, the bill of exceptions or motion for a new trial may be presented or made in either Division; but in this last case the Judge who tried the cause shall sit and vote as a member of Court in the

[1] A. S., 3rd December 1868, sec. 3; C. A. S., D, vi. 3. There is now only one Principal Clerk of Session—2 and 3 Geo. V. cap. 22.

[2] A. S., 3rd December 1868, sec. 4; C. A. S., D, vi. 4.

[3] A. S., 3rd December 1868, sec. 5; C. A. S., D, vi. 5.

[4] C. A. S., D, vi. 6; Larkin *v.* M'Grady, 1874, 2 R. 170.

hearing and judgment on the said bill of exceptions or motion for a new trial.[1]

(j) *Transmission of Retour.*—If no bill of exceptions is presented, and no notice of motion for a new trial is given within the time prescribed by the regulations in force with regard to ordinary civil causes, the party suing the brieve, if the verdict has been returned in his favour, shall apply to the Judge who tried the cause by motion, to be intimated to the agent of the opposite party, that the clerk to the proceedings be authorised to transmit to Chancery the retour prepared in terms of paragraph (h); and the said Judge shall authorise the clerk accordingly, and shall himself authenticate the retour by his subscription, as being the retour applicable to the said brieve. And in like manner, after any bill of exceptions shall have been disallowed, or motion for a rule refused, or rule for a new trial discharged, the same procedure shall be adopted by the party suing the brieve, if the verdict has been returned in his favour. And in the like events, should the verdict be against cognition, the party opposing the brieve may apply to the said Judge by motion to be intimated to the agent of the party suing the brieve, that the formal writing prepared as aforesaid be ordered to be entered in the Minute-Book.[2]

(k) *Expenses.*—It shall be competent to either party, subject to the provisions of said recited Act, to move the Division of the Court to which the Judge who tried the cause belongs, or in the event of the presiding Judge being a Lord Ordinary, to move either Division of the Court, to find him entitled to the expenses of the proceedings and trial, or any part thereof: Provided always that when the presiding Judge is a Lord Ordinary, the Division to whom the motion for expenses is made shall call in the presiding Judge to sit and vote as a member of the Court in disposing of the said motion.[3]

(4) Title to Sue.—It is not necessary that the person suing out a brieve of cognition should be the nearest male agnate; a near relation is sufficient.[4]

(5) Competency.—A married woman may be cognosced by her nearest agnate,[5] but if she is in the custody of her husband, a cognition, while it may affect the guardianship of her estate, will not necessarily decide the

[1] A. S., 3rd December 1868, sec. 8; C. A. S., D, vi. 7.
[2] C. A. S., D, vi. 8.
[3] A. S., 3rd December 1868, sec. 7; C. A. S., D, vi. 9.
[4] Larkin *v.* M'Grady, 1874, 2 R. 170.
[5] Haliburton *v.* Maxwell, 1791, Mor. 16379.

question of the custody of her person.[1] It is quite competent for a near relative, not being the nearest male agnate, to sue out a brieve, and for the nearest male agnate to come forward after the verdict and be served.[2] If he does not do so, an application for a *curator bonis* may be made.[3]

[1] Jardine *v.* Currie, 1825, 4 S. 158 (N. E. 159). See also Haliburton *v.* Maxwell, 1791, Mor. 16379.

[2] Larkin *v.* M'Grady, 1874, 2 R. 170.

[3] Ibid., per Lord President Inglis, p. 172.

CHAPTER X

DIVISION OF COMMONTY

(1) JURISDICTION.—See *supra*, pp. 85, 124.

(2) TITLE TO SUE.—See *supra*, pp. 223, 224.

(3) COMPETENCY.—Where there is only one proprietor burdened with rights of servitude competent to other heritors, a division of the commonty is incompetent.[1]

It is not competent to divide a commonty the property of the Crown or of royal burghs.[2] In the latter case the property must be held in burgage.[3] If property is vested in the Crown, although the benefit is conferred by grant upon a subject, division is incompetent.[4]

(4) SUMMONS.—(a) *Generally.*—The summons must be prepared in terms of the first section of the statute 13 & 14 Vict. cap. 36.[5]

(b) *Conclusions.*—The summons concludes for the exhibition and production by the defenders of the several writs and titles by which they claim any right of property or servitude over the commonty, and for a declarator, in terms of the Act 1695, cap. 69 (record edition), cap. 38 (12mo edition), that the pursuer is entitled to prosecute an action of division of said commonty, and that the same ought to be divided among the parties concerned according to valuation, or valued rent, of their several lands and properties. Where the ground is in Shetland, this conclusion is for division according to the number of merks land belonging to each of the parties.[6] In order that such division may be made, a commission is concluded for to the Judge Ordinary, or other proper person, to perambulate the commonty and to take a proof of the extent, limits, quality, and marches thereof enjoyed by the pursuer and defenders for forty years bygone or longer; to describe the marches and set up stones, and, if necessary, to take a proof of the valuation or valued rents of the lands of the several parties claiming interest in said commonty; to appoint a person of skill to value, and a surveyor to survey, the commonty and its several parts,

[1] Stewart *v.* Feuars of Tillicoultry, 1740, Mor. 2469.
[2] Act 1695, cap. 69 (record edition), cap. 38 (12mo edition).
[3] Hunter *v.* Mailler, 1854, 16 D. 641.
[4] Sandilands *v.* Mags. of Falkland, 19th January 1809, F. C.
[5] A. S., 18th June 1852, sec. 1; C. A. S., C, iv. 1 (*a*).
[6] Spence *v.* Earl of Zetland, 1839, 1 D. 415.

and thereafter to divide the commonty among the pursuer and the other persons concerned in their proper proportions; to make a plan of the commonty and its divisions and to mark off the several divisions by stones; with instruction to the commissioner to allot to each party such part of the commonty and mosses as may be adjacent to his property; and to report to the Court. The Court is then asked to ratify the divisions and allocations and to decern the same to belong to the respective parties heritably and irredeemably. A conclusion for declarator that the parties have right to enjoy the respective shares of the commonty as parts and pertinents of their other lands follows, and a decerniture is sought that the various parties should execute the necessary writings to carry these proceedings into effect. These are followed by a declarator that such of the defenders as shall not produce their rights and titles shall be found to have no right or interest in the commonty and be discharged from claiming or exercising such right or interest in all time coming. In conclusion, expenses are sought from the defenders in proportion to their interests; also a conclusion for expenses if the defenders oppose.

(5) CONDESCENDENCE.—The condescendence shall set forth, in reference to a plan or sketch to be produced along with the summons, the description of the boundaries of the common which the pursuer proposes to have divided, according to natural or other objects, or the names, if any, of hills, mosses, and other localities, occurring along or near to the line of such boundaries.[1]

The pursuer shall, in said condescendence, state the nature and extent of the right and interest he claims in such common, the titles under which he maintains that such interest belongs to him, and the claim he proposes to advance in such process of division, which claim may be subject to any alterations which the evidence and pleas of parties may render necessary.[2]

(6) DEFENCES.—The parties who intend to appear in the process shall lodge defences in terms of the statute 13 & 14 Vict. cap. 36, stating the nature and extent of the right and interest they mean to advance in the said common, whether in the whole or in a portion thereof, the extent and boundaries of the common, if they do not admit the boundaries stated by the pursuer, the lands, if any, within the pursuer's boundaries, which they claim as private property, and as not forming part of the common, the titles under which they maintain such pleas, and the like, and the claim they intend to advance in the process, subject to any

[1] A. S., 18th June 1852, sec. 2; C. A. S., C, iv. 1 (*b*).
[2] A. S., 18th June 1852, sec. 3; C. A. S., C, iv. 1 (*c*).

alterations which the evidence and pleas of other parties may render necessary.[1]

(7) PROCEDURE.—The action of division of commonty is an Inner House action. Notwithstanding this, the summons is called and enrolled in the Outer House. Where the pursuer has a good title the first interlocutor runs:—

The Lord Ordinary sustains the pursuer's title to sue and appoints all parties claiming an interest in the common to lodge their defences and claims by the day of .

The record is then made up in the usual way.

After condescendence and answers have been lodged, "the Lord Ordinary shall consider the same, both in reference to the requirements of the said statute, and also in order to consider whether any questions of law ought to be determined before allowing proof, or to what points the proof should in the first instance be directed; and also with a view to consider whether such proof should, in whole or in part, be by commission or before a jury, or in what other form; and whether there are any separate and distinct points which should be so tried before the general boundaries of the common are to be remitted to proof, and between what parties."[2]

If the decision on preliminary questions is in favour of the pursuer, the Lord Ordinary will allow a proof. The proof is usually taken before a commissioner. In such circumstances the interlocutor is in these terms:—

The Lord Ordinary sustains the libel of division; Finds the same relevant; Dispenses with the printing of the pleadings; Closes the record on the summons and defences and claims Nos. of process; Grants commission to , for the purposes, in the terms, and with the powers specified in the libel in all respects and as concluded for in the summons; and grants diligence against havers and witnesses, at the instance of all or any of the parties, and commission to to take the oaths and depositions, and receive their exhibits and productions. The commissioner to report *quam primum.*

After the proof has been taken and reported with the productions to the Lord Ordinary, the latter makes great avizandum of the whole proceedings to the Division of the Inner House to which the cause is marked.[3] The interlocutor is usually in the following terms:—

The Lord Ordinary circumduces the term for proving and makes great avizandum, with the libel, proof, and whole proceedings, to the Lords of the First [*or* Second] Division of the Court.

[1] A. S., 18th June 1852, sec. 4; C. A. S., C, iv. 1 (*d*).
[2] A. S., 18th June 1852, sec. 5; C. A. S., C, iv. 1 (*e*).
[3] Act 1695, cap. 69 (record edition), cap. 38 (12mo edition).

The process is then transmitted to the Division.

If there are objections to the report of the commissioner, the Division may either hear them, or remit to the Lord Ordinary to do so, subject in the latter case to review by the Division. The Court never interferes with the decision of the commissioner in practical matters.[1]

If there are no objections to the report of the commissioner, or where the objections have been disposed of, a joint minute is usually prepared by the parties setting forth the proceedings which have taken place, asking for decree of division in terms of an adjusted interlocutor annexed to the minute, and to remit the cause to the Lord Ordinary as to the custody of the plan, the terms of access, and the question of expenses. The decree of division is very long, and accordingly the Court is asked to dispense with the writing out of it by the clerk, to adopt a printed copy for signature, and to grant warrant to the Extractor to embody a printed copy of the decree of division in extracts of the decree.[2] The Court thereupon interpones authority to the minute, and grants decree and orders as craved. The cause is thereupon transferred to the Lord Ordinary, who deals with the questions remitted to him.

Expenses are granted against the defenders in proportion to their shares of the commonty. (See Maclaren on Expenses, p. 329.)

(8) Registration of Decree.—A decree of division has the effect of a conveyance in favour of the several parties participating in the division of the shares severally allotted to them, and an extract thereof from any competent Court books may be recorded in the appropriate Register of Sasines and is a complete title to the parties of their shares of the commonty.[3]

(9) Expenses.—See Maclaren on Expenses, p. 329.

[1] Bruce *v.* Bain, 1883, 11 R. 192.
[2] Innes *v.* Murray, 1859, 21 D. 1381.
[3] Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. cap. 94), sec. 35.

CHAPTER XI

DIVISION OR SALE OF COMMON PROPERTY

(1) GENERALLY.—This is a common law action for the purpose of having a subject held *pro indiviso* by several persons divided or sold, and the proceeds divided amongst them.

(2) JURISDICTION.—See *supra*, p. 85.

(3) TITLE TO SUE.—This action may be brought by any one of several proprietors holding *pro indiviso*,[1] even though there is a clause in the deed constituting the right forbidding a division or sale.[2] A trustee, who has no power of sale, may yet raise an action of division or sale.[3] Where, however, the fee of the property sought to be divided or sold is vested in certain individuals with other parties interested in the trust and all more or less interested in its maintenance, an action of division or sale is not competent.[4]

(4) CONCLUSIONS OF SUMMONS.—The summons begins with a conclusion for a declarator that the pursuer is entitled to insist in an action of division or sale of the subjects, which must be fully described, and that the subjects should be divided between the pursuer and the defenders in certain proportions, which are either set forth or are left to be determined in the course of the process. The summons then proceeds to ask for the appointment of a person to value and measure the subjects, and thereafter to divide the same in the proportions above specified or otherwise, and to report in due form. The Court is then asked to approve of the report and to decern that the respective divisions should belong to the pursuer and defenders respectively, and that they should make up titles to their respective proportions, and to execute and deliver to the persons having right thereto dispositions of the same. *Alternatively*, if the subjects cannot be divided, or if it

[1] Milligan *v.* Barnhill, 1782, Mor. 2486; Bryden *v.* Gibson, 1837, 15 S. 486; Brock *v.* Hamilton, 1852, 19 D. 701 (note); Grant *v.* Heriot's Trust, 1906, 8 F. 647, per Lord President Dunedin, p. 658.

[2] Grant *v.* Heriot's Trust, 1906, 8 F. 647, per Lord President Dunedin, p. 658.

[3] Craig *v.* Fleming, 1863, 1 M. 612.

[4] Kennedy and Tullis *v.* Incorporation of Maltmen, Glasgow, 1885, 12 R. 1026.

is inexpedient that they should be divided, declarator is asked that it is necessary to sell the same by public roup, and the free proceeds divided among the pursuer and defenders in certain proportions. Expenses of the action are asked for jointly and severally against the defenders, or in such proportions as the Court may fix, and further expenses are asked for in the case of unnecessary opposition.

Where there may be difficulty about the title, it is usual to introduce a conclusion for adjudication of the subjects to the purchaser.[1]

(5) Outer House Action.—The action being a common law action is competent in the Outer House[2] and the procedure is that of an ordinary Outer House action, with the variations noted later.

(6) Heritable or Moveable.—The subject of the action may be either heritable or moveable.[3]

(7) Where Appropriate.—Where *pro indiviso* proprietors disagree as to its management, the remedy is by an action of division or sale, and not by the appointment of a judicial factor.[4] Where the subject is capable of division, but only at a loss to the parties concerned, a *pro indiviso* proprietor is entitled to insist upon an immediate sale and division of the price.[5] Where capable of division, but the sale would not be advisable owing to the state of the market, the Court will order division but not sale.[6] The action is particularly appropriate in cases of heirs-portioners[7] and partners.[8]

(8) Procedure.—The preliminary procedure of signeting, serving, and calling the summons is the same as in an ordinary action.

Where the action is defended, the entering of appearance, lodging defences, and closing the record are also the same as in an ordinary action.

At the closing of the record the Lord Ordinary may, before answer, remit to a reporter, in which case the interlocutor will be in the following terms:—

The Lord Ordinary closes the record on the Summons and Defences Nos. of Process; Before answer remits to to consider the summons and whole procedure, and also to examine the subjects libelled,

[1] Campbell, 1893, 1 S. L. T. 157.

[2] Anderson *v.* Anderson, 1857, 19 D. 700, per Lord Curriehill, p. 701; Macbride *v.* Paul, 1862, 24 D. 546.

[3] Brock *v.* Hamilton, 1852, 19 D. 701 (note), per Lord Rutherfurd, p. 702 (note); Stair, i. 16. 4; Erskine's Inst. iii. 3. 56 *et seq.*

[4] Allan, Petr., 1898, 36 S. L. R. 3.

[5] Thom *v.* Macbeth, 1875, 3 R. 161.

[6] Morrison *v.* Kirk, 1912, S. C. 44.

[7] Frizell *v.* Thomson, 1860, 22 D. 1176.

[8] Stewart *v.* Simpson, 1835, 14 S. 72.

and to report whether they are incapable of division among the *pro indiviso* proprietors thereof, and whether it is proper and necessary that they should be sold, with due regard to the interests of the parties, and if so, to report whether they should be exposed as a whole or in lots, and to suggest the lots thereof, if desirable that they should be so exposed, should be exposed to sale by public roup, and to suggest any conditions which he may consider necessary for the articles of roup.[1]

Where the defences are repelled, or where the action is undefended, the Lord Ordinary finds the libel relevant, sustains the pursuer's title to raise and insist in the process of division or sale, and remits as before.

Where the reporter recommends a division, decree of division is usually pronounced in terms of the recommendation. The pursuer is thereupon found entitled to expenses against the defenders proportionate to the respective values of the subjects allotted to them, and this brings the action to an end.

Where the reporter recommends a sale, he usually states whether the property should be put up for sale in one lot or in several lots, and also states the upset price or prices of the same respectively, with reduced upset price or prices in the event of no sale. An interlocutor is accordingly pronounced approving of the report, finding that the property is incapable of division, or that it is not expedient to divide the property with due regard to the interests of parties, and declaring that it is proper and necessary that the said property should be sold in one lot at the upset price and reduced upset price mentioned in the report, or in several lots at the upset and reduced upset prices mentioned in the report. The interlocutor then appoints the sale to proceed at the sight of the Clerk of Court upon articles of roup to be adjusted at his sight and signed by him, upon such day or days and hour and at such place as shall be fixed by him. The articles of roup should bind the *pro indiviso* proprietors to execute a disposition in terms of a draft which should be lodged in process. The interlocutor thereafter provides for the advertisement of the sale or sales and appoints the price or prices, under deduction of the expenses of the sale, to be deposited in the name of the clerk in bank, there to await the order of the Court or Lord Ordinary.

Permission to the *pro indiviso* proprietors to bid for and purchase the subjects may be granted by the Court, and this permission is reserved in the articles of roup.[2]

After the sale the purchase price, after deducting the expenses of

[1] Morrison *v.* Kirk, 1912, S. C. 44. [2] Thom *v.* Macbeth, 1875, 3 R. 161.

the sale, is consigned, and a report of the sale is lodged in process. In a case where a defender had been in possession of the subjects for many years he was allowed to charge sums expended on the preservation and amelioration of the property against the proceeds of the sale.[1]

The report is then approved of and the pursuer found entitled to expenses, which are taxed by the Auditor. Decree is then pronounced dividing the money consigned among the parties and ordering the bank to pay the same and ordaining the Clerk of Court to deliver the disposition of the subjects which has been lodged in process. If there is any difficulty about the execution of the disposition, a conclusion for adjudication, as already mentioned, will be included in the summons, and an extract of the decree of adjudication will be a good title to the purchaser.[2]

Where defenders could not be traced, the Lord Ordinary refused to find the libel relevant and sustain the pursuer's title to raise and insist on a process of sale and division unless the pursuer added a conclusion for adjudication.[3]

[1] Miller *v.* Crichton, 1893, 1 S. L. T. 262.
[2] Conveyancing (Scotland) Act, 1874, sec. 65.
[3] Campbell, 1893, 1 S. L. T. 157.

CHAPTER XII

PROVING THE TENOR

(1) Definition.—Proving the tenor is a declaratory action in which the contents of a document which has been lost,[1] cancelled,[2] obliterated,[3] or destroyed,[4] in whole or in part, are ascertained by the Court and the contents so ascertained declared to have the same effect as the original deed would have had if still extant.

(2) Jurisdiction.—See *supra*, p. 84.

(3) Where Competent.—Although the writings sought to be proved are usually private writings, it is competent to prove judicial writings,[5] such as the verdict of a jury,[6] a valuation of teinds,[7] or a decree;[8] or public documents, such as the charter of a royal burgh;[9] or deeds recorded in public registers.[10] Holograph writings may also be set up.[11]

In proving an unextracted interlocutor it is necessary to prove the tenor of the summons also.[12]

Where a deed is found in the repositories of the granter at his death in a cancelled condition, a proving of the tenor is not an appropriate action, because, although the contents of the writing may be proved, the questions whether the cancellation destroys the deed or whether the deed can be restored as a legal instrument against the cancellation are wholly unsuitable for such a process.[13] Where, however, the deed was

[1] M'Clelland *v.* Sim, 1855, 17 D. 512; Russell's Trs. *v.* Russell, 1862, 24 D. 1141.

[2] Cunningham *v.* Mouat's Trs., 1851, 13 D. 1376; Winchester *v.* Smith, 1863, 1 M. 685.

[3] Cousin *v.* Gemmill, 1862, 24 D. 758. See also Duke of Atholl *v.* Lord Advocate, 1880, 7 R. 1195.

[4] Ronald, 1830, 8 S. 1008; Dow *v.* Dow, 1848, 10 D. 1465; Leckie *v.* Leckie, 1884, 11 R. 1088.

[5] Bankton, iv. 29. 7.

[6] Lord Cranston *v.* Turnbull, 1681, Mor. 15801.

[7] Alexander *v.* Oswald, 1840, 3 D. 40; Lord Lynedoch *v.* Liston, 1841, 3 D. 1078.

[8] Birnie *v.* Montgomery, 1675, Mor. 15796; Duke of Argyle *v.* M'Lean, 1781, Mor. 15828.

[9] Mags. of Sanquhar *v.* Officers of State, 1864, 2 M. 499.

[10] Richmond *v.* Officers of State, 1869, 7 M. 956; Browne *v.* Orr, 1872, 10 M. 397; Duke of Argyll *v.* Campbell, 1873, 11 M. 611.

[11] Lillies *v.* Lillie, 1832, 11 S. 160; Robertson *v.* Hyndman, 1833, 11 S. 775.

[12] Duncan *v.* Arnott, 1827, 5 S. 840 (N. E. 779).

[13] Winchester *v.* Smith, 1863, 1 M. 685, per Lord Neaves, p. 697, and Lord Justice-

extant in the condition in which it was executed, and subsequently obliterated or cancelled, it may be made the subject of an action of proving the tenor.[1]

(4) Where Necessary.—Although, in general, a party requires to set up by an action of proving the tenor a deed which has been lost or destroyed before he can found upon it, this is not a universal rule, and such a deed may be proved incidentally without such an action. In an old case it was laid down that "if the writ is such upon which a permanent right is to be set up or on which execution is to follow such writ cannot be supplied without a proving of the tenor; but if the writ be only such as imports the extinction or restriction of a debt, it may be supplied by adminicles without a proving of the tenor";[2] and the distinction there drawn between a deed founded on in a substantive action and a deed set up by way of exception has always been recognised by the Courts.[3]

Accordingly, it is necessary to raise an action of proving the tenor to establish the title to sue of a pursuer,[4] or where the lost deed is the foundation of an action.[5] In the former case, however, it was held by Lord Kincairney that the title sought to be set up must be a permanent title.[6]

On the other hand, where the missing deed is to be used, not to set up a title on which an action is founded, but is merely a part of the evidence of the case, a proving of its tenor may proceed incidentally.[7]

Where one of the parties to a cause destroys a writ, he cannot plead that the other party shall prove the tenor by a substantive action.[8]

Clerk Inglis, p. 699. See also Dow *v.* Dow, 1848, 10 D. 1465; Anderson *v.* Boyd, 1827, 5 S. 927 (N. E. 862).

[1] Falconer *v.* Stephen, 1849, 11 D. 1338.

[2] Maxwell and Riddel *v.* Maxwel, 1742, Mor. 15820.

[3] Home *v.* Home, 1680, Mor. 14999; Synod of Merse *v.* Scot, 1753, Mor. 15823; Drummond *v.* Thomson's Trs., 1834, 7 W. & S. 564, per Lord Brougham, p. 572; Maxwell *v.* Reid, 1863, 1 M. 932; Young *v.* Thomson, 1909, S. C. 529.

[4] Shaw *v.* Shaw's Trs., 1876, 3 R. 813. See also Inglis *v.* Hay, 1709, Mor. 13293; Dunbar *v.* Earl of Morton, 1714, Mor. 13296; Gilchrist *v.* Morrison, 1891, 18 R. 599.

[5] Gordon *v.* Robertson, 1873, 11 S. L. R. 35. See also Boyd *v.* Anderson, 1821, 1 S. 144 (N. E. 140); 2 S. 363 (N. E. 323); Merry *v.* Dun, 1835, 14 S. 36; Dow *v.* Dow, 1848, 10 D. 1465.

[6] Steele *v.* Law, 1895, 3 S. L. T. 190.

[7] Hutchison *v.* Tod, 17th May 1823, F. C.; Wilson *v.* Leckie, 1870, 7 S. L. R. 563.

[8] Kennoway *v.* Ainslie, 1752, Elchies, *voce* Trust, No. 16; Fraser's Trs. *v.* Fraser, 1800, Mor. App. *voce* Member of Parliament, No. 5; Fisher *v.* Smith, 1771, Mor. 9366; Seton *v.* Paterson, 1766, 5 Brown's Supp. 924; Ross *v.* Fisher, 1833, 11 S. 467.

The Court may dispense with a substantive action of proving the tenor by consent of parties.[1]

(5) The Parties.—Any person who can show a *primâ facie* interest in the deed sought to be proved may be pursuer.[2] Even when a deed was recorded, it was held that the grantee had an interest to set up its contents.[3]

Every person having an interest should be called as a defender. If the pursuer alone has an interest, he should call "the lieges" as defenders.[4]

(6) Conclusions of the Summons.—The *first* conclusion is to have it declared that the deed sought to be set up was of a certain tenor, the actual words of the deed being set forth where possible.[5]

The *second* conclusion is to the effect that it should be declared that the decree to be pronounced in the cause shall be in all respects as valid and effectual a document to the pursuer in all cases, improbation as well as others, as the original deed, if extant, would be, notwithstanding the same has been abstracted or lost, and cannot be found; and

The *third* conclusion is for expenses against the defender in the event of his appearing and occasioning expense in the process.

(7) Condescendence.—The pursuer must set forth (1) the terms of the deed; (2) the adminicles;[6] and (3) the *casus amissionis*.[7]

(a) *The Terms of the Deed.*—As the conclusions of the summons contain, where possible, the *ipsissima verba* of the lost deed, it is only necessary to set forth in the condescendence the terms of the deed by reference.

(b) *Adminicles.*—Adminicles are such informal writings as tend to establish the contents of the deed sought to be reduced. Their character varies with the nature of the writ to be proved.[8] Scrolls of an assignation of a bond and a translation of the assignation;[9] an incomplete scroll or draft of a postnuptial contract making reference

[1] Shand's Practice, ii. 844; Couper *v.* Marquis of Bute, 1827, 5 S. 831 (N. E. 771); Watson *v.* Scott, 1839, 1 D. 548; Dow *v.* Dow, 1848, 10 D. 1465; Winton & Co. *v.* Thomson & Co., 1862, 24 D. 1094.

[2] Winchester *v.* Smith, 1863, 1 M. 685, per Lord Deas, p. 692; *cp.* Alexander *v.* King's Advocate, 1830, 8 S. 634.

[3] Browne *v.* Orr, 1872, 10 M. 397.

[4] Mitchell and Innes *v.* The Lieges, 1852, 24 Jur. 662.

[5] Erskine's Inst. iv. 1. 56; Begbie *v.* Fell, 1822, 1 S. 391 (N. E. 365).

[6] Jenkinson *v.* Campbell, 1850, 12 D. 854.

[7] Mackinnon's Tr. *v.* Bank of Scotland, 1915, S. C. 411.

[8] Lithgow *v.* Murray, 1680, Mor. 15799; Winton & Co. *v.* Thomson & Co., 1862, 24 D. 1094; Richmond *v.* Officers of State, 1869, 7 M. 956, per Lord Kinloch, p. 957.

[9] Watson's Trs. *v.* Erskine, 1847, 19 Jur. 523.

to an antenuptial contract sought to be set up;[1] and a completed deed cancelled by the mistake of a law agent,[2] have been held sufficient adminicles.

Adminicles are usually necessary.[3] Where, however, the deed has been destroyed by the wrongful act of the person upon whom it was obligatory, the adminicles need not be averred, as they need not be proved.[4] In other cases, where, by the nature of the deed sought to be set up, no adminicle is to be expected, the Court will allow the action to go to proof without any adminicles being averred,[5] although their absence must be accounted for.[6]

(c) *Casus Amissionis.*—The circumstances attending the loss or cancellation of the deed are called *casus amissionis.* In one class of case a *special casus amissionis* must be averred, while in another class a *general casus amissionis* will be held sufficient. As Erskine says,[7] "In obligations which are distinguishable barely by the debtor's destroying and cancelling them, *ex. gr.* in personal unregistered bonds where the debtor who makes payment rests frequently secure by getting up the obligation from the creditor and destroying it, such a special *casus amissionis*[8] must be proved as may show that the bond was lost while in the creditor's hands by some particular accident, *ex. gr.* fire, robbery, shipwreck, or other such misfortune; otherwise bonds truly paid might be again demanded from the debtor as obligations still subsisting (Stair, b. iv. tit. 32, sec. 3). But in deeds which are intended to remain constantly with the grantee, or which require contrary deeds of renunciation to extinguish them, as dispositions, seisins, wadsets, etc., or where the debtor who makes payment does not commonly choose to rely for their extinction on the bare cancelling of them, as assignations, etc., a more general *casus amissionis*[9] is sufficient (Stair, b. iv. tit. 32,

[1] M'Leod *v.* Leslie, 1865, 3 M. 840; Stair, iv. 32. 10.

[2] Cunningham *v.* Mouat's Trs., 1851, 13 D. 1376.

[3] Rannie *v.* Ogg, 1891, 18 R. 903, per Lord President Inglis, p. 908; Incorporation of Skinners, Edinburgh *v.* Baxter's Heir, 1897, 24 R. 744.

[4] Lillies *v.* Lillie, 1832, 11 S. 160; Ritchie *v.* Ritchie, 1871, 9 M. 820; Leckie *v.* Leckie, 1884, 11 R. 1088; Borland *v.* Andrew's Judicial Factor, 1901, 4 F. 129; *cp.* Rannie *v.* Ogg, 1891, 18 R. 903.

[5] Winton & Co. *v.* Thomson & Co., 1862, 24 D. 1094. See also Stair, iv. 32. 7. Erskine's Inst. iv. 1. 55; Ogilvy *v.* Napier, 1612, Mor. 15786; Lithgow *v.* Murray, 1680, Mor. 15799; Earl of March *v.* Montgomery, 1743, Mor. 15820; A. *v.* B., 1749, Mor. 15823.

[6] Graham *v.* Graham, 1847, 10 D. 45; Ross *v.* Mellis, 1871, 10 M. 197; Thomson *v.* Dunlop, 1884, 11 R. 453.

[7] Erskine's Inst. iv. 1. 54.

[8] Smith *v.* Ferguson, 1882, 9 R. 866, per Lord Shand, p. 879. See also Donald *v.* Kirkaldy, 1787, Mor. 15831; Carson *v.* M'Micken, 14th May 1811, F. C.; M'Farlane *v.* M'Nee, 1826, 4 S. 509 (N. E. 517).

[9] Moffat *v.* Moffat, 31st January 1809, F. C.; Forbes' Trs. *v.* Welsh, 1827, 5 S.

sec. 4); insomuch that most lawyers are of opinion that it is sufficient to libel that the deed was lost anyhow, even *casu fortuito*."

Where the *casus amissionis* is simply that the deed has been lost, it must be specifically averred that efforts have been made to recover the deed, and also the particular efforts made.[1]

Where the deed sought to be proved is suspected of being forged, there must be a definite averment of the *casus amissionis*, and not a mere conjecture.[2]

It has been held to be a sufficient averment to enable a proof to be granted that a testator, after the execution of a testamentary writing, ordered it to be destroyed,[3] or destroyed it while of unsound mind.[4]

(8) Modes of Proof.—Proof may be either entirely in writing, *prout de jure*, or by oral testimony alone, depending entirely upon the circumstances of the case.

By Act 1579, cap. 45 (record edition), cap. 94 (12mo edition), it is provided, "That in all tyme cuming na tennour of lettres of hornyng executionis and indorsation thairof not extant and producit judiciallie sal be admittit to be provin be witnesses in quhatsumeuir actioune or caus persewit or to be persewit be the liegis of this realme befoir quhatsumeuir Juge or Juges within the samyne." This does not, however, prevent proof by written adminicles.[5]

Proof by written adminicles alone has been held sufficient where these have been probative documents under the hand of the granter of the deed;[6] and this has been extended to other cases, such as where the deed lost is recited in another deed.[7]

Where the written evidence is not sufficient of itself, it may be supplemented by parole,[8] and where the *casus amissionis* is clearly proved,[9]

497 (N. E. 468); Kerr *v.* Kay, 1830, 8 S. 1008; Walker *v.* Brock, 1852, 14 D. 362; Pollok *v.* Jones' Heir, 1899, 1 F. 394.

[1] M'Clelland *v.* Sim, 1855, 17 D. 512; Russell's Trs. *v.* Russell, 1862, 24 D. 1141; See also Walker *v.* Brock, 1852, 14 D. 362; M'Kean *v.* Miller, 1857, 19 D. 448, per Lord President M'Neill.

[2] Graham *v.* Graham, 1847, 10 D. 45, per Lord Jeffrey, p. 50.

[3] Bonthrone *v.* Ireland, 1883, 10 R. 779.

[4] Laing *v.* Bruce, 1838, 1 D. 59; Kennedys *v.* Macdonald, 1866, 2 S. L. R. 171.

[5] Erskine's Inst. iv. 1. 58.

[6] Stair, iv. 32. 10; Erskine's Inst. iv. 1. 56.

[7] Lesmore *v.* Marquis of Huntley, 1682, Mor. 15802; Kinnier *v.* Kellie, 1685, Mor. 15804; Inglis *v.* Lord A. Hay, 1712, Mor. 15819; M'Leod *v.* M'Lean, 1835, 13 S. 581; Fleming *v.* M'Intosh, 1835, 13 S. 1002; Dickson on Evidence, sec. 1347.

[8] Graham *v.* Graham, 1847, 10 D. 45, per Lord Jeffrey, p. 49; Dickson on Evidence, sec. 1348.

[9] Stair, iv. 32. 7; Erskine's Inst. iv. 1. 55; Graham *v.* Graham, 1847, 10 D. 45; Dickson on Evidence, sec. 1349 *et seq.*

oral evidence alone has been held sufficient, especially where the deed has been maliciously and fraudulently destroyed.[1]

(9) PROCEDURE.—(a) *Former Practice.*—An action of proving the tenor used to be an Inner House action. It could, however, be served, called, and enrolled in common form before a Lord Ordinary. When the action appeared in his rolls the Lord Ordinary made great avizandum to the Inner House with the process and adminicles, if any of the latter were produced. The case was then enrolled in the Summar Roll, where, if the case was allowed to proceed, the Court pronounced an interlocutor sustaining the adminicles produced, as sufficient for allowing a proof of the deed sought to be proved, allowing the pursuer to prove the tenor and the *casus amissionis*, and granting diligence against witnesses and havers, or granted a proof before answer. Whether appearance was made or not, proof was always taken. Where opposition was made, defences were ordered. The proof was usually taken before the Lord Ordinary or one of the Judges of the Division. A prepared state was made up, narrating the summons and procedure in Court, and containing the full deposition of the witnesses and a full inventory and description of the writs produced. The later practice, however, was to dispense with the state. Thereafter the action was advised and decided.[2]

(b) *Present Practice.*—Since the Act of Sederunt of 20th March 1907, where an action of proving the tenor has been brought before one of the Judges of the Outer House, he does not make great avizandum to the Inner House; but defences in said action are lodged, and a record made up in the same manner as in the case of ordinary contested actions; and the cause is disposed of by the Lord Ordinary in the Procedure Roll or after proof, and subject to the like review as if the action were an ordinary petitory action.[3]

Where no appearance has been entered and no defences lodged, the Lord Ordinary fixes a diet of proof, and disposes of the same with the same powers and in the like manner as were exercised by the Inner House according to former practice.[4]

(10) TEIND CAUSES.—Actions of proving the tenor may be brought in either Division of the Court of Session, as a quorum of Commissioners for Plantation of Kirks and Valuation of Teinds, and shall be prepared and determined as in the Court of Session.[5]

[1] Lillies *v.* Lillie, 1832, 11 S. 160; Leckie *v.* Leckie, 1884, 11 R. 1088; Borland *v.* Andrew's Factor, 1901, 4 F. 129; Young *v.* Thomson, 1909, S. C. 529. See also Dickson on Evidence, sec. 1349 *et seq.*

[2] Shand's Practice, pp. 839-842; Mackay's Manual, pp. 516, 517.

[3] A. S., 20th March 1907, sec. 7; C. A. S., C, iv. 5 (*a*).

[4] A. S., 20th March 1907, sec. 7; C. A. S., C, iv. 5 (*b*).

[5] A. S., 12th November 1825, sec. 18; C. A. S., H, v. 1.

The summons in such process shall distinctly libel and set forth the nature, form, and contents of that deed or writing, the tenor of which is to be proved; the adminicles also shall be libelled and distinctly set torth; and the *casus amissionis* shall be stated.[1]

It is competent to raise an action of proving the tenor of a valuation of teinds in order to supply an illegible word[2] or a part of such document.[3]

In an action to prove the tenor of two decrees of valuation the adminicles produced were certain documents preserved in the Teind Office and in the department of the Lord Clerk Register, and the *casus amissionis* was loss in a shipwreck in 1660, or in a fire in 1770, and the Court sustained the adminicles as sufficient and found the *casus amissionis* and tenor proved.[4]

Where the Court is satisfied with the adminicles produced, and the Teind Clerk has reported favourably upon them, the Court sometimes holds such report as equivalent to a proof.[5]

The proper method of obtaining information from the Teind Clerk is by a remit.[6]

(11) Lost Summons or Pleading.—Where a summons, petition, or other original writ or pleading is lost or destroyed, it is not necessary to raise an action of proving of the tenor, but a copy thereof, proved in the cause to the satisfaction of the Court before whom the cause is depending at the time, and authenticated in such manner as he or they shall require, may be substituted, and shall be held equivalent to the original for the purposes of the action.[7]

(12) Lost Interlocutor Sheets.—Formerly lost interlocutor sheets were held not to fall under the same rule as lost summonses or pleadings,[8] but sec. 15 of the Court of Session Act, 1868, has been amended to include lost interlocutor sheets.[9]

[1] A. S., 12th November 1825, sec. 18; C. A. S., H, v. 2.
[2] Duke of Atholl *v.* Lord Advocate, 1880, 7 R. 1195.
[3] Duke of Argyll *v.* Campbell, 1873, 11 M. 611.
[4] Earl of Wemyss *v.* Duke of Buccleuch, 1883, 10 R. 1084. See also Alexander *v.* Oswald, 1840, 3 D. 40 (subvaluation).
[5] Lord Lynedoch *v.* Liston, 1841, 3 D. 1078; Duke of Atholl *v.* Lord Advocate, 1880, 7 R. 1195; Earl of Wemyss *v.* Duke of Buccleuch, 1883, 10 R. 1084.
[6] Fogo *v.* Colquhoun, 1867, 6 M. 105.
[7] Court of Session Act, 1868, sec. 15.
[8] Cofton *v.* Cofton, 1875, 2 R. 599.
[9] A. S., 20th March 1907, sec. 12; C. A. S., A, iii. 8.

CHAPTER XIII

FURTHCOMING

(1) Definition.—Furthcoming is an action which has two objects—(*a*) To ascertain the property of the common debtor in possession of the arrestee, or the extent of the debt due by the latter to the former; and (*b*) to complete the diligence of the creditor by adjudging to him the debt, or by selling on his behalf the goods arrested.[1]

(2) Grounds of Action.—(*a*) An arrestment; and (*b*) a duly constituted debt on which the arrestment has proceeded.

(3) Jurisdiction.—If the arrestee is subject to the jurisdiction, it is unnecessary to found jurisdiction against the common debtor.[2]

(4) Competency of Action.—Where the arrestment is in execution there is no doubt of the competency of a furthcoming, and the arrestment may be served at the same time as the action of furthcoming.[3] Where, however, the arrestment is on the dependence of an action at the instance of a pursuer against the common debtor, and has not been followed up by an arrestment in execution, the competency of a furthcoming in such circumstances is not so clear. It certainly was formerly the practice to consider an arrestment on the dependence, which had been followed by a decree which had become final,[4] as equivalent to an arrestment in execution,[5] but in a comparatively recent case in the House of Lords in which the effect of an arrestment *jurisdictionis fundandæ causa* was considered, Lord Watson used the following words:—"If the arrester desires to make the moveable which he has attached available for satisfaction of any decree which he may obtain against the foreign defender, he must use a second arrestment on the dependence of his action, in order to interpel the person in whose hands it is laid from parting with the moveable until the action is at

[1] Bell's Comm. (7th ed.), ii. 63.

[2] Leggat Bros. *v.* Gray, 1912, S. C. 230.

[3] A. *v.* B., 1704, Mor. 686.

[4] Paul *v.* Henderson, 1852, 24 Jur. 310.

[5] Wight *v.* Wight, 1822, 1 S. 424 (N. E. 395); M'Donald *v.* Wingate, 1825, 3 S. 494 (N. E. 344); Gordon *v.* Hill, 1841, 3 D. 517; Potter *v.* Bartholomew, 1847, 10 D. 97; Learmonts *v.* Shearer, 1866, 4 M. 540; Liquidators of Benhar Coal Co. *v.* Turnbull, 1883, 10 R. 558, per Lord President Inglis, p. 562.

an end, *and if and when he gets a decree he must use a third arrestment in execution, and it is only in the latter proceeding that he can obtain a decree of furthcoming against the arrestee.*"[1]

It would therefore be advisable in future to follow an arrestment on the dependence with an arrestment in execution before, or simultaneous with, the service of an action of furthcoming.

An action of furthcoming is competent although the property arrested is not to be handed over by the arrestee until a future event.[2]

Although an action of furthcoming is an appropriate action to decide the question whether arrestments are good,[3] it is not a competent action to inquire into the validity of the title of a person sisted as a defender who holds an *ex facie* title to the property arrested.[4]

Where a railway company handed over to a bank a mortgage in security of advances made and which might be made, an action of furthcoming founded upon an arrestment in the hands of the bank was held to be incompetent.[5]

In a furthcoming where there were conclusions for the immediate sale of property which was not the exclusive property of the common debtor, but was the joint property of the common debtor and the arrestee, the Court held the conclusions to be incompetent.[6]

An arrestment upon which a furthcoming proceeds must arrest property in the hands of the arrestee belonging to the common debtor in the same capacity as that in which the original decree against him proceeded, otherwise the furthcoming will be incompetent.[7]

Where it only arrests an illiquid claim upon which no decree has passed, it will attach nothing.[8]

(5) The Parties.—The parties to a furthcoming are the creditor of the common debtor as pursuer, and the common debtor and the arrestee as defenders. The common debtor must be called as a party.[9]

Where a party is domiciled in Scotland at the time of a decree

[1] North *v.* Stewart, 1890, 17 R. (H. L.) 60, at p. 63. See also Lindsay *v.* London and North-Western Rly. Co., 1855, 18 D. 62, per Lord Deas, p. 69.

[2] Learmonts *v.* Shearer, 1866, 4 M. 540, per Lord Curriehill, p. 542; Jameson *v.* Sharp, 1887, 14 R. 643.

[3] Vincent *v.* Chalmers & Co.'s Tr., 1877, 5 R. 43.

[4] Loudon *v.* Young, 1856, 18 D. 856.

[5] Miller *v.* Girvan and Portpatrick Rly. Co., 1880, 8 R. 220.

[6] Lucas' Trs. *v.* Campbell and Scott, 1894, 21 R. 1096.

[7] Gibb *v.* Lee, 1908, 45 S. L. R. 833. See also Wilson *v.* Mackie, 1875, 3 R. 18; Burns *v.* Gillies, 1906, 8 F. 460; Gracie *v.* Gracie, 1910, S. C. 899.

[8] Alexander Mather & Son *v.* John Wilson & Co., Ltd., 1908, 15 S. L. T. 946.

[9] Stair, iii. 1. 36; Erskine's Inst. iii. 6. 16; Bell's Comm. (7th ed.), ii. 63; Smith *v.* Ninian, 1826, 5 S. 8 (N. E. 7), per Lord Glenlee; Wightman *v.* Wilson, 1858, 20 D. 779, per Lords Ivory and Curriehill.

against him, it does not require an arrestment to found jurisdiction before execution of his effects upon the decree is allowed to proceed; and where such a debtor's effects have been validly arrested on a decree, it is not necessary to have a further arrestment to found jurisdiction in an action of furthcoming, although before a furthcoming is brought the common debtor has lost his Scottish domicile.[1] In the same way, where an arrestment was used on an extract registered certificate of a judgment of the Queen's Bench, it was held that the common debtor, who was an Englishman, could be validly cited in an action of furthcoming without the use of arrestments *jurisdictionis fundandæ causa*.[2]

Where the common debtor dies after a decree has been obtained against him, but before an action of furthcoming has been brought, it is sufficient in the latter action to call the representative of the common debtor.[3] Where, however, the common debtor does not die until after the raising of the furthcoming, it will require to be transferred by minute against his representative.[4] If the arrestee dies, the action of furthcoming does not fall, but may be made effectual against his representative.[5]

If the expenses of the decree which the pursuer has obtained against the common debtor, and upon which arrestment has proceeded, have been decerned for in the name of the pursuer's agent as agent-disburser, and have not been paid, the agent-disburser should be conjoined as a pursuer in the furthcoming.[6]

(6) Conclusions of Summons.—Where money is arrested, the summons concludes against the arrestee—

to make payment and delivery to the pursuer of the sum of £ sterling, or of such other sum or sums as may be owing by him to [*common debtor*] and arrested in his hands at the instance of the pursuer upon the day of , or at least of such part thereof, with interest as aforesaid, as shall satisfy and pay the pursuer the principal sum of £ sterling, interest thereon at the rate of per centum per annum, from the day of until payment, and £ sterling, being the taxed amount of the expenses of process, with £ sterling, as the dues of extract, all contained in a decree obtained before at the instance of the pursuer against the said [*common debtor*] on the day of .

[1] Burns *v.* Monro, 1844, 6 D. 1352.

[2] Valentine *v.* Grangemouth Coal Co., 1897, 35 S. L. R. 12.

[3] Stair, iii. 1. 36; Erskine's Inst. iii. 6. 11.

[4] Stair, iii. 1. 36; Stirling *v.* Lady Auldbarr's Tenants, 1616, Mor. 779; Stirling *v.* Tenants, 1626, Mor. 780.

[5] Erskine's Inst. iii. 6. 11; Bell's Comm. (7th ed.), ii. 80; Earl of Aberdeen *v.* Scot's Creditors, 1738, Mor. 774.

[6] May *v.* Malcolm, 1825, 4 S. 76 (N. E. 79).

Where goods are arrested, the conclusions are—

to make delivery to the pursuer, or to such other person as our said Lords shall appoint, of all moveable goods and effects, the property of or owing by him to the said [*common debtor*] and arrested in his hands at the instance of the pursuer upon the day of ; and the said goods and effects ought and should be publicly rouped and sold by decree and warrant of our said Lords, and that under such conditions and provisions as our said Lords shall direct, and the proceeds or price thereof ought and should be made furthcoming to and be paid over to the pursuer, or at least so much thereof as shall satisfy and pay the pursuer—(1) the expenses of and incident to the sale of said goods and effects; (2) the principal sum of £ , etc.

(as in preceding conclusion).

As an arrestment is futile unless it can be followed up, and the diligence worked out by a decree effectually transferring from the common debtor to the arresting creditor the obligation which was originally prestable to the former by the arrestee, the conclusions must be so framed as to enable the Court to do so.[1] Thus where the fund arrested is not payable until a certain event, the conclusion in the furthcoming should be so guarded as not to conclude for immediate payment against the arrestee, but for payment on the event contemplated.[2]

The summons should conclude for expenses of process against the common debtor and also against the arrestee in the event of his appearing and opposing,[3] and where the arrestment is in execution, there should also be a conclusion for the expense of the arrestment, as in neither case is the expense covered by the arrestment.[4] (See Maclaren on Expenses, p. 111.)

(7) Defences.—(a) *By the Arrestee.*—(i.) *Dilatory Defences.*—The arrestee may plead every objection to the validity of the furthcoming. He may accordingly plead—(1) That the arrestment on which the action of furthcoming proceeds is irregular.[5] Thus where the decree obtained by the creditor against the common debtor, who was an Englishman, was pronounced in an action where arrestment to found jurisdiction

[1] Lucas' Trs. *v.* Campbell and Scott, 1894, 21 R. 1096, per Lord Kinnear, pp. 1102, 1103. See also Sinclair *v.* Staples, 1860, 22 D. 600, per Lord Cowan; Bankhardt's Trs. *v.* Scottish Amicable Assurance Society, 1871, 9 M. 443; Valentine *v.* Grangemouth Coal Co., 1897, 35 S. L. R. 12; Roney *v.* Tarakan Petroleum Oil Syndicate, Ltd., 1910, 1 S. L. T. 272.

[2] Learmonts *v.* Shearer, 1866, 4 M. 540, per Lord Curriehill; Jameson *v.* Sharp, 1887, 14 R. 643, per Lord President Inglis, p. 648.

[3] Wightman *v.* Wilson, 1858, 20 D. 779, per Lord Ivory, p. 784.

[4] Innes *v.* Forbes, 1740, Mor. 825; May *v.* Malcolm, 1825, 4 S. 76 (N. E. 79).

[5] Stair, iii. 1. 37; Erskine's Inst. iii. 6. 16.

was not used, a defence by the arrestee to that effected was sustained;[1] and in the Sheriff Court a defence that the fund arrested was alimentary was sustained.[2] This defence must be pleaded timeously.[3] And (2) That the common debtor has not been called.[4]

(ii.) *Defences on the Merits.*—The arrestee may plead against the arrester all defences which he could have pleaded in an action at the instance of the common debtor for the debt or goods arrested.[5] Thus, he may plead—

1. That at the date of the arrestment he held no goods of the common debtor, or was not due the latter any money.[6]

2. That although there were goods belonging, or a debt due, to the common debtor, at the time of the arrestment, the arrestee had a right of real security, such as lien or pledge, over the subjects arrested.[7]

3. That the debt due to the common debtor has been paid or compensated.[8] Compensation must be in respect of a debt due prior to the arrestment,[9] and it must be pleaded during the dependence of the furthcoming.[10]

4. That the goods arrested were lawfully poinded by another creditor of the party to whom they belonged.[11] Where the arrestee gives the arrester and the poinder equal facilities this defence will be good, but where the arrestee acts in collusion with the poinder to obtain for the latter an undue preference, this defence will be rejected.[12]

5. That the goods arrested were forcibly removed by the owner in spite of protest and remonstrance.[13]

[1] Smith *v.* Ninian, 1826, 5 S. 8 (N. E. 7).

[2] Coulter *v.* Nicol, 1897, 5 S. L. T. 141. See also Thomson *v.* Thomson, 1905, 42 S. L. R. 711; Lord Ruthven *v.* Drummond, 1908, S. C. 1154; Lord Ruthven *v.* Pulford & Sons, 1909, S. C. 951.

[3] Anderson, Child, and Child *v.* Pott and M'Millan, 1829, 7 S. 499.

[4] Smith *v.* Ninian, 1826, 5 S. 8 (N. E. 7); Wightman *v.* Wilson, 1858, 20 D. 779; Graham Stewart on the Law of Diligence, p. 235.

[5] Gibson *v.* Wills, 1826, 5 S. 74 (N. E. 69); Wright *v.* Denham, 1835, 13 S. 559; Houston *v.* Aberdeen Banking Co., 1849, 11 D. 1490.

[6] Bell's Comm. (7th ed.), ii. 63; Cunninghame *v.* Cunninghame, 1837, 15 S. 687; Wilson *v.* Carrick, 1881, 18 S. L. R. 657; Kidstons, Watson, Turnbull & Co. *v.* M'Farlane's Trs., 1904, 12 S. L. T. 722; Alexander Mather & Son *v.* John Wilson & Co., Ltd., 1908, 15 S. L. T. 946.

[7] M'Pherson *v.* Wright, 1885, 12 R. 942. See also Brodie *v.* Wilson, 1837, 15 S. 1195; Clyne *v.* Dunnet, 1833, 11 S. 791; affd. M'L. & Rob. 28.

[8] Erskine's Inst. iii. 6. 16; Wilson *v.* Carrick, 1881, 18 S. L. R. 657.

[9] M'Lure *v.* Brown, 1678, Mor. 2617; Miller *v.* Meldrum, 1756, Mor. 2618.

[10] Bell's Comm. (7th ed.), ii. 64; Wilson & Co. *v.* Cunningham, Stevenson & Co., 15th December 1808, Hume's Sess. Papers, No. 10.

[11] Stair, iii. 1. 37; Borthwick and Ingram *v.* North British Rly. Co., 1892, 9 Sh. Ct. Rep. 60.

[12] Stair, iii. 1. 37; Bankton, iii. 1. 54.

[13] Roberton and Johnston *v.* North British Rly. Co., 1892, 9 Sh. Ct. Rep. 72.

6. That the money or goods arrested are not to be handed over by the arrestee until a future event.[1] This defence may only compel the creditor to amend his conclusions in accordance with the defence.

7. That the common debtor had taken a new debtor in place of the arrestee.[2]

The arrestee may refer the existence of the debt to the oath of the common debtor, unless the common debtor is bankrupt,[3] and the result will be effectual against the arrester.[4]

(iii.) *Defences not Available.*—The arrestee cannot plead that the debt by the common debtor to the creditor is not due, or has been compensated, or in any way extinguished.[5]

(b) *By the Common Debtor.*—The common debtor may plead all objections to the validity of the arrestment. With regard to the debt due by him to the arrester, if the common debtor appeared in the action at the instance of the arrester, he may not plead in the furthcoming that he is not due the debt.[6] If he did not appear, he must suspend the decree.[6] If the arrestment followed on a decree of registration, the common debtor may state any defence competent to an action for payment.[7]

(8) DECREE.—The decree is in terms of the conclusions of the summons. Thus where goods have been arrested the decree does not make the arrestee hand over the goods to the creditor, but ordains him to produce them in order that they may be sold, and that the price, or so much thereof as is required to satisfy the debt of the pursuer, should be handed over to the latter.[8] The order for sale is an adjudication and transfer to the arrester of the right of the common debtor.[9] Where shares in a joint stock company were arrested, the Court remitted to a stockbroker to sell the shares, and granted warrant to the pursuers, after the sale, to execute a transfer of the shares, and ordained the company to register the transfer.[10] Where no sale takes place, the

[1] Jameson *v.* Sharp, 1887, 14 R. 643.

[2] Pitcairn *v.* Fraser, 1836, 14 S. 1101.

[3] Dyce *v.* Paterson, 1846, 9 D. 310; Adam *v.* Maclachlan, 1847, 9 D. 560; Thomson *v.* Duncan, 1855, 17 D. 1081.

[4] Erskine's Inst. iii. 6. 16; Horn *v.* Murray, 1711, Mor. 12464.

[5] Erskine's Inst. iii. 6. 16; Hamilton *v.* Durham, 1621, Mor. 7799; Houston *v.* Aberdeen Banking Co., 1849, 11 D. 1490; MacDougall's Tr. *v.* Law, 1864, 3 M. 68.

[6] Donaldson *v.* Ord, 1855, 17 D. 1053.

[7] Ibid.; Erskine's Inst. iii. 6. 16.

[8] Stair, iii. 1. 38; iv. 50. 26.

[9] Erskine's Inst. iii. 6. 17; Stevenson *v.* Grant, 1767, Mor. 2762; Muirhead *v.* Corrie, 1735, Mor. 687.

[10] Harvie *v.* Mallina Gold Co., 15th October 1895, Appendix, pp. 847-9, to Graham Stewart on Diligence; Sinclair *v.* Staples, 1860, 22 D. 600, per Lord

goods arrested may be adjudged to belong to the arrester at a valuation. Where a debt has been arrested, the decree adjudges the debt, or so much of it as is necessary to satisfy the arrester's debt to be paid over to him, and the debt is thereby transferred.[1]

In a recent case against a company and its liquidator to have an arrested share in the company made furthcoming to the pursuer, it appeared that the share certificate was missing; and the Lord Ordinary repelled a plea to the effect that as a condition of decree being pronounced, the defenders should be indemnified against all liability in respect of the missing certificate.[2]

(9) Furthcoming against a Cautioner.—Where an arrestment has been recalled or specially loosed on caution, a petitory action against the cautioner on his bond may be raised, but the measure of his liability would not thereby be ascertained, and accordingly a furthcoming is brought.[3] The principal defender is the cautioner or cautioners;[4] the arrestee and the common debtor must also be called.[5]

If, notwithstanding the loosing of arrestment, the arrestee still holds the subject arrested, the arrestee and the cautioner may be sued alternatively.[6] Otherwise, it is not necessary to have a petitory conclusion against the arrestee.[7]

The liability of the cautioner is the same as that of the arrestee.[8] Where the arrester's debt is constituted by a decree in an action, the reclaiming days should elapse before an action of furthcoming is raised.[9]

(10) Arrestment and Sale.—Where the subject that is arrested is a ship, the proceedings adopted for making the arrestment effectual are called arrestment and sale. These proceedings, although they may differ in their inception from those furthcomings in which the subjects arrested require to be sold, are in their subsequent stages somewhat

Cowan; Bankhardt's Trs. *v.* Scottish Amicable Assurance Society, 1871, 9 M. 443; Cassells *v.* Stewart, 1879, 6 R. 936, at p. 956; affd. 8 R. (H. L.) 1; Valentine *v.* Grangemouth Coal Co., 1897, 35 S. L. R. 12; Lucas' Trs. *v.* Campbell and Scott, 1894, 21 R. 1096.

[1] Erskine's Inst. iii. 6. 17; Bell's Comm. (7th ed.), ii. 64; Bell's Prin., sec. 2283.

[2] Roney *v.* Tarakan Petroleum Oil Syndicate, Ltd., 1910, 1 S. L. T. 272.

[3] Stair, iii. 1. 36; May *v.* Malcolm, 1825, 4 S. 76 (N. E. 79); M'Donald *v.* Parlane, 1834, 12 S. 654; Potter *v.* Bartholomew, 1847, 10 D. 97.

[4] M'Donald *v.* Parlane, 1834, 12 S. 654.

[5] Wight *v.* Wight, 1822, 1 S. 424 (N. E. 395); M'Donald *v.* Parlane, 1834, 12 S. 654.

[6] Erskine's Inst. iii. 6. 13; Graham *v.* Bruce, 1665, Mor. 792; Ballinten *v.* Connon, 1848, 11 D. 26; Graham Stewart on Diligence, p. 242.

[7] Wight *v.* Wight, 1822, 1 S. 424 (N. E. 395).

[8] Lord Balmerino *v.* Lochinvar, 1627, Mor. 788, at p. 790; Potter *v.* Bartholomew, 1847, 10 D. 97; Macdougall's Tr. *v.* Law, 1864, 3 M. 68.

[9] Paul *v.* Henderson, 1852, 24 Jur. 310.

similar to such furthcomings. In furthcomings the debt in respect of which the arrestment has been used must be constituted by a final decree before the furthcoming is raised. In an arrestment and sale this is unnecessary, as a conclusion for constituting the debt, upon which an arrestment on the dependence may be used, can be inserted preliminary to the crave for sale.[1] If, however, there is no preliminary conclusion, the ship must have been arrested in respect of a debt which has already been constituted before an action of arrestment and sale can be raised.

The defenders to be called are the owners of the ship, and, if the ship has been loosed on caution, the cautioner or cautioners.[2]

The conclusions, other than the conclusion for constitution, are for warrant to sell by public roup the ship arrested, with all her fittings, and to make the proceeds, after paying the expenses of the roup, furthcoming for the satisfaction of the pursuer's debt and expenses. If no appearance is entered, or no preliminary defences are lodged, the first step is to present a minute to the Lord Ordinary for warrant to inventory the ship preparatory to a sale. The interlocutor granting the crave of this minute is in terms similar to the following:—

. . . grants warrant to [*name of valuator*] to pass on board the steamship or vessel of , and to make a full and complete inventory of the said vessel, with her boats, furniture, guns, ammunition, small arms, and other apparelling and appurtenances, and, if need be, to break open the hatches and other lockfast places of the said vessel, the same being again carefully fastened; and grants commission to any of His Majesty's Justices of the Peace to take the oath of the valuator upon the said inventory, and the sum at which the said vessel may be set up in a judicial sale.

The valuator then returns an inventory, etc., as per said interlocutor, and the pursuer lodges a second minute in which he asks the Lord Ordinary to grant warrant to expose the ship to public roup at the upset price. The interlocutor granting this minute may be in the following terms:—

The Lord Ordinary, on the motion of the pursuer, and having considered the Inventory and Valuation by , No. of process, and oath of the valuator thereto appended, Ordains the steamship or vessel of , with her boats, furniture, guns, ammunition, small arms, and other apparelling and appurtenances conform to said inventory, to be publicly rouped and sold in the Faculty Hall, St. George's Place, Glasgow, on , the day of 19 , at o'clock noon, and there and then to be set up to sale at the upset price

[1] Taylor *v.* Williamson, 1831, 9 S. 265.
[2] M'Donald *v.* Parlane, 1834, 12 S. 654.

of £ sterling; Appoints the sale to be conducted at the sight of , Depute-Clerk of Session, whom failing , Depute-Clerk of Session, and under articles of roup to be adjusted and signed by him, after due advertisement in the *Glasgow Herald*, *Shipping Gazette*, *Fairplay*, *Syren*, *Liverpool Journal of Commerce*, and *Newcastle Chronicle* newspapers, and the proceeds of sale to be placed on deposit-receipt with the bank, in the name of the Accountant of Court, said deposit-receipt to be lodged in process subject to the orders of the Court; And appoints the sale to be reported to the Lord Ordinary; And authorises intimation of the exposure of said vessel to sale to be made by circular to such shipbrokers as the pursuer may think necessary.

After the sale the pursuer lodges another minute craving the Lord Ordinary to approve of the sale and declare that the ship belongs to the purchaser, and, in addition, craving decree for payment to the pursuer of so much of the proceeds as may be necessary to meet his claim. Upon this a final interlocutor is pronounced. If the proceeds of the sale are not sufficient to meet the pursuer's claim the expenses of the sale are first deducted. In most cases where a ship is sold there is a competition for the proceeds of the sale. In such a case, after the ship is sold, the expenses of raising the action and bringing the vessel to sale are awarded to the pursuer, and the balance of the price becomes a fund *in medio*, upon which claims are ordered to be lodged as in a multiplepoinding.[1]

Where the arrestment which has been used is not in respect of a debt which has been constituted by decree in an action, but in respect of a bond, such as a bottomry bond, the validity of the arrestment depends upon whether the debtor in the bond is subject to the jurisdiction. If he is subject to the jurisdiction, letters of arrestment may be used and an action of arrestment and sale proceeded with. If he is not, it will be necessary to use arrestments to found jurisdiction, and thereafter to raise an action for payment on the bond, on which the vessel may be arrested on the dependence; and combined with this action a warrant for the sale of the ship may be craved.

Where a bottomry bond was signed by the master of a vessel who was not part owner, and the holder of the bond was about to raise an action against the master for payment of the sums due under the bond and for sale of the vessel under the authority and orders of the Court, the Court granted the prayer of a petition to arrest the vessel *ad interim* in the Port of Leith, the reason for such a course being that as the owners were not proper defenders in an action on the bottomry

[1] Clark *v.* Bowring & Co., 1908, S. C. 1168, session papers; Constant *v.* Christensen, 1912, S. C. 1371, session papers.

bond, it was impossible to arrest the vessel on the dependence, and it was therefore necessary to take extraordinary means for securing the vessel over which the bond was granted and retaining her within the jurisdiction.[1]

The necessity for such a petition has been questioned.[2]

[1] Lucovich, Petr., 1885, 12 R. 1090. See also Clan Line Steamers, Ltd. *v.* Earl of Douglas Steamship Co., Ltd., 1913, S. C. 967 ; M'Connachie, Petr., 1914, S. C. 853.

[2] Graham Stewart on Diligence, p. 244.

CHAPTER XIV

ADJUDICATION

(1) Division of Action.—(a) *Main Division.*—The main division of actions of adjudication is into (i.) adjudication for debt; and (ii.) adjudication in implement.

Adjudication for debt is a real diligence by which the heritable property of a debtor is attached by his creditor, and, although a diligence, takes the form of an ordinary action.

Adjudication in implement is an action for specific performance of an obligation to convey heritable property where the granter of the obligation or his heirs refuse or are unable to give a proper disposition.

(b) *Division of Adjudication for Debt.*—Adjudication for debt may either be for a present debt, in which case it is called *adjudication in execution*, or for a future or contingent debt due by a person who is *vergens ad inopiam*, in which case it is called *adjudication in security*.

(c) *Minor Divisions.*—The minor actions of adjudication are:—Constitution and adjudication; adjudication upon *debita fundi;* declaratory adjudication; and adjudication on trust bond.

(2) Adjudication in Execution.—(a) *Generally.*—Adjudication in execution of debt is the modern equivalent for the ancient apprising. The latter was originally a very summary proceeding in which a debtor who was not possessed of sufficient moveables was ordered by the Sheriff to sell his lands within fifteen days in order to pay the debt, failing which, the lands were absolutely transferred to the creditor. By the Act 1469, cap. 12 (record edition), cap. 36 (12mo edition), a power of redemption within seven years was given to the debtor, and by the Act 1621, cap. 6, it was enacted that the rents and profits, so far as they exceeded the interest of the debt, should be imputed towards the extinction of the principal debt, and that the seven years should not run against minors. By the Act 1661, cap. 344 (record edition), cap. 62 (12mo edition), the period of redemption was extended from seven to ten years, and it was provided that all apprisings within year and day of the first effectual apprising should rank *pari passu*—the first effectual apprising being defined as the apprising on which the

first feudal right has been completed by sasine, or by charge against the superior.

By the Act 1672, cap. 45 (record edition), cap. 19 (12mo edition), apprisings were abolished, and a process of adjudication was introduced into the Court of Session whereby the Court was empowered to adjudge by a *special* adjudication such portion of the debtor's lands as corresponded to the debt, interest, and expense of entry and infeftment, with a fifth part more on account of the inconvenience to the adjudger of taking land instead of money. Upon decree, the adjudger entered into possession, and was under no obligation to account for a surplus of rents or profits. The period of redemption of *special* adjudication was five years.

Where the debtor did not cede the quiet possession of the lands and ratify the *special* adjudication, it was in the power of the creditor to use a *general* adjudication of all right vested in the debtor in respect of the afore-mentioned sums except one-fifth part more.[1]

Special adjudication is now unnecessary, and *general* adjudication may be concluded for alone.[2]

In practice, therefore, the action concludes for *general* adjudication.

(b) *Jurisdiction.*—See *supra*, pp. 81, 124.

(c) *Grounds of Adjudication.*—There must be a liquid document of debt, or a debt constituted by decree.[3] Where constitution of the debt is a necessary preliminary, the decree of constitution must have been extracted before the service of the action of adjudication.[4]

A bill of exchange is of itself a sufficient ground for adjudication, without being protested or registered.[5]

A prescribed bond or bill,[6] or a bond or bill by a married woman,[7] will not ground an adjudication.

An open account, though attested by the debtor, a bare acknowledgment for borrowed money, or other document which may warrant decree in a separate action for payment of the amount is not sufficient for an adjudication.[8]

There must be a clear deduction of the whole grounds of diligence.[9]

[1] A. S., 26th February 1684.
[2] 10 & 11 Vict. cap. 48, sec. 18 ; 31 & 32 Vict. cap. 101, sec. 59.
[3] Bell's Comm. (7th ed.), i. 742.
[4] Mackay *v.* Watt's Creditors, 11th December 1800, F. C.
[5] Fergusson *v.* Robertson, 20th February 1816, F. C. ; Parker, p. 13.
[6] Scott *v.* Brown, 1828, 7 S. 192.
[7] Watson *v.* Robertson, 1772, Mor. 5976; Scott *v.* Sheniman, 1818, Hume, 221 ; *cp.* Thomson *v.* Stewart, 1840, 2 D. 564.
[8] Parker, p. 12.
[9] Wilkie *v.* Flowerdew, 1850, 12 D. 818, per Lord Fullarton, p. 823.

(d) *Subjects Adjudgeable.*—Any heritable subject, right of liferent, reversion, tack, tithe, annual-rent, or even faculty in relation to lands belonging to the debtor may be adjudged.[1]

A right to an annuity or pension, whether secured on lands or not, can only be reached by adjudication.[2]

An entailed estate may be adjudged during the life of the debtor in possession.[3]

All personal bonds destined to a series of heirs, bonds secluding executors, heritable bonds, though no infeftment have followed, and though the term of payment have not arrived,[4] a husband's *jus mariti*,[5] and offices of profit capable of being exercised by others than the grantees, or which may be voluntarily transmitted,[6] may be adjudged.

Moveables which cannot be arrested, such as heirship moveables[7] or the stock of certain chartered banks,[8] can be adjudged.

A trust estate is adjudgeable for expenses connected with litigation affecting the trust estate.[9] A creditor of a principal beneficiary under a lapsed trust may adjudge his interest therein,[10] and a creditor in an obligation granted by trustees can adjudge the heritage held in trust, though held subject to a direction to sell.[11]

(e) *Subjects not Adjudgeable.*—A *spes successionis* cannot be adjudged,[12] nor can a bond of annuity over heritable estates if declared alimentary.[13]

The petty customs of a burgh cannot be adjudged,[14] nor the rent payable by a tacksman of such customs.[15]

[1] Bankton, iii. 2. 38; Erskine's Inst. ii. 6. 32; ii. 12. 6; Jackson *v.* Haliday, 1758, Mor. 2769; Cuningham & Co. *v.* Hamilton, 1770, Mor. 10410.

[2] Bankton, iii. 2. 38, 39.

[3] Colvills, Petrs., 1779, Mor. 168; *cp.* Graham *v.* Hunter, 1828, 7 S. 13; Grahame *v.* Alison, 1830, 9 S. 130; affd. 6 W. & S. 518.

[4] Stuart *v.* Stuart, 1705, Mor. 140.

[5] Menzies *v.* Gillespie, 1761, Mor. 5974; Calder *v.* Steele, 19th November 1818, F. C.; Smith *v.* Frier, 1857, 19 D. 384.

[6] Cockburn *v.* Langton's Creditors, 1747, Mor. 150; Nairne *v.* Freebairn, 1737, Mor. 10403; Wilson *v.* Falconer, 1759, Mor. 165; Craig, iii. 2. 15; Bankton, iii. 2. 40; Erskine's Inst. ii. 12. 7.

[7] Bankton, iii. 2. 38.

[8] Royal Bank *v.* Fairholm, 1770, Mor. App. Adjudication, No. 3; Sinclair *v.* Staples, 1860, 22 D. 600.

[9] Stewart *v.* Forbes, 1888, 15 R. 383.

[10] Gavin *v.* Kirkpatrick, 1826, 4 S. 629 (N. E. 637).

[11] Earl of Breadalbane *v.* M'Donald, 1824, 2 S. 621 (N. E. 529).

[12] Beaton and M'Andrew *v.* M'Donald, 1821, 1 S. 49 (N. E. 53); Trappes *v.* Meredith, 1871, 10 M. 38.

[13] Lewis *v.* Anstruther, 1852, 15 D. 260.

[14] Phin *v.* Mags. of Auchtermuchty, 1827, 5 S. 690 (N. E. 644); Mags. of Lochmaben *v.* Beck, 1841, 4 D. 16.

[15] Kerr *v.* Mags. of Linlithgow, 1865, 3 M. 370.

Arrears of rent or of an annuity cannot competently be attached by adjudication.[1]

A railway is not subject to adjudication.[2] Whether "superfluous lands" taken for a railway can be adjudged has not been decided in Scotland. In England it would seem that "superfluous lands" delivered in execution under a writ of *elegit* may be sold.[3]

(f) *Articulate Adjudication.* — Where an adjudication is led for different debts in the same summons, each debt is accumulated separately so that a *pluris petitio* in one does not affect the others.[4] This is called an articulate adjudication. In one case where the summons concluded "as the debts shall be jointly or separately accumulated" and decree was taken simply "in terms of the libel," the Extractor was found to have no power to extract it articulately.[5]

An articulate adjudication may be led for one ground of debt, as where the principal, interest, and penalty may be separately stated, and an error in any of these sums will only affect the sum in which the error is made.[6]

(g) *The Parties.*—The pursuer is the creditor, or someone who has made up title to the creditor's claim.[7]

If the debtor is alive, he alone is defender. If the debtor is dead and has left an heir-at-law, the latter is the defender. If there is no heir-at-law, the Lord Advocate must be called as defender.[8]

In an adjudication against a pupil, his tutors and curators must also be called and cited.[9]

The debtor who is called as defender must have a right to the subjects at the date of the action, not a right which merely emerges later.[10]

A party may qualify an interest to appear and defend.[11]

(h) *Conjunction of Adjudgers.*—Different creditors may be conjoined

[1] Broughton *v.* Fraser, 1832, 10 S. 418.

[2] Glover's Trs. *v.* City of Glasgow Union Rly. Co., 1869, 7 M. 338, per Lord President Inglis.

[3] *In re* Calne Rly. Co., 1870, L. R. 9 Eq. 658.

[4] Catrine's Creditors *v.* Baird, 1738, Mor. 107 ; Porteous *v.* Nasmith, 1784, Mor. 132.

[5] Landale *v.* Carmichael, 1794, Mor. 305.

[6] Lord Camelford's Trs. *v.* Maxwell, 1789, Mor. 309.

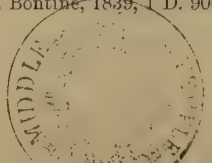
[7] Park's Creditors *v.* Maxwell, 1785, Mor. 14382 ; Malcolm *v.* Dick, 1866, 5 M. 18 ; Hinton *v.* Connell's Trs., 1883, 10 R. 1110 ; *cp.* Black *v.* Shand's Creditors, 1823, 2 S. 118 (N. E. 110).

[8] 20 & 21 Vict. cap. 44, sec. 1 ; Reid *v.* Officers of State, 1747, Mor. 1355.

[9] M'Turk *v.* Marshall, 7th February 1815, F. C.

[10] Wilson *v.* Webster, 1836, 14 S. 1117.

[11] Somerville *v.* Bontine, 1839, 1 D. 906.



in an adjudication. This is only competent in the case of a first adjudication. A first adjudication is the first adjudication called in Court, not the first adjudication made effectual by decree.[1] On the first enrolment of the first summons of adjudication after the expiry of intimation any creditor of the defender can produce a summons of adjudication libelled and signeted, with the instruction of his debt, and have the same conjoined with the first adjudication.[2] A second adjudger cannot avail himself of any special provision in order to take the lead of the first adjudger; he is only entitled to be conjoined.[3]

There is no process of conjunction in a second adjudication.[4] Posterior adjudgers who lead adjudications within a year and day after the first adjudication rank *pari passu* with the first adjudication.[5] If led later, posterior adjudications rank after the first adjudication and those conjoined therein.[6]

(i) *Summons.*—The summons of adjudication in execution sets out with stating the necessity for an adjudication of the subjects in terms of the Act 1672, cap. 45 (record edition), cap. 19 (12mo edition). The description of the subjects must be full and accurate, as the decree follows the description and forms the title to the subjects. The teinds should also be mentioned.[7] It then craves that the subjects, with the teinds, writs, evidents, rights, titles, securities, and reversions, should be adjudged from the defender, and decerned and declared to belong to the pursuer and his heirs and assignees heritably for payment and satisfaction to them of the principal sum,[8] interest, and expenses of process and of extract contained in a decree, or of the sum, etc., contained in a liquid document of debt, according as the same shall extend when accumulated at the date of the decree of adjudication, and of the interest of the accumulated sum during the non-redemption of the subjects, together with the superior's composition and the expense of completing the pursuer's title, with interest on the same from the date of disbursing during non-redemption.

Where there are different grounds of debt each should be accumulated separately. Where there is doubt as to the exact sum due, it may be advisable to adjudge articulately for a sum that is certainly

[1] Allisons *v.* Ballantine, 1805, Mor. App. *voce* Adjudication, No. 14.
[2] 19 & 20 Vict. cap. 91, sec. 5.
[3] Forman *v.* Nicholson, 1832, 10 S. 365.
[4] Campbell *v.* Maclean's Creditors, 1801, Mor. App. *voce* Bankrupt, No. 13.
[5] Act 1661, cap. 344 (record edition), cap. 62 (12mo edition); Lady Bangour *v.* Hamilton, 1681, Mor. 248.
[6] Du Roveray *v.* Mackenzie, 1795, 3 Pat. App. 409.
[7] Home *v.* Home, 1702, Mor. 184.
[8] Barclay *v.* Alexander, 1846, 8 D. 549; Wilkie *v.* Flowerdew, 1850, 12 D. 818.

due, with a random conclusion for the balance, or it may be advisable simply to adjudge in security. (See *Articulate Adjudication*, *supra*, p. 800, and *Adjudication in Security*, *infra*, p. 803.)

Expenses are not usually concluded for except in adjudications in implement. (See Maclaren on Expenses, p. 109.)

The summons in adjudication in security contains no conclusions for accumulation.

(j) *Litigiosity.*—A notice of any signeted summons of adjudication or of constitution and adjudication combined for debt or in security or in implement may be registered in the Register of Adjudications, which notice shall set forth the names and designations of the pursuer and defender of such action and the date of signeting such summons in the form or as nearly as may be in the form of Schedule RR annexed to the Titles to Land Consolidation (Scotland) Act, 1868; and no summons of constitution, adjudication, or constitution and adjudication combined, shall have any effect in rendering litigious the lands to which such summons relates, except from and after the date of the registration of such notice.[1]

(k) *Defences.*—Any defect in the ground of debt or any irregularity in the action is a good defence; also any plea in bar.[2]

Pluris petitio is the most frequent defence, but if the excess is small the only effect of this defence is to reduce the adjudication from an adjudication in execution to one in security.[3] If the excess is very great the action may be dismissed.[4]

It is *no* defence that the ground of debt is under suspension or reduction,[5] or that a multiplepoinding has been raised to ascertain who is best entitled to the debt.[6] Neither is it a good defence that part of an estate is about to be sold under a statute for the liquidation of an entailer's debts,[7] or that the defender has executed a trust deed of his heritable property for behoof of creditors.[8]

(l) *Procedure.*—The summons is signeted, served, and called in the usual way. It is not advisable to accept service of a summons of

[1] 31 & 32 Vict. cap. 101, sec. 159; 31 & 32 Vict. cap. 64, sec. 17.

[2] Paterson *v.* Tod, 1828, 6 S. 1062.

[3] Balfour *v.* Wilkieson, 1738, Mor. 107; Campbell's Creditors *v.* Macleod, 17th June 1801, F. C.

[4] Brown's Creditors *v.* Gordon, 1760, Mor. 116; MacWhinnie *v.* Burton, 1796, Mor. 125; Mackinnell *v.* Goldie, 1797, Mor. 312.

[5] Boyd *v.* Boyd, 1676, Mor. 188; Tod *v.* Scot, 1707, Mor. 190; Fletcher *v.* Earl of Airly, 6th January 1693, 4 Brown's Supp. 41.

[6] Thain *v.* Moncrief, 1770, Mor. App. Adjudication, No. 4.

[7] Campbell *v.* Campbell, 1828, 6 S. 1146.

[8] Harrowar's Trs. *v.* Couper's Trs., 1827, 5 S. 374 (N. E. 347).

constitution and adjudication, as the execution of the summons has now been substituted for a general charge on the heir to enter.[1] To make the lands litigious a notice of the summons should be registered in the Register of Adjudications.[2] (See *Litigiosity, supra*, p. 802.)

After calling, the summons is enrolled for the purpose of obtaining an order for intimation, except as after mentioned. (See *Adjudication in Implement*, p. 804, and *Adjudication on Debita Fundi*, p. 806.) The order is in the following terms:—"The Lord Ordinary, in respect that it is stated that this is the first process of adjudication brought against the defender of the subjects libelled, appoints intimation to be made in the Minute-Book and on the walls of the Parliament House to all the creditors of the defender for the purpose and in the form prescribed by the Acts of Parliament passed thereanent."

Intimation is necessary for twenty sederunt days, whether the action is defended or not,[3] and cannot be dispensed with or the *inducia* shortened,[4] except where special despatch is required in order to secure *pari passu* ranking.[5] It does not preclude a preliminary defence.[6]

The manner in which intimation is made is by putting up on the walls of the Parliament House a copy of the said interlocutor with the date and the clerk's mark appended, and the name and address of the agent, and by obtaining an entry to be made in the Minute-Book by the Clerk of Court.

Intimation can be stopped by the debtor showing *instanter* that there are no grounds for adjudging,[7] as where he produces a discharge of the debt.[8] But it is no ground for staying intimation that the debtor has executed a trust deed of all his heritable property for behoof of his creditors.[8]

Where the case is undefended the pursuer's agent, on the expiry of the twenty days, attends at the office of the Clerk of Court and writes a certificate on the interlocutor sheets to that effect. The case may then be sent to the Undefended Roll, and a decree taken in absence.

Where the action is defended, the case proceeds in the usual way, without awaiting the expiry of the intimation.

(3) Adjudication in Security.—Adjudication in security properly so-called is admitted on grounds of equity where a creditor has future,

[1] Titles to Land Consolidation (Scotland) Act, 1868, sec. 60.
[2] Ibid., sec. 159, Schedule RR.
[3] 54 Geo. III. cap. 137, sec. 9; 19 & 20 Vict. cap. 91, sec. 5.
[4] Badenoch *v.* Turner, 1838, 16 S. 903.
[5] M'Kidd, Petr., 1890, 17 R. 547.
[6] Idle *v.* Earl of Fife, 1830, 8 S. 669.
[7] Duke of Queensberry's Exrs. *v.* Tait, 11th July 1817, F. C.
[8] Lord Glenlee in Harrowar's Trs. *v.* Couper's Trs., 1827, 5 S. 374 (N. E. 347).

conditional, or contingent claims against a debtor who is *vergens ad inopiam*,[1] or against whom there are other adjudications.[2]

Another form is where an adjudication in execution has been raised by a creditor who is not quite certain of the correct amount of his claim and he restricts his decree to a decree in security.[3] In such adjudication the arrears of the interest on the sum adjudged for belong to the executors of the adjudger.[4]

The conclusions of the summons are similar to the conclusions in a summons of adjudication in execution, except that the subjects are only asked to be adjudged in security.[5] There is also no conclusion for accumulation, and consequently no state is required.[6]

The condescendence should specifically state the nature of the debt and the impending insolvency of the debtor, or that there are other adjudications against the debtor.

If it is a first adjudication, it must be intimated for twenty sederunt days in the Minute-Book and on the walls of the Parliament House to all the other creditors of the defender,[7] and otherwise the procedure is the same as in an adjudication in execution.

There is no *legal* as the right is entirely redeemable,[8] and it competes *pari passu* with ordinary adjudications.[9]

(4) Adjudication in Implement.—This form of adjudication is not founded upon statute, but was recognised by the Court from an early period in the exercise of its *nobile officium*, and is resorted to for implement of any informal writing containing an express or implied sale or transference of lands and other heritages.[10]

Where the action is brought against the granter of the obligation no preliminary step is necessary. Where the action is brought against the granter's heir the preliminary procedure is the same as where the adjudication is in execution.[11] (See *Constitution and Adjudication, infra*, p. 805.)

[1] Erskine's Inst. ii. 12. 9 ; Bell's Comm. (7th ed.), i. 752. 753 ; Blaw *v.* Blaw, 1711, Mor. 12908 ; Nisbet *v.* Stirling, 1759, Mor. 59 ; Parker, pp. 63, 64.

[2] Parker, p. 64 ; Bell's Comm. i. 753 ; Blaw *v.* Blaw, 1711, Mor. 12908 ; Nisbet *v.* Stirling, 1759, Mor. 59.

[3] Parker, pp. 32 and 63 ; Ker *v.* Graham, 1830, 8 S. 462.

[4] Parker, p. 63.

[5] Bell's Comm. i. 752.

[6] Parker, p. 64.

[7] 54 Geo. III. cap. 137, sec. 9 ; 19 & 20 Vict. cap. 91, sec. 5.

[8] Strachan *v.* Strachan's Creditors, 1752, Elchies, Adjudication, No. 41 ; Wallace-Dunlop's Creditors *v.* Brown and Collinson, 1781, Mor. 62 ; Mackinnell's Creditors *v.* Goldie, 1797, Mor. 312.

[9] Act 1661, cap. 344 (record edition), cap. 62 (12mo edition).

[10] Parker on Adjudications, p. 79.

[11] 31 & 32 Vict. cap. 101, sec. 60. See *Constitution and Adjudication, infra*, p. 805.

The summons should set forth the deed or writing containing the defender's obligation to convey, along with a careful description of the subjects sought to be adjudged, and concludes that in implement of said obligation the subjects should be adjudged from the defender and declared to belong to the pursuer; that the defender should clear the subjects of incumbrances, burdens, etc., or make payment to the pursuer of a sum necessary for that purpose; that he should deliver to the pursuer the title-deeds of the subjects; and that he should pay the expenses of process.

No intimation is necessary,[1] and it is no bar that an adjudication for debt of the same subjects is in dependence, or a ranking and sale of the estate.[2]

There is no *legal* and no *pari passu* ranking, because the action is for completing the pursuer's right to a special subject, which right, when completed, must be exclusive. It is irredeemable unless the nature of the right adjudged is itself subject to redemption, as a heritable security.[3]

In competition of adjudications *in implement* at the instance of different parties relating to the same subject, the first adjudication completed by recorded sasine will in the first instance be preferred, even though the decree on which it proceeded be subsequent in date to the other decrees.[4]

Where a person has a personal right to demand a conveyance of lands from a third party, and this *jus crediti* has been properly adjudged in execution by a creditor, the creditor may then raise an adjudication in implement against the third party.[5] If, however, the creditor does not properly attach the *jus crediti* by his adjudication in execution, he cannot raise an adjudication in implement against the third party.[6]

(5) Minor Adjudications.—(a) *Constitution and Adjudication.*—Where the original debtor is dead and the heir has made up a title to the estate the creditor must first constitute his debt against the heir by raising an action of constitution, and, having obtained a decree, raise a separate action of adjudication in either of the forms above mentioned.[7]

[1] Parker, p. 81.

[2] Ibid.; Hutchinson *v.* Cameron's Trs., 1830, 8 S. 982; Wood *v.* Hutchinson, 1830, 8 S. 988; Wood *v.* Scott, 1833, 11 S. 355; Bontine *v.* Graham, 1839, 1 D. 631; Somerville *v.* Bontine, 1839, 1 D. 906.

[3] Parker, pp. 81, 82.

[4] Ibid., p. 81.

[5] Watson *v.* Wilson, 1868, 6 M. 258.

[6] Strachan *v.* Whiteford, 1776, Mor. App. *voce* Adjudication, No. 7; Macgregor *v.* Macdonald, 1843, 5 D. 888, per Lord Fullarton, p. 902.

[7] Bell's Comm. (7th ed.), i. 749 *et seq.*

Where the heir has neither made up a title nor renounced the succession, the procedure is by a combined action of constitution and adjudication.[1]

Where the heir has renounced the succession, the procedure is also by a combined action of constitution and adjudication.[2] In the latter case the decree of constitution is called *cognitionis causa tantum*, and the adjudication which follows is called an adjudication *contra hæreditatem jacentem*.[3]

Formerly the heir had a year in which to consider whether he would enter or renounce the succession, but this has been reduced to six months.[4]

(b) *Adjudication upon Debita Fundi.*—This is an adjudication affecting lands held in security, and proceeds after a poinding of the ground. Where there is a real burden but no personal obligation, or an ineffectual personal obligation, or where it is desired that interest on interest should be equally preferable with the principal sum in the bond, decree is first taken in a process of poinding of the ground. Thereafter an adjudication is raised, narrating the ground of debt, the decree of poinding, and the execution of the letters.

Adjudications on *debita fundi* being preferable are not affected by the *pari passu* ranking of the Act 1661, cap. 344 (record edition), cap. 62 (12mo edition), and need not be intimated to other creditors.[5]

It does not seem to be necessary to have a decree of constitution against the heir in order to found an adjudication on a *debitum fundi*.[6] Letters of poinding of the ground proceed on merely calling the heir for his interest.

(c) *Declaratory Adjudication.* — Where a beneficiary wished to make up a title to trust property feudally vested in trustees who had died, it was from an early date the practice to raise a declaratory adjudication at the instance of the beneficiary, calling all parties that might appear to have an interest, and concluding that the trust should be adjudged to the pursuer for the purposes of the trust.[8]

[1] 31 & 32 Vict. cap. 101, sec. 60.

[2] Ibid. See also 10 & 11 Vict. cap. 48, sec. 16; Brown *v.* Wood, 1851, 13 D. 543. As to expenses, see Carruthers *v.* Hogg, 1828, 7 S. 81.

[3] Erskine's Inst. ii. 12. 47.

[4] 31 & 32 Vict. cap. 101, sec. 61.

[5] Young *v.* Scott, 1893, 1 S. L. T. 14; Erskine's Inst. ii. 8. 37; Bell's Comm. (7th ed.), i. 753.

[6] Bell's Comm. (7th ed.), i. 754.

[7] Oliphant *v.* Hamilton, 1667, Mor. 2171; Bell's Comm. i. 754.

[8] Dalziell *v.* Dalziell and Henderson, 1756, Mor. 16204; Drummond *v.* M'Kenzie, 1758, Mor. 16206; Gordon's Trs. *v.* Harper, 4th December 1821, F. C.; Black *v.*

This procedure has been superseded by petition under the "Trusts (Scotland) Act, 1867."[1]

(d) *Adjudication on Trust Bond.*—This was a device, said to have been invented by Sir Thomas Hope, to enable an heir to escape from liability for the debts of his ancestor, for which he would otherwise have been liable had he served as heir; or to enable an heir to challenge adverse deeds. The procedure was for the heir to grant a trust bond to a friend with a back-bond containing an obligation by the simulate creditor to denude of the property whenever the adjudication was completed. The creditor then charged the heir to enter, and on his refusal adjudication in favour of the fictitious creditor followed. The creditor is then in a position to set aside any deeds granted by the predecessor of the granter of the bond on all the grounds which a creditor or singular successor might plead, and having succeeded he fulfilled his back-bond by conveying it, free of all adverse claims or deeds, to the heir.[2]

By the Act 1695, cap. 39 (record edition), cap. 24 (12mo edition), however, it was provided that if any apparent heir, without being lawfully served or entered heir, shall either enter to possess his predecessor's estate, or any part thereof, or shall purchase by himself or any other any right thereto, whether redeemable or irredeemable otherwise than the said estate is exposed to a lawful public roup, and as the highest offerer thereat without any collusion, his foresaid possession or purchase shall be repute a behaviour as heir and a sufficient passive title to make him represent his predecessor universally and to be liable for all his debts and deeds.

(6) Completing Title.—(a) *Subjects other than Heritable Securities.*—Where the person whose lands are adjudged was infeft, the adjudger or purchaser may record the decree, with a warrant of registration thereon, in the appropriate Register of Sasines in terms of sec. 15 of the Titles to Land Consolidation (Scotland) Act, 1868, or he may expede a notarial instrument on the decree in terms of sec. 17 of said Act if he does not desire the whole of the decree. If the person desiring to take infeftment is not the original adjudger he will complete

Lorimer, 1822, 1 S. 521 (N. E. 481); Menzies *v.* Menzies, 1736, Ross' Leading Cases, i. 320; Marquess of Ailsa *v.* Jeffray, 1859, 21 D. 492, per Lord Curriehill, p. 502, and Lord Deas, p. 504; Miles *v.* North British Rly. Co., 1867, 5 M. 402.

[1] 30 & 31 Vict. cap. 97, sec. 14.

[2] Beveridge *v.* Crawford, 1793, Mor. 5296; Ker's Trs. *v.* Ker, 1808, Mor. App. *voce* Adjudication, No. 16; Ker's Trs. *v.* Kers, 1825, 1 W. & S. 381; Rutherfurd *v.* Nisbet's Trs., 1830, 9 S. 3; Bell's Prin., secs. 834, 1859; Bell's Lectures on Conveyancing (3rd ed.), p. 1116; *cp.* Dunlop *v.* Cochrane, 1824, 2 Sh. App. 115.

his title in the same way as if he had acquired right in the same way to an ordinary conveyance.[1]

Where the person whose lands are adjudged was not infeft, the decree of adjudication operates as an assignation of such person's unrecorded conveyance, and his title may be completed in any of the ways authorised by secs. 22 and 23 of the Titles to Land Consolidation (Scotland) Act, 1868.[1]

(b) *Heritable Securities.*—In cases where heritable securities, including real burdens, have been adjudged, the adjudger may complete his title by recording either an abbreviate of adjudication, or an extract of the decree, in the appropriate Register of Sasines, in either of which cases he is in the same position as if an assignation of such securities had been granted in his favour by the ancestor, or person, or creditor in trust or otherwise, and whether in life or deceased, whose estate is adjudged, and as if such assignation had been duly recorded in the appropriate Register of Sasines at the date of so recording such abbreviate or extract decree.[2] An abbreviate must be registered within sixty days.[3] Where there has been a reclaiming note, the sixty days runs from the Inner House judgment,[4] but the Inner House sometimes *ob majorem cautelam* adjudges of new.[5]

(c) *Long Leases.*—Where an adjudication of a long lease or an assignation thereof in security has been obtained, the recording of the abbreviate of adjudication in the register in which the lease is recorded completes the right of the adjudger to such lease or assignation in security.[6]

(d) *Sequestration.*—Sequestration is equivalent to an adjudication of the heritable estates of the bankrupt in favour of his trustee.[7] The trustee must, within twenty-one days of his confirmation, record in the General Register of Inhibitions and Adjudications an abbreviate signed by him or his agent.[8] An application to the *nobile officium* of the Court to record an abbreviate of adjudication in a bankruptcy more than twenty-one days after the confirmation of the trustee has been granted *valeat quantum*.[9] (See Goudy on Bankruptcy (3rd ed.), pp. 267, 335, 584.)

[1] Titles to Land Consolidation (Scotland) Act, 1868, sec. 62, as amended by the Conveyancing (Scotland) Act, 1874, sec. 62.

[2] Titles to Land Consolidation (Scotland) Act, 1868, sec. 129, as amended by sec. 65 of the Conveyancing (Scotland) Act, 1874.

[3] Act 1661, cap. 243 (record edition), cap. 31 (12mo edition).

[4] Cathcart *v.* Maclaine, 1846, 9 D. 305.

[5] Stewart *v.* Forbes, 1888, 15 R. 383.

[6] Registration of Leases Act, 1857, sec. 10.

[7] Bankruptcy (Scotland) Act, 1913, sec. 103.

[8] Ibid., sec. 75.

[9] Martin, Petr., 1857, 20 D. 55.

(7) Redemption and Expiry of "the Legal."—(a) *Generally.*—In adjudication for execution the right acquired by decree of adjudication is not an absolute right of property. It is a mere *pignus prætorium,* and the debtor has a right of redemption,[1] which is not affected by the negative prescription.[2] The period during which the debtor may redeem is ten years from the date of decree,[3] and is called "the legal." In adjudications on *debita fundi*[4] and *contra hæreditatem jacentem*[5] "the legal" is seven years.

The expiry of "the legal" of itself does not entitle the adjudger to the absolute property of the subjects adjudged. In order that the subjects may become the irredeemable property of the adjudger, it is necessary (1) that he should obtain decree in an action of declarator of the expiry of "the legal,"[6] or (2) that the positive prescription should run in his favour. In the latter case the adjudger must be infeft on a decree or charter of adjudication, with possession for forty years after the expiry of the legal,[7] and the Conveyancing (Scotland) Act, 1874, does not reduce this period, even if made irredeemable by declarator of expiry of the legal.[8]

(b) *Declarator of the Expiry of "the Legal."*—This is an action in which the adjudger asks for declarator that the right of redemption of the adjudged subjects has expired; that the pursuer has not been satisfied nor paid the accumulated sum contained in a decree of adjudication obtained by the pursuer against the defender, either by his possession of the subjects and his intromissions with the rents, etc., therefrom, or in any other way within the years of "the legal" or since its expiry; that the subjects adjudged are now irredeemable and belong and pertain to the pursuer as his own proper lands and heritages heritably and irredeemably; and that the pursuer is entitled to possess and enjoy the same in all time coming.

[1] Grindlay *v.* Drysdale, 1833, 11 S. 896; Cochrane *v.* Bogle, 1849, 11 D. 908; affd. 7 Bell's App. 65; M'Dougall *v.* Blackie, 1863, 1 M. 503; Hill *v.* Hill, 1871, 10 M. 3.

[2] Chalmers *v.* Oliphant, 1766, Mor. 5178; M'Culloch *v.* Buchanan, 1828, 6 S. 1059; Thomson *v.* Stewart, 1840, 2 D. 564; Graham Stewart on Diligence, p. 656. See, however, Paul *v.* Reid, 8th February 1814, F. C.; Cubbison *v.* Hyslop, 1837, 16 S. 112.

[3] Act 1661, cap. 344 (record edition), cap. 62 (12mo edition); Act 1672, cap. 45 (record edition), cap. 19 (12mo edition).

[4] Stair, iv. 23. 6. See, however, Bankton, iii. 2. 97.

[5] Act 1621, cap. 7 (both editions).

[6] Stewart *v.* Lindsay, 1811, 1 Ross' Leading Cases (Land Rights), 164.

[7] Caitcheon *v.* Ramsay, 1791, Mor. 10810; Johnston *v.* Balfour, 1745, Mor. 10789; Spence *v.* Bruce, 1807, 1 Ross' Leading Cases, 206; Robertson *v.* Duke of Athol, 1808, Hume, 463; 1815, 3 Dow, 108.

[8] Hinton *v.* Connell's Trs., 1883, 10 R. 1110.

The action may be defended on the ground of defect in the adjudication or that the pursuer has been satisfied either by payment or by intromissions with the subjects. Where the adjudger has entered into possession he is liable in a strict accounting for the rents, etc., recovered.[1] Accordingly the adjudger must lodge a state of the debt.[2] In the state the adjudger may take credit for the payment of composition to the superior although the latter has given it gratis to the adjudger, and also for the expenses, although the adjudger has got the business done gratis.[3]

The effect of the decree is to give the adjudger an absolute and irredeemable title to the lands adjudged.[4]

The procedure in this action is the same as in any action of declarator. (See Graham Stewart on Diligence, p. 654 *et seq.*)

(c) *Declarator of Extinction or Redemption.*—The debtor in an adjudication may, on the narrative that he is willing to pay any balance of debt due to the adjudger, or that the latter has been satisfied, raise an action of declarator of extinction of the adjudication, or of reduction and extinction, or of redemption, and may combine with the action conclusions for count and reckoning; or he may raise a simple action of count and reckoning. This he may do at any time before a decree of declarator of expiry of "*the legal*," or before the adjudger's title has otherwise become absolute by the positive prescription. The debtor may also plead the foregoing as a defence in an action of declarator of expiry of "the legal."

Where decree is obtained it is usually recorded, although it is not necessary in order to re-invest the debtor. (See Graham Stewart on Diligence, p. 660 *et seq.*)

The person liable to pay an annuity has no title to plead, in answer to a claim by a person who has adjudged the creditor's right, that the creditor in the annuity has paid the debt due to the adjudger.[5]

(8) Expenses.—See Maclaren on Expenses, p. 109.

[1] Muir *v.* Shaw, 1681, Mor. 301, 3477; Colquhoun *v.* Lord Balvie, 1636, Mor. 3472; Dalrymple *v.* Lyon, 1752, Mor. 304.

[2] Landale *v.* Carmichael, 1794, 1 Ross' Leading Cases (Land Rights), 174, at p. 177.

[3] Kincaid *v.* Haliburton, 1625, Mor. 314.

[4] Campbell *v.* Scotland and Jack, 1794, Mor. 321; Ormiston *v.* Hills, 7th February 1809, F. C.; Stewart *v.* Lindsay, 1811, 1 Ross' Leading Cases (Land Rights), 164.

[5] Macleod's Trs. *v.* Murray, 1891, 18 R. 830.

CHAPTER XV

MAILLS AND DUTIES

(1) GENERALLY.—An action of maills and duties is an action for the recovery of rents of heritable subjects at the instance of a creditor who has a right to enter into possession by being in right of a *debitum fundi*, or real right, affecting the said heritable subjects.

Formerly an action of maills and duties might be raised (*a*) by a person who claimed in respect of a title upon which no possession had followed, or (*b*) by a person in possession who desired a possessory judgment; but now "it is only an incumbrancer that requires to use a process of maills and duties in order to give a title, in a question with the tenant, to uplift the rents."[1] A proprietor or creditor with an *ex facie* absolute title cannot raise such an action.[1] It must, however, be an incumbrancer to whom has been given an assignation, express or implied, of the rents.[2] Accordingly an action of maills and duties cannot be raised by a heritable creditor where the proprietor is himself in the natural possession of the subjects;[3] nor by the holder of a reserved real burden who has no right to enter into possession;[4] but the creditor in a ground-annual containing a disposition of the lands in security and an assignation of the rents is entitled to raise such an action.[5] Even the grantee under a bond and disposition in security, who afterwards came to hold, subject to a liferent to another, an *ex facie* absolute disposition of the same lands, has been held entitled to raise the action.[6]

It was discussed in one case, but not decided, whether a heritable creditor with an assignation to rents could draw the rents without a decree of maills and duties and by merely giving intimation to the tenants.[7] However this may be, it is clear that a creditor cannot exercise

[1] Scottish Heritable Security Co. *v.* Allan, Campbell & Co., 1876, 3 R. 333, per Lord President Inglis, p. 340.

[2] Smith's Trs. *v.* Chalmers, 1890, 17 R. 1088, per Lord M'Laren, p. 1090.

[3] Ibid. See also 57 & 58 Vict. cap. 44, sec. 5, where power is given to eject a proprietor who is in default with payment of his interest or principal. Inglis' Trs. *v.* Macpherson, 1911, 48 S. L. R. 955.

[4] Bell's Prin., sec. 922.

[5] Somerville *v.* Johnston, 1899, 1 F. 726.

[6] Crichton's Trs. *v.* Clarke, 1909, 1 S. L. T. 467.

[7] Neils *v.* Lyle, 1863, 2 M. 168.

all the special remedies of the landlord against the tenants without such a decree.[1]

Failure instantly to make payment upon service of intimation, requisition, and protest in statutory form is sufficient to put the debtor in default.[2]

(2) Jurisdiction.—The Court of Session has jurisdiction in actions of maills and duties where the amount of the rents in dispute exceeds £50.[3] The Sheriff Court has jurisdiction irrespective of value, provided that it is competent for either party at the closing of the record or within six days thereafter to require an action of maills and duties where the value of the cause in dispute exceeds £50 by the year or £1000 in value to be remitted to the Court of Session.[4]

(3) Where Incompetent.—It is incompetent for a superior or his assignee to raise an action of maills and duties for the recovery of feu-duties or casualties,[5] and an action of maills and duties is not a habile process for testing the validity of an entail.[6]

The holder of an assignation in security of a long lease under the Registration of Leases (Scotland) Act, 1857, is not entitled to enter into possession by an action of maills and duties, as there is a special procedure provided in the statute.[7]

(4) Defences.—It is a good defence that there has not been a proper demand by the heritable creditor,[8] or that the pursuer does not produce a valid title.[9]

A judicial factor cannot appear as a defender and exclude the pursuer,[10] and sequestration of the proprietor does not prevent a creditor from insisting in his action, although the latter will not be entitled to expenses against the trustee.[11]

Arrears of rent cannot be recovered after the tenant has removed for

[1] Railton *v.* Muirhead, 1834, 12 S. 757 ; Hood *v.* Martin's Creditors, 1835, 13 S. 923 ; Blair *v.* Galloway, 1853, 16 D. 291, per Lord Rutherfurd, p. 293 ; M'Farlane *v.* Campbell, 1857, 19 D. 623 ; Wylie *v.* Heritable Securities Investment Association, 1871, 10 M. 253, per Lord Deas, pp. 261, 262.

[2] M'Ara *v.* Anderson, 1913, S. C. 931.

[3] Sheriff Courts (Scotland) Act, 1907, secs. 5 (4) and 7.

[4] Ibid., sec. 5 (2nd proviso (*a*)).

[5] Prudential Assurance Co. *v.* Cheyne, 1884, 11 R. 871 ; Nelson's Trs. *v.* Tod, 1896, 23 R. 1000 ; Aberdeen Corporation *v.* British Linen Bank, 1911, S. C. 239, per Lord Dundas, p. 242.

[6] Fairlie's Trs. *v.* Fairlie, 1860, 22 D. 632.

[7] Dunbar *v.* Gill, 1908, S. C. 1054.

[8] Saxty *v.* Smiths & Co., 1893, 1 S. L. T. 61; *cp.* M'Ara *v.* Anderson, 1913, S. C. 931.

[9] Mackintosh *v.* Mackintosh, 1835, 13 S. 884.

[10] Ferguson *v.* Murray, 1853, 15 D. 682.

[11] Johnston *v.* Budge, 1871, 8 S. L. R. 381.

five years from the land.[1] If the tenant has a right of retention of the rent against the landlord for a debt by the latter in connection with the tenant's occupancy he may plead it against the creditor.[2] If the landlord's debt has no connection with the occupancy, the tenant cannot plead retention or compensation.[3]

The widow of the debtor may defend to the extent of demanding a third of the rents under deduction of a like proportion of the interest of the debt.[4]

(5) Procedure.—Previous to the year 1894 the action of maills and duties was directed against the landlord and the tenants. All the tenants required to be called,[5] but it was not indispensable that the landlord should be called.[6] If the landlord were called, he was only called for any interest he might have,[7] and the conclusions of the summons were that the tenants called should each be decerned and ordained to pay to the pursuer his rent presently owing, or at least so much thereof as would satisfy and pay the principal sum due by the landlord to the pursuer, with interest, liquidate penalty, and termly failures. A conclusion might also be inserted for payment of future rents, the terms of payment being always first come and bygone.[8] A conclusion for expenses was directed against the landlord in any event and against the tenants only if they appeared and opposed.[9] It was imperative that the pursuer should set forth specifically his title.[10]

This form may still be used.[11]

By the Heritable Securities (Scotland) Act, 1894,[12] an alternative form of action is provided. By sec. 3 it is enacted that the creditor in a heritable security may raise an action of maills and duties without calling the tenants as defenders, and give notice of the raising of such action to the tenants by registered letter in the form as nearly as may be of Schedule B annexed to the said Act, and such notice, when received by the tenants, shall be held as interpelling them from making payment of the rents due by them respectively in the same manner and to the same effect as if they had been called according to the old form. On

[1] Act 1669, cap. 14 (record edition), cap. 9 (12mo edition).
[2] Stewart *v.* M'Ra, 1834, 13 S. 4; Turner *v.* Nicolson, 1835, 13 S. 633.
[3] Chambers' Judicial Factor *v.* Vertue, 1893, 20 R. 257.
[4] Whish *v.* Scott, 1895, 3 S. L. T. 8.
[5] Smith's Trs. *v.* Chalmers, 1890, 17 R. 1088.
[6] Haliburton *v.* Tenants of Carse, 1702, Mor. 2232.
[7] Schaw *v.* Black, 1889, 16 R. 336; Robertson's Trs. *v.* Gardner, 1889, 16 R. 705.
[8] Bruce *v.* Grant, 1824, 2 S. 657 (N. E. 552); Woodward *v.* Wilson, 1829, 7 S. 566.
[9] Juridical Styles, iii. 35; Stair, iv. 22. 15; Erskine's Inst. iv. 1. 49.
[10] Macintosh *v.* Macintosh, 1835, 13 S. 884; Hutchison *v.* Ferrier, 1846, 8 D. 1228.
[11] 57 & 58 Vict. cap. 44, sec. 3.
[12] 57 & 58 Vict. cap. 44.

intimation of the decree in such an action to said tenants by registered letter in the form as nearly as may be of Schedule C annexed to the said Act the said tenants shall make payment of the rents due by them respectively as if the same had been decerned for and a charge for payment given in an action of maills and duties according to the old form, and payment when so made shall be a complete exoneration and discharge to such tenants respectively.

The action is a simple declarator that the pursuer has right to the rents of the security subjects, or at least to as much of the same as will satisfy the principal sum due with interest, liquidate penalty, and termly failure. A conclusion is added to find the defender liable in expenses.

The last-mentioned Act only applies to creditors in heritable bonds, bonds and dispositions in security, bonds of annual-rent, bonds of annuity, and all securities authorised to be granted by the 7th section of the Act 19 & 20 Vict. cap. 91, and all deeds and conveyances whatsoever, legal as well as voluntary, which are or may be used for the purpose of constituting or completing or transmitting a security over lands or over the rents or profits thereof, as well as such lands themselves and the rents and the profits thereof, and the sums, principal, interest, and penalties secured by such securities, but shall not include securities by way of ground-annual, whether redeemable or irredeemable, or absolute dispositions qualified by back-bonds or letters.[1]

(6) Rights and Duties of a Heritable Creditor in Possession.—A heritable creditor holding a decree of maills and duties may bring a poinding of the ground,[2] eject a squatter,[3] or use sequestration for rent against a tenant not called in the action, but who has become a tenant subsequent thereto.[4] He incurs generally all the liabilities of an owner in questions arising with third parties in relation to the lands,[5] but he is not liable in a *personal* action for payment of county council rates.[6] He is not bound to grant an assignation until payment of principal and interest and a final settlement of accounts has been made.[7] (See Graham Stewart on Diligence, p. 520 *et seq.*; Gloag and Irvine on Rights in Security, p. 102 *et seq.*)

[1] 57 & 58 Vict. cap. 44, sec. 18; 31 & 32 Vict. cap. 101, sec. 3; 19 & 20 Vict. cap. 91, sec. 7.

[2] Henderson *v.* Wallace, 1875, 2 R. 272.

[3] Hutchison *v.* Alexander, 1904, 6 F. 532.

[4] Robertson's Trs. *v.* Gardner, 1889, 16 R. 705.

[5] Baillie *v.* Shearer's Factor, 1894, 21 R. 498. See also Liquidators of the City of Glasgow Bank *v.* Nicolson's Trs., 1882, 9 R. 689.

[6] Argyll County Council *v.* Walker, 1909, S. C. 107. See, however, Greenock Board of Police *v.* Greenock Property Investment Society, 1885, 12 R. 832.

[7] Bruce *v.* The Scottish Amicable Life Assurance Society, 1907, S. C. 637.

CHAPTER XVI

POINDING OF THE GROUND

(1) GENERALLY.—Poinding of the ground is sometimes described as a diligence. It is, however, not so much a diligence as a declaratory real action, and its object is to declare that the pursuer's right to land, whether as a superior or a heritable creditor, entitles him to the moveables thereon as accessories. It is competent only to a real creditor by virtue of his infeftment on a *debitum fundi*, whatever may have been its origin. It contains no personal conclusions whatever except perhaps for expenses, and the persons who are called as defenders, being the owner and possessors of the ground, are called not in respect of any conclusions directed against them, but in respect of their interest in the lands, and accordingly it requires no charge. All the moveables on the ground may be attached for the sum wherewith the land is burdened, except the goods of strangers, or of tenants beyond the amount of past and current rents. Where the goods of the debtor have been sold and removed, the purchaser of such goods is protected.[1]

(2) JURISDICTION.—The action is competent either in the Sheriff Court or in the Court of Session.[2]

(3) WHERE COMPETENT.—A creditor infeft under a bond and disposition in security may raise a poinding of the ground[3] whether he is a first or a second bondholder.[4]

A creditor under a bond and disposition in security, who has obtained decree of maills and duties, may raise an action of poind-

[1] Act 1469, cap. 12 (record edition), cap. 36 (12mo edition); Stair, ii. 5. 9; iii. 2. 13; iv. 23. 4; iv. 47. 24; Bankton, ii. v. 7 and 8; Erskine's Inst. ii. 8. 33; iv. 1. 11; Bell's Comm. (7th ed.), ii. 56; Collet *v.* Balmerinoch, 1679, Mor. 10550; Bell *v.* Cadell, 1831, 10 S. 100, per Lord Mackenzie, p. 102; Campbell's Trs. *v.* Paul, 1835, 13 S. 237, per Lord Balgray, p. 241; Brown *v.* Scott, 1859, 22 D. 273; Royal Bank *v.* Bain, 1877, 4 R. 985, per Lord Deas; Athole Hydropathic Co. *v.* Scottish Provincial Assurance Co., 1886, 13 R. 818, per Lord President Inglis, p. 822.

[2] Ross' Lect. ii. 454; Bell's Comm. (7th ed.), ii. 57; Sheriff Courts (Scotland) Act, 1907, sec. 5.

[3] Bell's Prin., sec. 2285; Wilson *v.* Fraser, 1822, 1 S. 316 (N. E. 292); affd. 2 Shaw's App. 162; Henderson *v.* Wallace, 1875, 2 R. 272, per Lord President Inglis, p. 276; Scottish Union and National Insurance Co. *v.* James, 1886, 13 R. 928.

[4] Young's Trs. *v.* Hill's Tr., 1893, 1 S. L. T. 357.

ing of the ground,[1] and so may a creditor in a contract of ground-annual.[2]

A superior may poind the ground for his feu-duties and casualties,[3] but such an action is not, in the correct sense, the assertion of a claim to the rents or a diligence to attach them.[4] Where a superior has poinded the ground for arrears of feu-duty after the sequestration of his vassal, the poinding is available only for the current term's feu-duty and one year's arrears.[5] This restriction did not formerly apply to the heritable creditor of an English bankrupt,[6] nor to the heritable creditor of a bankrupt's ancestor after sequestration of the estates of the heir in possession,[7] but it has now been made to apply to all poindings of the ground.[8]

An action of poinding of the ground can be raised in security of current interest.[9]

The executor of a creditor or the assignee or disponee of a creditor[10] may sue such an action, even though not himself infeft,[11] but the author must have been infeft. The only case in which the privilege of poinding of the ground is allowed to a creditor who has no infeftment is the case of a disposition of land burdened with a particular debt in favour of a third party, but that case is exceptional.[12]

(4) Where Incompetent.—A creditor holding an *ex facie* absolute disposition to lands belonging to his debtor cannot raise an action of poinding of the ground, although he has granted a back letter declaring that he holds the lands in security for his debt.[13] The recording of such a back letter makes no difference.[13]

[1] Henderson *v.* Wallace, 1875, 2 R. 272.

[2] Bell's Trs. *v.* Copeland & Co., 1896, 23 R. 650. See also Thomson *v.* Scott, 1828, 6 S. 526.

[3] Erskine's Inst. iv. 1. 11; Morrison's Trs. *v.* Webster, 1878, 5 R. 800; Stewart *v.* Gibson's Tr., 1880, 8 R. 270.

[4] Aberdeen Corporation *v.* British Linen Bank, 1911, S. C. 239. See also Royal Bank *v.* Dixon, 1868, 6 M. 995, per Lord Barcaple, p. 997.

[5] Campbell *v.* Edinburgh Parish Council, 1911, S. C. 280.

[6] Scottish Union and National Insurance Co. *v.* James, 1886, 13 R. 928.

[7] Millar's Trs. *v.* Miller & Son's Tr., 1886, 13 R. 543.

[8] 50 & 51 Vict. cap. 69, sec. 2.

[9] Stewart *v.* Gibson's Tr., 1880, 8 R. 270.

[10] Keirie *v.* Nicolson, 1671, Mor. 5448; Waugh *v.* Jamieson, 1676, Mor. 5453.

[11] Tweedie *v.* Beattie, 1836, 14 S. 337; Marquess of Ailsa *v.* Jeffray, 1859, 21 D. 492.

[12] Scottish Heritages Co., Ltd. *v.* North British Property Investment Co., Ltd., 1885, 12 R. 550, per Lord Lee, p. 555. See also Touch *v.* Falkland's Tenants, 1664, 2 Brown's Supp. 367; Wilson *v.* Fraser, 1822, 1 S. 316 (N. E. 292); affd. 2 Sh. App. 162; Ross' Lect. ii. 436; More's Notes, p. ccxi.

[13] Garthland *v.* Lord Jedburgh, 1632, Mor. 10545; Scottish Heritable Security Co. *v.* Allan, Campbell & Co., 1876, 3 R. 333.

It is incompetent to use a poinding of the ground against property which is the *bonâ-fide* property of a third party although it is upon the ground at the date of the poinding;[1] or against property belonging to a debtor which has been removed from the ground prior to the service of the action, even though the removal has been wrongful.[2]

A creditor under a bond and assignation of a ninety-nine years' lease duly recorded in terms of the Registration of Leases (Scotland) Act, 1857, has been held not entitled to warrant of poinding of the ground.[3]

A superior who has divested himself of his superiority in favour of a third party cannot raise an action of poinding of the ground for the recovery of arrears of feu-duty due prior to his divestiture.[4]

A wadsetter may not poind the ground,[5] and an adjudger has been held to be in the same position,[6] but the authorities for the latter proposition have been questioned.[7]

Where there is more than one pursuer, there must be community of interest, otherwise the action is incompetent.[8]

(5) The Defenders.—The defenders called are the proprietor, possessors, and tenants,[9] and care should be taken to see that the character in which these parties are called is correctly set forth.[10]

The proprietor need not be personally feudally infeft.[11] Where the proprietor is dead, it is sufficient to call his heir as a defender for his interest.[12] If the proprietor or his apparent heir is not called, the diligence may be set aside.[13]

Heritable creditors other than the pursuer may be called for any interest they may have, and it has been held that they have a title to

[1] Thomson *v.* Scoular, 1882, 9 R. 430; Nelmes & Co. *v.* Gillies, 1883, 10 R. 890. See also M'Arthur *v.* Brown, 1858, 20 D. 1232.

[2] Urquhart *v.* Macleod's Tr., 1883, 10 R. 991.

[3] Luke *v.* Wallace, 1896, 23 R. 634.

[4] Scottish Heritages Co. *v.* North British Property Investment Co., 1885, 12 R. 550; *cp.* Maxwell's Trs. *v.* Bothwell School Board, 1893, 20 R. 958, per Lord Rutherfurd-Clark.

[5] Garthland *v.* Lord Jedburgh, 1632, Mor. 10545; Henderson *v.* Wallace, 1875, 2 R. 272, per Lord President Inglis, p. 276.

[6] Erskine's Inst. iv. 1. 11; Ross' Lect. ii. 431; Henderson *v.* Wallace, 1875, 2 R. 272, per Lord President Inglis, p. 276.

[7] Graham Stewart on Diligence, p. 496.

[8] Douglas *v.* Tait, 1884, 12 R. 10.

[9] Bell's Comm. (7th ed.), ii. 57.

[10] Brown *v.* Scott, 1859, 22 D. 273.

[11] Mackenzie's Trs. *v.* Smith, 1883, 20 S. L. R. 351.

[12] Oliphant *v.* Hamilton, 1667, Mor. 2171.

[13] Black *v.* Macgill and Malcolm, 1706, 4 Brown's Supp. 653.

defend such an action.[1] Any other person having an interest, such as a preferable right or security, may appear and defend.[2]

(6) Form of Summons.—The following is a form of summons where the land is in the possession of tenants or possessors:—

Whereas it is humbly meant and shown to us by our lovite *A.*, *pursuer;* against *B.*, *principal debtor*, and against *C.*, *D.*, and *E.*, tenants [*or* possessors] of the lands and others after mentioned, *defenders*, in terms of the condescendence and note of pleas in law hereunto annexed: Therefore it ought and should be decerned and ordained, by decree of the Lords of our Council and Session, that our letters be directed at the instance of the pursuer against the said defenders, to messengers-at-arms, our Sheriffs in that part, charging them, conjunctly and severally, to pass, and in our name and authority search for, seek, fence, arrest, apprise, compel, poind, and distrain All and Sundry the said *B.*, *C.*, *D.*, and *E.*, their readiest moveable goods, gear, effects, corns, cattle, horse, sheep, insight plenishing and others whatsoever, poindable or distrainable, being, or that shall happen to be, within or upon the grounds of the lands and others, described and contained in the bond and disposition in security after mentioned [*or other deed*], viz. All and Whole [*describe them*]; but in so far as relates to the said tenants, to the amount of the rents only which may be due and payable by each of them respectively at the time, or from time to time, for each of their respective possessions of the said lands and others, or parts thereof, the terms of payment of said lands being first come and bygone, and make payment thereof to the pursuer, to the amount of the principal sum of £ sterling, and liquidate penalty, specified and contained in the said bond and disposition in security, dated and recorded , made and granted by the said *B.* to and in favour of the pursuer, and interest of the said principal sum, from the term of , and in time coming during the not redemption, and to see the pursuer satisfied of and paid the same; And further, the said defender, *B.*, in any event, and such of the other defenders as shall appear and oppose the present action, ought and should be decerned and ordained, conjunctly and severally, or severally, by decree foresaid, to make payment to the pursuer of the sum of £ sterling, or of such other sum as our said Lords shall modify, as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland, used and observed in the like cases as is alleged.—Our will is herefore, etc.

(7) Effect of Service of Summons.—The service of a summons of poinding of the ground interpels the debtor from allowing others to acquire rights over the moveables on the subjects poinded,[3] but is not equivalent to intimation of an assignation to rents so as to interpel the tenants from paying to the debtor future rents as they fall due.[4] As

[1] Scottish Heritages Co., Ltd. *v.* North British Property Investment Co., Ltd., 1885, 12 R. 550.

[2] Stair, iv. 23. 20; Bell's Comm. (7th ed.), ii. 57.

[3] Lyons *v.* Anderson, 1880, 8 R. 24. See also Campbell's Trs. *v.* Paul, 1835, 13 S. 237; Barstow *v.* Mowbray, 1856, 18 D. 846.

[4] Royal Bank *v.* Dixon, 1868, 6 M. 995; *cp.* Lang *v.* Hislop & Co., 1854, 16 D. 908.

the service of the summons creates a *nexus*, a warrant to inventory the effects should be obtained so as to preserve evidence of what has been attached.[1] Where there is a warrant to inventory, postal service should not be adopted.[2] It is doubtful whether it is sufficient that service of the summons has been accepted.[1]

(8) Defences.—Defences may consist of objections either to the title of the pursuer[3] or to his obtaining a preferential ranking,[4] or they may be upon the merits.[5]

A proprietor cannot defend to the effect of opposing a decree in absence against the tenants.[6]

(9) Letters of Poinding.—A decree of poinding of the ground is a warrant for letters of poinding under the Signet. The latter may proceed upon a bill obtained in the Bill Chamber, but in the ordinary case a bill is unnecessary. The letters set forth the fact that a decree of poinding of the ground has been granted decerning and ordaining that letters of poinding be directed to messengers-at-arms to poind the moveables on the ground, all in terms of said decree, and the will charges the messenger to make the poinding. If the letters are passed upon a bill, they bear the date of the *fiat* and the words "*Ex deliberatione Dominorum Concilii.*" If there is no bill, the words are "*Per decretum Dominorum Concilii.*" Poinding proceeds, after the lapse of fifteen days from the date of the decree, without the parties called being charged, and is similar to personal poinding.

For the effects of a decree of poinding, see Graham Stewart on Diligence, p. 504 *et seq.*

(10) Procedure.—There is nothing in the procedure or interlocutor requiring comment.

[1] Graham Stewart on Diligence, p. 500.
[2] Dove Wilson's Sheriff Court Practice, p. 472.
[3] Anstruther *v.* Anstruther, 1838, 16 S. 1132.
[4] Young's Trs. *v.* Hill's Tr., 1893, 1 S. L. T. 357.
[5] Buchan *v.* Scott, 1830, 8 S. 463.
[6] Buchan *v.* Scott, 1829, 7 S. 296.

CHAPTER XVII

TEIND CAUSES

(1) JURISDICTION.—The Court of Session as such is now the Court of Teinds.[1] The second Junior Lord Ordinary is the Lord Ordinary in teind causes, and any four Judges of the Inner House, along with the Lord Ordinary in teind causes, constitute the Teind Court.[2]

The Teind Court has jurisdiction in the following causes:—(1) Actions of a judicial nature, including therein valuation of teinds; sale of teinds; valuation and sale; reductions of a locality and of a valuation; declarators including actions of proving the tenor. (2) Actions of a ministerial and discretionary character, such as augmentation, modification, and locality; approbation of a subvaluation; division of *cumulo* valuation of teinds; disjunction and annexation, and disjunction and erection *quoad omnia;* uniting parishes; transportation of churches and manses. (3) Disjunction and annexation, and disjunction and erection *quoad sacra;* and transportation of churches and manses of *quoad sacra* parishes, etc., all under the New Parishes (Scotland) Act, 1844.[3] (4) Actions under the Glebe Lands (Scotland) Act, 1866;[4] and (5) Applications under the Teind Acts, 1810[5] and 1824.[6]

(2) PROCEDURE.—Procedure in General in the Teind Court, and with regard to Augmentation, Modification, and Locality; Valuation of Teinds; Reductions of Localities, Approbations, and Prorogations of Tacks;[7] Proving the Tenor; Suppression and Annexation, Disjunction and New Erection, etc.; and Transporting Kirks, is to be found in the Codifying Act of Sederunt, 1913, Book H. See also Nenion Elliot's Teind Court Procedure.

A summons must be signed by the Teind Clerk.[8]

Teind causes remitted to the Outer House may fall asleep.[9]

Decrees in absence are dealt with as in the Court of Session.[10]

[1] Presbytery of Stirling *v.* Heritors of Larbert, 1900, 2 F. 562; *cp.* Pearson *v.* Mags. of Dunbar, 1862, 24 D. 1357.

[2] 2 & 3 Vict. cap. 36, sec. 8; Court of Session Act, 1868, sec. 9.

[3] 7 & 8 Vict. cap. 44.

[4] 29 & 30 Vict. cap. 71.

[5] 50 Geo. III. cap. 84.

[6] 5 Geo. IV. cap. 72.

[7] See also Lord Provost and Mags. of Edinburgh, Petrs., 1881, 8 R. 982.

[8] Matheson *v.* Marchioness of Stafford, 1862, 34 Jur. 211.

[9] Locality of King Edward, 1903, 11 S. L. T. 71.

[10] C. A. S., H, i. 10. See Buchanan *v.* Gilmour, 1883, 11 R. 59.

CHAPTER XVIII

SUSPENSION; SUSPENSION AND INTERDICT; SUSPENSION AND LIBERATION; SUSPENSION OF DECREES

Each of these proceedings originates by a note presented in the Bill Chamber, and all are fully dealt with in the author's work on Bill Chamber Practice (*q.v.*).

PART VIII

PETITIONS

CHAPTER I

GENERALLY

(1) Difference between Procedure by Petition and by Summons.—While procedure by summons is based on the idea that there is some person, whether an individual, body corporate or unincorporate, or the lieges, against whom the pursuer desires to establish a right or seek a remedy, a petition is an *ex parte* application craving the authority of the Court for the petitioner, or seeking the Court to ordain another person, to do an act or acts which otherwise the petitioner would be unable to do, or cause to be done.

A petition does not run in name of the Sovereign; it is simply addressed to the Court.

While a summons usually passes the Signet and may thereupon be served upon the defender, a petition cannot be served until the authority of the Court has been obtained.

A summons may be signed by a law agent, whereas a petition must be signed by counsel.

In a summons the procedure is solemn, while the procedure in a petition is summary.

(2) Jurisdiction.—(a) *Bill Chamber.*—(i.) *Petitions Transferred to the Junior Lord Ordinary.*—By the Court of Session Act, 1857,[1] commonly known as the Distribution of Business Act, sec. 4, it is provided as follows:—"All summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually depending at the time of presenting the same shall be brought before the Junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just; and, in particular, all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court, viz.:—

"1. Petitions and applications under any of the various statutes now in force relative to entails.

"2. Petitions and applications under any of the General Railway

[1] 20 & 21 Vict. cap. 56.

Acts, or under the Lands Clauses Consolidation (Scotland) Act, 1845, or under any local or personal Act.

"3. Petitions and applications relative to money consigned under any statute or law, subject to the order, disposal, or direction of the Court of Session.

"4. Petitions and applications for the appointment of judicial factors, factors *loco tutoris*, or *loco absentis*, or *curators bonis*, or by any such factors or curators for extraordinary or special powers, or for exoneration or discharge.

"5. All petitions, applications, and reports under the Judicial Factors Act, 1849."

By the Clerks of Session (Scotland) Regulation Act, 1889,[1] sec. 3, however, it is enacted that—"All summary petitions and applications, which are at present, under the provisions of section 4 of the Act 20 & 21 Victoria, chapter 56 (intituled An Act to Regulate the Distribution of Business in the Court of Session in Scotland), appropriated to the Court of the Junior Lord Ordinary, shall, from and after the date at which this Act comes into operation, *be presented and disposed of in the Bill Chamber*, and the custody of all processes relative to such summary applications and petitions shall be transferred to the Clerk of the Bills and his assistants, who shall exercise all powers and discharge all duties in reference to the procedure in such applications and petitions as are at present competent to and incumbent upon the clerks in the Court of the Junior Lord Ordinary; and such applications may be made and petitions presented and disposed of and orders pronounced thereon at all times by the Junior Lord Ordinary in Session and by the Lord Ordinary on the Bills in vacation.

"Provided that nothing herein contained shall affect the form of such applications and petitions, or of the interlocutors to be pronounced therein, or the preparation of extracts of decrees pronounced therein, or shall increase or alter the powers presently possessed during vacation by the Lord Ordinary on the Bills, who shall have the same powers, including that of reporting to the Inner House, as are at present exercised by the Junior Lord Ordinary."

Although these petitions have been transferred from the Court of the Junior Lord Ordinary to the Bill Chamber, the practice which was inaugurated by a notice to agents, dated 21st November 1857,[2] whereby

[1] 52 & 53 Vict. cap. 54.

[2] Printed in the Rolls of the Court of Session, Winter Session, 1857-1858, No. 22, ssued Monday, 23rd November 1857.

these petitions are directed to have the words "Junior Lord Ordinary" printed at the top of the first page thereof, is still adhered to. The reason is, that although these petitions are now presented and disposed of in the Bill Chamber, it is expressly provided that the Clerks of Session Act does not affect "the form of such applications and petitions," which are in all questions of procedure petitions in the Court of Session.[1]

Petitions for the recall of a *curator bonis* and for the appointment of a new *curator bonis* have been held, after a conference between the Judges of the two Divisions of the Court, to be only competent before the Junior Lord Ordinary.[2] The recall of a judicial factor appointed under sec. 164 of the Bankruptcy Act, 1856, is made by the same Judge.[3]

A petition for the appointment of a judicial factor when accompanied by sequestration of an estate,[4] or by a dissolution of partnership,[5] or when the petition is incidental to an action of interdict in the Sheriff Court,[6] is competent before the Junior Lord Ordinary.

It is competent for a judicial factor and trustee in a sequestration to obtain his discharge before the Junior Lord Ordinary.[7]

A petition by a tutor-nominate for authority to sell must be presented to the Junior Lord Ordinary.[8]

Formerly the Court was of opinion that the Distribution of Business Act, 1857, did not apply to a petition for the appointment of an *interim* judicial factor under the Companies Clauses Consolidation (Scotland) Act, 1845, sec. 57,[9] but this opinion has been revised,[10] and the practice now is to present such petitions in the Bill Chamber.

(ii.) *Petitions for the Appointment of Judicial Factors to Persons Deceased in Terms of Sec.* 163 *of the Bankruptcy* (*Scotland*) *Act,* 1913.[11]

[1] 52 & 53 Vict. cap. 54, sec. 3.

[2] Souter *v.* Finlay, 1890, 18 R. 86. See also Kyle, etc., Petrs., 1862, 24 D. 1083; Tweedie, Petr., 1886, 14 R. 212; Forrest *v.* Forrest's Judicial Factor, 1898, 6 S. L. T. 68; *cp.* Sinclair, Petr., 1886, 23 S. L. R. 737.

[3] Masterton *v.* Erskine's Trs., 1887, 14 R. 712. See sec. 163 of the Bankruptcy Act, 1913.

[4] Rhind *v.* Sheach, 1875, 2 R. 1002; Smith *v.* Smith, 1892, 20 R. 27; Gaff, etc., Petrs., 1893, 20 R. 825.

[5] Wallace *v.* Whitelaw, 1900, 2 F. 675. See also Macnabs *v.* Macnab, 1912, S. C. 421.

[6] Booth *v.* MacKinnon, 1908, 15 S. L. T. 848.

[7] Duke *v.* Somervell, 1903, 11 S. L. T. 289.

[8] Dow's Tutor, Petr., 1910, S. C. 273.

[9] Glasgow, Garnkirk, and Coatbridge Rly. Co. *v.* Caledonian Rly. Co., 1850, 12 D. 944; Broad *v.* Edinburgh Northern Tramways Co., 1888, 15 R. 615.

[10] Wright *v.* Cart Navigation Trs., 1904, 11 S. L. T. 708.

[11] 3 & 4 Geo. V. cap. 20, sec. 2; A. S., 6th January 1914. See sec. 164, Bank-

(iii.) *Petitions for the Award and Recall of Sequestration and Matters Incidental thereto under the Bankruptcy (Scotland) Act*, 1913.[1]

(iv.) *Petitions for Authority to Register English or Irish Judgments.*[2]

(v.) *Petitions for Appointment of Arbiter under the Small Landholders (Scotland) Act*, 1911.[3]

(vi.) *Petitions to have Mid-Superiority Declared Forfeit.*[4] (See also Maclaren's Bill Chamber Practice.)

(b) *Inner House.*—As the general words at the commencement of sec. 4 of the Distribution of Business Act, 1857, have been held to be limited by the general principle or rule that all petitions to what is properly the *nobile officium* of the Court fall naturally to the Inner House,[5] it follows that petitions other than those falling under the five classes enumerated in said section or are otherwise authorised to be presented to Lords Ordinary, or in the Bill Chamber or Exchequer Court, should be presented to the Inner House.

Thus, the following petitions are presented in the Inner House:—

For removal of trustees and executors;[6]

By tutors-nominate to grant leases;[7]

By tutors-nominate to renounce an agricultural lease;[8]

By a tutor to borrow money on a pupil's estate;[9]

For delivery of a bond of caution for curators-nominate;[10]

For recall of arrestment, whether process is depending[11] or not depending in the Outer House;[12]

Craving an order on creditors who failed to elect a trustee to meet and to do so;[13]

ruptcy (Scotland) Act, 1856; A. S., 25th November 1857, sec. 29; C. A. S., G, ii. Schedule No. 1; Clerks of Session (Scotland) Regulation Act, 1889, sec. 3; Begg, Petrs., 1893, 1 S. L. T. 274; Curle's Trs., Petrs., 1893, 1 S. L. T. 340.

[1] 3 & 4 Geo. V. cap. 20.

[2] Judgments Extension Act, 1868 (31 & 32 Vict. cap. 54), sec. 2.

[3] 1 & 2 Geo. V. cap. 49, sec. 7 (11).

[4] Titles to Land Consolidation (Scotland) Act, 1868, sec. 104.

[5] Dixon's Tutor, Petr., 1867, 5 M. 1052; Paterson, Petr., 1890, 17 R. 1059.

[6] Mitchell, etc., Petrs., 1864, 2 M. 1378; Jackson *v.* Welch, 1865, 4 M. 177; Stewart *v.* Chalmers, 1904, 7 F. 163; Lamont *v.* Lamont, 1908, S. C. 1033; Cherry *v.* Patrick, 1910, S. C. 32; Wishart, etc., Petrs., 1910, 2 S. L. T. 229.

[7] Morison, Petr., 1861, 23 D. 1313.

[8] Turner, etc., Petrs., 1862, 24 D. 694.

[9] Dixon's Tutor, Petr., 1867, 5 M. 1052.

[10] Young, etc., Petrs., 1864, 2 M. 695; Murray, Petr., 1873, 1 R. 45; Nicol's Curator, Petr., 1884, 11 R. 867.

[11] Hart, Petr., 1864, 3 M. 336; *cp.* Latham *v.* Edinburgh and Glasgow Rly. Co., 1866, 4 M. 1084; Gardiner *v.* Blackwood, 1866, 1 S. L. R. 136.

[12] Matthew *v.* Patullo, 1858, 21 D. 18.

[13] Steuart *v.* Chalmers, 1864, 2 M. 1216.

For recall of sequestration and appointment of a judicial factor ;[1]

For sequestration of rents of an estate and appointment of a judicial factor pending a dispute ;[2]

For authority to feu by trustees of a charity ;[3]

For authority to a trustee to bid at a public roup of the trust estate ;[4]

For admission as a notary public ;[5]

For custody of children ;[6]

For admission to the poor's roll ;[7]

To have it declared that a deed was formally executed ;[8]

To the *nobile officium*, or alternatively under the Trusts Acts ;[9]

For leave to appeal to the House of Lords ;[10]

For execution or regulation pending appeal to the House of Lords ;[11]

To apply judgment of House of Lords ;[12]

In matters relating to registered or unregistered companies under the Companies (Consolidation) Act, 1908,[13] and the Assurance Companies Act, 1909 ;[14]

For citation before an arbiter of witnesses and havers resident in different counties of Scotland ;[15]

For the examination of witnesses who are sick, aged, or about to leave Scotland where an action has not been raised or has been raised and not called ;[16]

For the examination of Scottish witnesses and havers to be laid before a foreign tribunal ;[17]

[1] Borthwick, Petr., 1862, 1 M. 104.

[2] Rintoul, Petr., 1862, 1 M. 214 ; Speirs *v.* Speirs, 1877, 5 R. 75 ; Paterson, Petr., 1890, 17 R. 1059.

[3] Managers of Prime Gilt Box of Kirkaldy, Petrs., 1859, 21 D. 871.

[4] Coats' Trs., Petrs., 1914, S. C. 723.

[5] Aikman, Petr., 1873, 1 R. 248.

[6] Hood *v.* Hood, 1871, 9 M. 449 ; M'Callum *v.* M'Callum, 1893, 20 R. 293 ; Guthrie *v.* Guthrie, 1906, 8 F. 545 ; A. B. *v.* C. B., 1906, 8 F. 973.

[7] A. S., 21st March 1842 ; C. A. S., A, x.

[8] Conveyancing (Scotland) Act, 1874, sec. 39.

[9] Websters *v.* Miller's Trs., 1887, 14 R. 501. See also Thomson *v.* Miller's Trs., 1883, 11 R. 401 ; *cp.* Smith *v.* Smith, 1892, 20 R. 27.

[10] 48 Geo. III. cap. 151, sec. 15 ; 6 Geo. IV. cap. 120, sec. 5.

[11] 48 Geo. III. cap. 151, sec. 17.

[12] Ferrie *v.* Ferrie, 1853, 15 D. 766 ; Anstruther *v.* Anstruther's Trs., 1873, 11 M. 955 ; Mackenzie, Petr., 1872, 9 S. L. R. 546.

[13] Secs. 135 and 285.

[14] Sec. 29.

[15] Caird, Petr., 1865, 3 M. 851.

[16] Smiths, Petrs., 21st January 1802, F. C. ; Johnstone *v.* Keyden, 1824, 3 S. 238 (N. E. 167) ; Blair *v.* Mags. of Brechin, 1825, 4 S. 98 (N. E. 100) ; Clouston *v.* Morris, 1848, 20 Jur. 228 ; Scott, Petr., 1866, 4 M. 1103 ; Hansen *v.* Donaldson, 1873, 1 R. 237 ; Pringle, Petr., 1905, 7 F. 525 ; Neill, Petr., 1911, 48 S. L. R. 830.

[17] Stemrich, Petr., 1886, 13 R. 1156 ; Reid, Petr., 1890, 17 R. 790 ; Baron de Bildt, Petr., 1905, 7 F. 899 ; Lord Advocate, Petr., 1909, S. C. 199.

Under the National Insurance Act, 1911;[1]

To compel arbiters to proceed;[2]

For *interim* appointments to fill public offices;[3]

For delivery of deeds recorded in the Books of Court;[4]

For appointment of returning officer;[5]

For opinion of Court in English cases;[6]

For authority to charge estate with estate duty under Finance Act, 1894;[7]

Petitions and complaints; and

Casus improvisus of every kind, whether arising in the statute[8] or otherwise.

See also *Privative Jurisdiction*, pp. 87 *et seq.*, 97 *et seq.*, 100 *et seq.*; *Commission and Diligence, infra*, Part x.; *Petition and Complaint*, p. 131 *et seq.*, and *infra*, Chap. xiii.; *Trust Petitions, infra*, p. 859 *et seq.*

(c) *Outer House.*—The following petitions may be presented to any Lord Ordinary:—

(i.) Petitions under the Conjugal Rights (Scotland) Act, 1861, for the protection of the property of married women;[9]

(ii.) Petitions under the Trusts Act, 1867;[10]

(iii.) Petitions for the restoration of possession of real or personal property of which the petitioner has been violently or fraudulently deprived, and to order the specific performance of any statutory duty;[11]

(iv.) Petitions under the Married Women's Property Act, 1881, for authority to dispense with a husband's consent;[12]

(v.) Petitions under the Patents and Designs Act, 1907;[13]

(vi.) Petitions under the Presumption of Life Limitation Act, 1891;[14]

[1] 1 & 2 Geo. V. cap. 55, secs. 66 and 67; C. A. S., D, vii.

[2] Forbes *v.* Underwood, 1886, 13 R. 465; Watson *v.* Robertson, 1895, 22 R. 362, per Lord President Robertson, p. 366.

[3] Lord Advocate, Petr., 1885, 12 R. 925; Mags. of Rothesay *v.* Carse, 1902, 4 F. 641.

[4] Mackenzie, Petr., 1902, 4 F. 559; Pheysey, Petr., 1906, 8 F. 801.

[5] Royal Burgh of Renfrew, Petr., 1897, 25 R. 18.

[6] Trappes *v.* Meredith, 1871, 10 M. 38.

[7] Harris' Trs. *v.* Harris, 1904, 11 S. L. T. 726; *cp.* Morris *v.* Morris' Trs., 1904, 11 S. L. T. 793.

[8] Collins Brothers & Co., Ltd., 1916, 1 S. L. T. 309 (Companies Acts): Goudy (3rd ed.), pp. 166-8, 224, 235, 464 (Bankruptcy Statutes); *infra*, p. 859 (Trust Acts).

[9] 24 & 25 Vict. cap. 86, sec. 1.

[10] 30 & 31 Vict. cap. 97, sec. 16, extended to non-gratuitous trustees by 47 & 48 Vict. cap. 63, secs. 1 and 2; Clark's Tr. *v.* M'Rostie, 1908, S. C. 196.

[11] Court of Session Act, 1868, sec. 91.

[12] 44 & 45 Vict. cap. 21, sec. 5.

[13] 7 Edw. VII. cap. 29; C. A. S., C, vi. See also Herbert *v.* Cowie Bros. & Co., 1897, 24 R. 361; Dewar *v.* Dewar & Sons, 1898, 6 S. L. T. 90.

[14] 54 & 55 Vict. cap. 29, sec. 12.

(vii.) Petitions to appoint an arbiter or oversman;[1]

(viii.) Petitions for the recall of arrestment and inhibition used on the dependence of a Court of Session action may be presented to the Lord Ordinary before whom the action depends;[2]

(ix.) Miscellaneous.

A petition for the removal of a trustee on the ground of insanity,[3] or on the ground of continuous absence,[4] may be presented in the Outer House.

A petition for power to make advances for the maintenance and education of minor beneficiaries who have not a vested right is competent in the Outer House.[5]

(d) *Exchequer Court.*—The Court of Exchequer has jurisdiction in all matters pertaining to the royal revenue.[6] Accordingly any petition with reference to the same should be presented to the Court of Exchequer.[7] The Court of Session, however, has sole jurisdiction to decide regarding the validity or invalidity and preference of the title of the Crown to honours, manors, lands, tenements, or hereditaments, or to casualties belonging to the Crown.[8]

Unless where otherwise expressly provided by the Exchequer Court Act, 1856, all petitions to the Exchequer Court must be brought before the Lord Ordinary in Exchequer causes.[9] Petitions for the appointment of tutors-dative are expressly ordered to be made to either Division acting as the Court of Exchequer.[10]

A petition under the Defence Act, 1842,[11] to uplift and apply money representing the price of lands acquired by the War Department was held incompetent before the Junior Lord Ordinary in the Bill Chamber, and should have been brought before the Lord Ordinary in Exchequer causes.[12]

Money consigned in terms of the Parliamentary Deposits and Bonds Act, 1892,[13] may be presented either in the Division or to the Lord Ordinary in Exchequer causes.[14]

[1] 57 & 58 Vict. cap. 13, secs. 2, 3, 4, and 6.

[2] 1 & 2 Vict. cap. 114, sec. 20; 31 & 32 Vict. cap. 101, sec. 158.

[3] Reid, Petr., 1897, 5 S. L. T. 124. See also Lees, Petr., 1893, 1 S. L. T. 42; Tod *v.* Marshall, 1895, 23 R. 36.

[4] Johnston *v.* Johnston, 1900, 2 F. 467. See also Dickson's Trs., Petrs., 1894, 2 S. L. T. 61.

[5] Hodgson's Trs., Petrs., 1904, 12 S. L. T. 532.

[6] 6 Anne, cap. 26, sec. 6 (6 Anne, cap. 53, sec. 7, Scots Statutes revised).

[7] Perth Quarter Sessions, 1861, 24 D. 221.

[8] 6 Anne, cap. 26, sec. 22 (6 Anne, cap. 53, sec. 30, Scots Statutes revised).

[9] 19 & 20 Vict. cap. 56, sec. 2.

[10] Ibid., sec. 19.

[11] 5 & 6 Vict. cap. 94.

[12] Shaw Stewart, Petr., 1905, 13 S. L. T. 39.

[13] 55 & 56 Vict. cap. 27, secs. 1 (1), (3), 3.

[14] Mason, Petr., 1899, 7 S. L. T. 25; Balfour, Petrs., 1909, S. C. 358.

Petitions under the Finance Act, 1894, are presented to the Exchequer Court.[1]

(e) *In Vacation.*—See Maclaren on Bill Chamber Practice, p. 252 *et seq.*

(3) Where Petitions are Incompetent.—It is incompetent to raise by way of petition legal questions for which there are other and more appropriate remedies.[2] Thus a petition presented by an heir of entail in possession for the purpose of having the annuity of the widow of the former heir of entail fixed by the Court,[3] and petitions involving the declarator of a right,[4] have been refused as incompetent.

An independent petition to the Inner House is not the correct method of attempting to put right a matter incidental to a process depending before a Lord Ordinary.[5]

After the verdict of a jury finding that a public right-of-way existed over certain lands had been extracted, a petition to remit to qualified persons to visit the lands and mark on a plan the position and direction of the roads was held incompetent.[6]

It has been held incompetent to proceed by way of petition to have a register of patents, designs, and trade marks rectified.[7]

A petition under sec. 91 of the Court of Session Act, 1868, to ordain licensing magistrates to inspect premises with a view to an application for a licence is not a competent mode of procedure.[8]

It is incompetent to petition the Court for a warrant to cite a person resident in England to give evidence before an arbiter in Scotland.[9]

A petition presented against a member of the College of Justice praying the Court to ordain him to deliver up certain documents over which he alleged he had a right of hypothec was dismissed as incompetent.[10]

[1] 57 & 58 Vict. cap. 30, sec. 10; C. A. S., C, viii. 4, 5, 6, 7, 8.

[2] Merry *v.* Monkland Canal Co., 1826, 4 S. 707 (N. E. 713); Sinclair's Exrs. *v.* Sinclair, 1846, 8 D. 963; Wallace *v.* Whitelaw, 1900, 2 F. 675, per Lord President Balfour, p. 678; Logan *v.* Cunningham, 1903, 41 S. L. R. 23.

[3] Carter-Campbell *v.* Lamont-Campbell, 1894, 21 R. 614.

[4] Glasgow Incorporation of Fleshers *v.* Watson, 1824, 3 S. 305 (N. E. 215); Nimmo *v.* Alexander, 1824, 3 S. 58 (N. E. 37); Drysdale *v.* Mags. of Kirkaldy, 1825, 4 S. 126 (N. E. 128); Cuningham *v.* Dickson, 1839, 1 D. 362; Clerk, Petr., 1780, 8 M. 904.

[5] Sykes *v.* Nicol, 1848, 10 D. 1499.

[6] Home Drummond, etc., Petrs., 1868, 6 M. 896.

[7] Dewar *v.* Dewar & Sons, 1898, 6 S. L. T. 90; *cp.* Herbert *v.* Cowie Bros. & Co., 1897, 24 R. 361. See also Patents and Designs Act, 1907, sec. 72.

[8] Annan *v.* Leith Licensing Authority, 1901, 9 S. L. T. 63.

[9] Highland Rly. Co., Petrs., 1868, 6 M. 896.

[10] Macneil *v.* Douglas, 1836, 14 S. 588.

(4) Form of Petitions.—All petitions are addressed "Unto the Right Honourable the Lords of Council and Session," with the exception of those addressed to the Lord Ordinary on the Bills and petitions presented to an Outer House Judge in matters incidental to causes depending before him. In the case of petitions to the Lord Ordinary on the Bills they are addressed "Unto the Honourable the Lord Ordinary officiating on the Bills"; in the case of the other exception they are addressed "Unto the Honourable Lord ." The form then proceeds—"The petition of Humbly sheweth." The designation of the petitioner must be correct, otherwise the procedure will require to be commenced of new.[1] Thereafter the facts necessary to explain the prayer of the petition are narrated in short paragraphs, and references to dates are made by the dates being put in the margin opposite the expression "of this date." It is thought that these paragraphs should be numbered in the same way as are articles of condescendence in summonses, and that they should be answered in like manner. The petition concludes with a prayer in which the Court is usually craved for intimation of the petition on the walls and in the Minute-Book in common form,[2] and for advertisement in certain named newspapers, if the last is considered necessary. In petitions to the Lord Ordinary on the Bills and petitions presented to an Outer House Judge in matters incidental to a cause depending before him the crave for intimation in common form and for advertisement is usually omitted. Then follows a prayer for service upon persons named, who should be *all* persons having an interest,[3] even when furth of Scotland,[4] and for answers within a specified time. A general prayer for service "on such parties and in such manner as your Lordships shall think fit" is incorrect.[5] What is desired to be done by the Court is then set forth, and the prayer concludes "or to do further or otherwise in the premises as to your Lordships shall seem proper." This last clause allows a person other than the nominee mentioned in the petition to be appointed by the Court without a new or amended petition or renewed intimation.[6]

Petitions should be prepared or revised by counsel.[7] Petitions

[1] Maccallum, etc., Petrs., 1883, 11 R. 60.

[2] Hutchison, Petr., 1847, 19 Jur. 347.

[3] Gordon, etc., Petrs., 1832, 11 S. 235; Fowlds *v.* Hodges, 1836, 15 S. 244; Russell, Petr., 1855, 17 D. 1005; Lawson, etc., Petrs., 1894, 2 S. L. T. 308.

[4] Dalrymple *v.* Ranken, 1836, 14 S. 1011.

[5] Duke of Northumberland and Others, Petrs., 1854, 16 D. 803.

[6] Davidson *v.* Bogle, 1837, 15 S. 421; Hay *v.* Boreland, 1837, 15 S. 850.

[7] Note, dated 14th November 1855, printed in 18 D. 33.

other than petitions to the Lord Ordinary on the Bills should be signed by counsel.[1] Petitions to the Lord Ordinary on the Bills may be signed by the petitioner or his agent as well as by counsel.[2]

Petitions should be marked with the Division to which they belong, and, if presented in the Outer House or in the Bill Chamber as the case may be, should be marked with the name of the Lord Ordinary, or "Junior Lord Ordinary," respectively.[3]

Where there have been prior petitions in the same case a reference to these should be made at the head of the first page of the petition.[4]

A distinctive letter of the alphabet (A, B, C, etc.) shall be printed in large heavy type on the front page and on the backing of every print boxed to the Court, so that in each process the letters thus printed shall follow consecutively. Any print without such lettering shall not be received by the boxing clerks.[5]

(5) NOTES.—A note in the Inner House is a petition to the President of either Division of the Court incidental to a depending cause, such as a note to refuse a reclaiming note, to sist a party, to transmit process, or for an early hearing. It is always signed by counsel,[6] and may be in writing or printed as the occasion demands. It should be intimated to the opposite party and lodged with the clerk.

A note should be in the following form:—

Unto the Right Honourable the Lord President [*or* Lord Justice-Clerk].

Note for [*designation*]

in causâ

A. B., Pursuer;

against

C. D., Defender.

My Lord President [*or* Justice-Clerk]—

[*Here set forth the facts necessary to explain the crave with which the note concludes.*]

May it therefore please your Lordship to move the Court to [*here narrate the crave*].

In respect whereof,

[*Signature of Counsel.*]

[1] Hay *v.* Perth Baking Co., 1823, 2 S. 107 (N. E. 101).

[2] Scott *v.* Anstruther, 1848, 10 D. 732.

[3] Notice to Agents, dated 21st November 1857, printed in the Rolls of Court of Session issued 23rd November 1857.

[4] Scott, Petr., 1856, 18 D. 323.

[5] C. A. S., A, iii. 5.

[6] Faculty of Advocates *v.* Rae, 1832, 4 Jur. 488.

In the case of joint minutes and certain other documents the practice has varied from time to time, certain clerks insisting on notes and others declining them. It seems unfortunate that such procedure should depend upon the caprice of the clerk in office for the time.[1] It is thought that the proper practice is to proceed by note, as a note details all the prior proceedings and, *inter alia*, sets forth the date of boxing the original paper, thus enabling the Judges' clerks to have the same looked out for the Judges' use.

The term "note" may also be used to describe petitions in the same cause subsequent to the original petition. Thus, where a judicial factor appointed by petition to the Court asks for special powers, the application should properly be by "note" and not by "petition."[2] The only difference between this kind of "note" and a "petition" is in the nomenclature.

(6) PRINTING AND BOXING.—(a) *Generally.*—It is only where petitions require to be printed that they are boxed. Boxing consists of lodging copies of the petition in the enrolling room at the Parliament House for the use of Judges, professors, reporters, learned societies, etc., and for this purpose one of the clerks of the Inner House Judges in rotation is in attendance in the box room every lawful day in session, and on the box days in vacation and recess, between the hours of 11 and 1 o'clock, for the purpose of receiving and boxing printed papers, and marking on the record copy that copies have been boxed.[3]

(b) *Inner House Petitions.*—As a rule, Inner House petitions require to be printed and boxed.[4] There is a tendency, however, where intimation and service is not required, to allow petitions to be in writing.[5] In the latter case the principal petition is lodged with the Clerk of Court, along with a copy for the use of the President. If three other copies for the use of the other Judges in the Division are required they must be furnished.

(c) *Outer House Petitions.*—Petitions under the Trusts (Scotland) Act, 1867, and the Presumption of Life Limitation (Scotland) Act, 1891, should be printed and boxed. As regards the other Outer House petitions, printing, and consequently boxing, may be dispensed with,

[1] Scots Style Book, vol. vi. pp. 132, 133.

[2] 12 & 13 Vict. cap. 51, sec. 7; Regulations and Memoranda by the Principal Extractor of the Court of Session, dated August 1907; Incidental Petitions in Factories, etc. See also The Seafield Preserve Co., Ltd., Petrs., 1911, S. C. 3. Maclaren's Bill Chamber Practice, pp. 109, 110.

[3] A. S., 19th June 1821, sec. 8; C. A. S., A, ii. 3.

[4] Duthie, Petr., 1854, 17 D. 143; Notice to Agents, printed in the Rolls of Court of Session, Winter Session 1857-1858, No. 22, issued Wednesday, 23rd November 1857.

[5] Coldstream's Practice, p. 232.

especially petitions for the recall of arrestment and inhibition and petitions under the Conjugal Rights Amendment Act, 1861, and the Married Women's Property Act, 1881.

(d) *Petitions Dealt with in the Bill Chamber.*—(i.) *Petitions to the Junior Lord Ordinary.*—These petitions must invariably be printed and boxed.

(ii.) *Petitions to the Lord Ordinary on the Bills during Session.*—These petitions are in writing, and do not require to be printed until a reclaiming note has been taken against the judgment of the Lord Ordinary on the Bills. These petitions are principally:—

Petitions for the award and recall of sequestration and matters incidental thereto;

Petitions for the appointment of judicial factors to persons deceased in terms of sec. 163 of the Bankruptcy (Scotland) Act, 1913;[1]

Petitions for authority to register English or Irish judgments after the lapse of one year;

Petitions for appointment of an arbiter under the Small Landholders (Scotland) Act, 1911; and

Petitions to have mid-superiorities declared forfeit. (See also Maclaren's Bill Chamber Practice.)

(iii.) *Petitions to the Lord Ordinary on the Bills in Vacation, Recess, or Adjournment.*—Printing and boxing in vacation, recess, or adjournment depend upon whether the petition would require to be printed and boxed if presented in session. If so, the petition must be printed and boxed; if not, not. As the boxes are not open during vacation except on box days, the boxing of printed petitions is done at the first box day after the lodging of the petition.

(7) Lodging.—After prints of the petition have been boxed, the boxing clerk marks upon the principal petition "boxed," with the date, and the petitioner's agent thereupon makes up a process and lodges it with the Clerk of Court in the same way as in the case of a summons.

Where the petition is in manuscript there is no boxing. "Lodging" satisfies the requirements of "presenting," although boxing should follow immediately after in cases where printing is necessary.[2]

(8) First Order.—Nothing can be done in a petition without an order of Court. Accordingly, after a petition has been prepared, revised, and signed, steps are taken to obtain such an order.[3] If the petition

[1] In practice these petitions are deemed petitions to the Junior Lord Ordinary, and are accordingly printed and boxed—C. A. S., G, ii.; A. S., 6th January 1914.

[2] Bain *v.* Allan, 1884, 11 R. 650.

[3] C. A. S., C, iii. 1.

is printed it is boxed and lodged, and on the following morning the petition appears in the Single Bills or Motion Roll, as the case may be. If the petition is in manuscript, it must be lodged and enrolled before it can appear in either of these rolls. When the petition appears in the Single Bills or Motion Roll, an order for "intimation and service" is usually taken, or "intimation, service, and advertisement" where advertisement is necessary, and an order is, in the same interlocutor, taken upon the respondent, if so advised, to lodge answers thereto within a certain number of days after service. At this stage the Court may take exception to the competency of the petition; but the competency is not usually decided at this stage, and where there is any question of competency an interlocutor is usually granted ordering intimation and service, etc., as craved, reserving consideration of the competency.[1]

When a petition has been written on it becomes a depending cause.[2] "Intimation" is used in two different senses. It is sometimes used in the sense of service upon the respondent. When used along with the term "service," as in "intimation and service," it means intimation on the walls and in the Minute-Book, and for these purposes a copy of the first order is written on a print of the petition, and a one shilling law Court stamp is affixed thereto, and the print is handed to the hall-keeper of the Parliament House, who puts it up on the walls of the lobby of the Parliament House, and a marking is made in the Minute-Book by the Clerk of the Process.

(9) INDUCIÆ.—The usual *inducice* in petitions is eight days, whether the respondent is within or furth of Scotland.[3]

In *entail* petitions, however, the *inducice* is usually seven days if the respondent is in Scotland, unless in Orkney and Shetland, or in any other island of Scotland, and fourteen days where he is in Orkney or Shetland or such other island, or furth of Scotland.[4] If no provision is made in the interlocutors or orders of the Court in the particular case, the *inducice* is fourteen days from the date of service if the respondent is within Scotland, or forty days if within Shetland or Orkney; where the party called is furth of Scotland, he is allowed sixty days from the date of service for answering the petition.[5]

Where the petition is for the appointment of a judicial factor in

[1] Macfarlane, etc., Petrs., 1857, 19 D. 656.
[2] Horn, etc., Petrs., 1857, 20 D. 52.
[3] Antonio, p. 138; Thoms on Judicial Factors, pp. 459, 460.
[4] Entail Amendment (Scotland) Act, 1875 (38 & 39 Vict. cap. 61), sec. 12 (4); Court of Session Act, 1868, sec. 14.
[5] C. A. S., C, v. 1.

terms of sec. 163 of the Bankruptcy (Scotland) Act, 1913, the appointment cannot be made until the lapse of fourteen days after the date of publication and service, or such other time as the Court may fix.[1]

On the expiry of the *inducice* the petitioner's agent lodges a print of the petition, with deliverance, execution of service, or acceptance of service, and also a certificate of intimation on the walls, etc. If no answers have been lodged, this fact should also be included in the certificate. The petition is then enrolled for further procedure.

(10) SERVICE.—A copy of the first deliverance written on a copy of the petition and certified by the Clerk of Court is the warrant for service.[2]

Service may be by messenger-at-arms or by post (see *Citation, supra*, p. 317 *et seq.*), or service may be accepted.[3]

Where service is by messenger the execution of service must be in the *old* style, as the new and short form only applies to executions of service in summonses and notes of suspension, suspension and interdict, and suspension and liberation.[4]

Where the petition is served by post, the execution of the service may be written upon a copy petition, with copy deliverance annexed, without the same being certified, but in cases of personal service, acceptance of service and, where the petition is served by a messenger, the execution or acceptance of service must be written on a certified copy.[5]

Service can only be accepted by an Edinburgh agent, and must be holograph or tested.[6]

In exceptional circumstances personal service may be dispensed with.[7]

Where ward is abroad there may be edictal service.[8]

Service must be made within year and day of the date of the first order,[9] and where answers are asked for by a certain day, which is named, service must be made immediately after the order for service has been granted.[10]

[1] C. A. S., G, ii. 3 ; A. S., 6th January 1914.

[2] Antonio, p. 136, sec. 2. See also Bruce, etc., Petrs., 1899, 7 S. L. T. 256.

[3] Graham, Petr., 1858, 20 D. 436.

[4] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 20.

[5] Antonio, pp. 136, 137, sec. 2.

[6] Ibid., p. 137, sec. 2.

[7] Frazer, Petr., 1828, 7 S. 205 ; Livingstone, Petr., 1835, 13 S. 1033 ; Macintyre, etc., Petrs., 1850, 13 D. 951 ; M'Kechnie, etc., Petrs., 1890, 27 S. L. R. 261 ; Hamilton, Petr., 1899, 7 S. L. T. 226 ; Buyers, Petr., 1910, 2 S. L. T. 201.

[8] Allison, etc., Petrs., 1901, 8 S. L. T. 339.

[9] Commercial Bank *v.* Corstorphine Road Trs., 1842, 4 D. 842.

[10] Duke of Northumberland *v.* Harris, 1832, 10 S. 366.

It is no valid objection to the execution of citation of a petition that it is partly printed and annexed to the petition by gumming.[1]

Where service is made by post, it must be made by a law agent on the roll of the Court of Session.[2]

(11) WHERE NO ANSWERS ARE LODGED.—If, on the expiry of the *inducicæ*, no answers have been lodged, the petition, along with the requisite executions, acceptances, and certificates, is lodged and enrolled in the Single Bills or Motion Roll, when, if a remit or proof is not considered necessary, the prayer of the petition will be granted or otherwise dealt with. In some petitions there is invariably a remit, as in entail petitions, or a proof, as in petitions under the Presumption of Life Limitation Act. In petitions whose procedure is regulated by the Distribution of Business Act, 1857, the Lord Ordinary has full power to decide or dispose of the same after making such investigation and inquiry, and requiring such assistance from professional persons or persons of science or skill as he shall judge proper.[3] A law agent of standing is selected as reporter where it is considered necessary to ascertain whether the statutory procedure has been adopted, or where a deed is required to be executed at the sight of the Court; a valuator, architect, engineer, or land surveyor where what is required to be ascertained is a matter falling under his special branch of skill or knowledge. In factory petitions a remit is usually made to the Accountant of Court.

The report, if favourable, usually concludes with a draft interlocutor which the reporter considers suitable in the circumstances. Where the report is not favourable, objections may be stated thereto, and these are put to the roll and discussed. A note of the objections must be furnished when the petition is enrolled to the Lord Ordinary's clerk for his Lordship's use.[4]

The Court seldom interferes with the terms of the report except where a principle is involved,[5] or actuarial calculations are made on a wrong basis,[6] or where the opinion expressed is not very strong or clear.[7]

In unopposed Outer House petitions, after the period of intimation

[1] Hunter, Petr., 1908, 15 S. L. T. 716.

[2] Kerr, Petr., 1906, 14 S. L. T. 412.

[3] 20 & 21 Vict. cap. 56, sec. 5.

[4] C. A. S., C, ii. 13.

[5] Pringle *v.* Pringle, 1891, 18 R. 895.

[6] De Virte *v.* Wilson, 1877, 5 R. 328; M'Donalds *v.* M'Donald, 1880, 7 R. (H. L.) 41.

[7] Gilligan's Factor *v.* Fraser, 1898, 25 R. 876. See also Smith (Gardner's Curator Bonis), 1899, 7 S. L. T. 251; Donald (M'Call's Curator), 1901, 8 S. L. T. 440.

and service has expired, it is not necessary to enroll such petition before the Lord Ordinary, but the same may, on the requisition of the agent, be transmitted to the Lord Ordinary to be disposed of, or for such further or other procedure as to him may seem proper.[1] After a remit has been made by the Lord Ordinary to a man of business or a man of skill to report, all motions in such petition shall be made before the Lord Ordinary, and be enrolled in the Lord Ordinary's daily roll, and not in the roll of continued motions provided for by sec. 31 of the Court of Session Act, 1868.[2]

In unopposed petitions to the Inner House where the report is favourable the petition may be disposed of in the Single Bills instead of being sent to the Summar Roll, but intimation of the motion must be given to the Keeper of the Rolls in order that the Court may have an opportunity of considering the matter beforehand.[3]

(12) ANSWERS.—Where a respondent is at issue with the petitioner regarding the statements made in the petition, it is the practice to lodge formal answers, which should either be printed and boxed, or be in writing, according as the petition itself is printed or in manuscript. In the same way, answers may be signed by counsel or by the respondent or his agent according as the petition is one which must be signed by counsel,[4] or may be signed by the petitioner or his agent.[5]

Answers should be intimated to the petitioner's agent along with six copies of the answers.

Where the respondent is not at issue with the petitioner on fact but only in law, he may lodge a minute to that effect.

Answers are in the form of defences in an ordinary action, only there are no pleas in law.

After answers have been lodged the Court may either order a proof,[6] make a remit,[7] remit with power to take proof,[8] or give a decision after a simple hearing on the petition and answers in the Summar or Procedure Roll, as the case may be.

(13) COMPEARER.—Where a person upon whom the petition has not been served desires to appear in the process, he may lodge and box answers in the same way as if he had been called in the petition, and

[1] C. A. S., C, iii. 2.
[2] Ibid., 3.
[3] General Accident Assurance Corporation, Ltd., Petrs., 1906, 8 F. 483.
[4] A. S., 11th July 1828, sec. 112; C. A. S., A, iii. 14; Denny *v.* Macnish, 1863, 1 M. 268.
[5] Scott *v.* Anstruther, 1848, 10 D. 732.
[6] Whirter *v.* Latta, 1889, 17 R. 68; Bankes *v.* Anderson, 1899, 1 F. 1194.
[7] Forbes *v.* Dalziel, 1877, 5 R. 328; Bankes *v.* Anderson, 1899, 1 F. 1194.
[8] Semple *v.* Tennent, 1888, 15 R. 810.

when the answers appear in the Single Bills or Motion Roll he may move that the answers be allowed to be received; or he may lodge a minute asking to be allowed to lodge answers.[1] The petitioner may resist either motion, but if the compearer can qualify any reasonable interest his answers will be received.[1]

(14) INTERIM APPOINTMENT. — A special prayer for an *interim* appointment is usual,[2] although it is not absolutely necessary.[3] It has been made *ex proprio motu* by the Court,[4] and upon an application in a petition where, owing to a reclaiming note, a permanent appointment could not at once be made.[5]

In one case the Court refused to make an *interim* appointment during the running of the *inducicæ*, on the ground that the respondent might have a good answer to an *interim* appointment.[6]

The Court will make an *interim* appointment where the matter is urgent;[7] and when such an appointment is made the reading in the Minute-Book is dispensed with, and immediate extract ordered.[8]

(15) AMENDMENT OF PETITION.—The Court may allow a petition to be amended both before[9] and after[10] intimation and service have been made. In the latter case, however, where the amendment is a material one, the Court generally insists upon new intimation and service. Thus, where there was an error in the name of the petitioner, the Court refused to allow intimation and advertisement already made to stand, and ordered the petition, after being amended, to be commenced of new;[11] and where there was a serious error in the prayer of a petition for carrying into effect a private Act of Parliament under notices required by the Act, a new set of notices was ordered.[12] Where the compearing respondent consents,[13] the Court may allow the petition to proceed after amendment without new intimation and service.

[1] Gas Power and By-Products Co., Ltd. *v.* Power Gas Corporation, Ltd., 1911, S. C. 27.

[2] Kirk, etc., Petrs., 1827, 5 S. 564 (N. E. 530); Davidson, etc., Petrs., 1830, 8 S. 1027; Henderson, Petr., 1830, 8 S. 1027; Philp, Petr., 1831, 10 S. 192; Lyall, Petr., 1843, 5 D. 1428.

[3] Taylor *v.* Taylor's Trs., 1857, 19 D. 1097, at pp. 1098, 1099.

[4] Brown, etc., Petrs., 1848, 11 D. 1027; Goold, etc., Petrs., 1856, 18 D. 1318.

[5] Sharp *v.* M'Call, 1860, 23 D. 38, per Lord Justice-Clerk Inglis, p. 40.

[6] Armit, etc., Petrs., 1844, 16 Jur. 439.

[7] A. B., Petr., 1829, 8 S. 89; Wilson, etc., Petrs., 1849, 12 D. 248; Young *v.* Collins, 1852, 14 D. 746; Goold, Petr., 1856, 18 D. 1318.

[8] Antonio, p. 139, sec. 7.

[9] Bonthorn, etc., Petrs., 1828, 7 S. 215; Shanklie, etc., Petrs., 1854, 16 D. 898.

[10] Forbes *v.* Dalziel, 1877, 5 R. 328.

[11] Maccallum, etc., Petrs., 1883, 11 R. 60.

[12] Lockhart, etc., Petrs., 1837, 15 S. 498; Rollo, etc., Petrs., 1852, 14 D. 990.

[13] Watson *v.* Crawcour, 1856, 19 D. 70.

An incompetent petition has been allowed to be amended so as to make it competent.[1]

An error in a petition and complaint which practically amounted to a clerical error was allowed to be amended.[2]

A correction may be made in a petition even after extract.[3] Additional petitioners may be sisted.[4]

(16) Falling Asleep.—Inner House petitions do not fall asleep, even when remitted to an Outer House Judge.[5] Petitions to the Junior Lord Ordinary under the Distribution of Business Act, 1857, being originally Inner House petitions, do not fall asleep.[6] Sequestration petitions do not fall asleep.[7]

(17) Reclaiming Notes.—(a) *Petitions Presented to the Junior Lord Ordinary under the Distribution of Business Act.*—Reclaiming notes are only allowed against interlocutors on the merits,[8] and cannot bring up for review prior interlocutors on the merits which have become final.[9] Interlocutors not upon the merits can only be brought to the notice of the Inner House by a report of the Lord Ordinary. It is not necessary that an interlocutor, in order to be an interlocutor on the merits, should exhaust the merits of the petition. Thus, where in a petition for authority to charge improvement expenditure on an entailed estate the Lord Ordinary pronounced an interlocutor authorising the petitioner to charge and remitting to a man of business to revise the necessary bond,[10] and where in a petition for discharge of a *curator bonis* the Lord Ordinary pronounced an interlocutor finding that certain sums charged in the curator's account were not proper charges against the curatory, and of new remitting to the Accountant of Court to give effect to these findings and to adjust the balance due by the *curator bonis* and to report,[11] both these interlocutors were held to be interlocutors on the merits, and could be reclaimed against.

It is competent to reclaim against an interlocutor making an appointment in absence, but the reclaiming note should not be in the form of

[1] Forbes *v.* Dalziel, 1877, 5 R. 328; Grant, Petr., 1901, 9 S. L. T. 138.

[2] Dunlop Pneumatic Tyre Co., Ltd. *v.* Rose, 1901, 3 F. 635.

[3] Hope *v.* Hamilton, 1851, 13 D. 1268; Scott, Petr., 1855, 17 D. 932.

[4] Morrison, etc., Petrs., 1882, 19 S. L. R. 442; Thomson, etc., Petrs., 1882, 19 S. L. R. 738.

[5] Gillies *v.* Scott, 1829, 7 S. 839.

[6] Wemyss, Petr., 1860, 22 D. 556.

[7] Bankruptcy (Scotland) Act, 1913, sec. 42.

[8] 20 & 21 Vict. cap. 56, sec. 6; M'Nab *v.* M'Nab, 1871, 10 M. 248. See also Wallace *v.* Whitelaw, 1900, 2 F. 675.

[9] Marquis of Queensberry's Trs. *v.* Douglas, 1907, S. C. 924.

[10] Macqueen *v.* Tod, 1899, 1 F. 859.

[11] Clark *v.* Barr's Trs., 1903, 5 F. 856.

a reponing note but of a reclaiming note against an interlocutor on the merits praying to have the appointment recalled.[1]

Where a judgment on the merits has been pronounced during session a reclaiming note must be boxed within eight days of the date of the interlocutor reclaimed against, after which the judgment of the Lord Ordinary, if not reclaimed against, is final.[2] Where petitions appropriate to the Junior Lord Ordinary during session are dealt with and disposed of in vacation, the interlocutor disposing of the petition must be reclaimed against within eight days.[3]

Where the days allowed for presenting a reclaiming note against an interlocutor expire during any vacation, recess, or adjournment of the Court, such reclaiming note may be presented on the first box day occurring in said vacation, recess, or adjournment after the reclaiming days have expired; and if there be no such box day, then on the first ensuing sederunt day.[4]

Where a petition has been heard during session, but the interlocutor deciding the merits has been signed in vacation, such interlocutor, if dated at or prior to the first box day in vacation, may be reclaimed against on the second box day; and if dated after the first box day, then on the first sederunt day ensuing, or within such number of days from the date of such interlocutor as may be competent in the case of a reclaiming note against such interlocutor dated and signed during session.[5]

If in a reclaiming note the respondent objects to its competency, it is competent for the Court to consider the competency of the petition itself.[6]

(b) *Petitions under the Trusts (Scotland) Act*, 1867.— All such petitions as respects review are subject to the same rules and regulations as are enacted with regard to petitions coming before the Junior Lord Ordinary in virtue of the Distribution of Business Act.[7]

(c) *Petitions for Recall of Arrestment and Inhibition.*—Formerly a reclaiming note required to be *lodged* within ten days from the date of the interlocutor reclaimed against,[8] whether the reclaiming days expired

[1] Sharp *v.* M'Call, 1860, 23 D. 38.

[2] 20 & 21 Vict. cap. 56, sec. 6.

[3] Staig *v.* Johnston, 1875, 2 R. 701.

[4] A. S., 14th March 1894; C. A. S., D, i. 4; Bain *v.* Allan, 1884, 11 R. 650.

[5] Grant Suttie's Tutors *v.* Viscountess Dalrymple, 1883, 11 R. 3; Court of Session Act, 1868, sec. 94. See also Countess Dowager of Seafield *v.* Kemp, 1898 25 R. 873.

[6] Wallace *v.* Whitelaw, 1900, 2 F. 675.

[7] Trusts (Scotland) Act, 1867, sec. 16.

[8] 1 & 2 Vict. cap. 114, sec. 20; 31 & 32 Vict. cap. 101, sec. 158.

during session or in vacation,[1] and where the reclaiming days expired on a day in vacation when the clerks' office was not open, the provision of the statute was held to be sufficiently complied with if the reclaiming note was lodged on the first day thereafter on which it was open.[2] Now, where the reclaiming days expire during vacation, recess, or adjournment, the note may be *presented* on the first box day occurring after the reclaiming days have expired, and if there is no such box day, then on the first ensuing sederunt day.[3] Presenting includes lodging.[4]

(d) *Petitions for the Award and Recall of Sequestration, and Matters Incident thereto.*—Every interlocutor of the Lord Ordinary which is not expressly excluded from review by the Bankruptcy (Scotland) Act, 1913, may be brought under review by a reclaiming note in common form presented within fourteen days from the date of the Lord Ordinary's interlocutor, and the reclaiming note is sent to the Summar Roll and disposed of as speedily as the forms of Court will allow.[5]

The Court of Session Act, 1868, does not apply to proceedings under the Bankruptcy Acts,[6] and accordingly it is not necessary to obtain leave to reclaim an interlocutory judgment,[6] nor does a reclaiming note against an interlocutor bring up for review prior interlocutors which have become final.[7]

Where the reclaiming days expire in vacation, recess, or adjournment the reclaiming note may be presented on the first box day occurring in such vacation, recess, or adjournment, after the reclaiming days have expired, or, if there is no such box day, on the first ensuing sederunt day.[8]

The Division of the Court to which the petition is appropriated must be marked on the original petition,[9] and reclaiming notes from interlocutors on the petition must be presented to such Division.[10] In one case, however, where a petition for sequestration was marked to the First Division and a petition for recall was presented to the Lord Ordinary, who refused it, and his judgment was reclaimed against to the

[1] Lockhart *v.* Cumming, 1851, 13 D. 996. See also Joel *v.* Gill, 1860, 22 D. 357, per Lord Justice-Clerk Inglis, p. 358.

[2] Henderson *v.* Henderson, 1888, 16 R. 5.

[3] A. S., 14th March 1894; C. A. S., D, i. 4.

[4] Bain *v.* Allan, 1884, 11 R. 650.

[5] Bankruptcy (Scotland) Act, 1913, secs. 166, 167; Davis *v.* Hepburn, 1866, 5 M. 80.

[6] M'George *v.* M'George's Creditors, 1887, 14 R. 841.

[7] Alison *v.* Robertson's Trs., 1890, 18 R. 212.

[8] Joel *v.* Gill, 1860, 22 D. 357.

[9] Bankruptcy (Scotland) Act, 1913, sec. 20.

[10] Gow *v.* Bell, 1862, 1 M. 25.

Second Division, the latter Court refused to throw out the reclaiming note as incompetent, but left open the question of contingency.[1]

As these petitions are all presented to the Lord Ordinary officiating on the Bills,[2] it is to be presumed that, in all other respects as regards reclaiming, the practice and procedure appropriate to reclaiming notes from interlocutors pronounced in the Bill Chamber[3] will be followed.

It is incompetent for the Lord Ordinary to report a sequestration petition by formal interlocutor for the decision of the Inner House.[4]

(e) *Petitions for the Appointment of a Judicial Factor under the Bankruptcy (Scotland) Act*, 1913.—Under the Distribution of Business Act, 1857, petitions and applications, *inter alia*, for the appointment of judicial factors, which were formerly brought before the Inner House, were transferred to the Junior Lord Ordinary. By sec. 163 of the Bankruptcy (Scotland) Act, 1913, the petition for the appointment of a judicial factor to a deceased person while presented to "either Division of the Court of Session" is to be dealt with by "the Lord Ordinary," to whom is given the power of appointment. Sec. 2 of the latter Act says that "the Lord Ordinary" means "the Lord Ordinary officiating on the Bills in the Court of Session," not the Junior Lord Ordinary. By Act of Sederunt, 6th January 1914, it is enacted that in the Codifying Act of Sederunt any reference to the Bankruptcy (Scotland) Act, 1856, or statutes amending the same, shall be held to import a reference to the Bankruptcy (Scotland) Act, 1913, and that the provisions of the Codifying Act of Sederunt shall have force and effect under the last-mentioned statute, but in so far always as not inconsistent therewith. By the Codifying Act of Sederunt[5] such a petition is required to be marked "Junior Lord Ordinary," with the extraordinary result that although the petition is marked "Junior Lord Ordinary" the appointment is made by the Lord Ordinary on the Bills. What effect this may have upon the period of reclaiming will depend upon whether the marking or the Judge actually making the appointment is to be the criterion. If the former, the period of reclaiming would seem to be eight days; if the latter, fourteen days. The provisions of the Codifying Act of Sederunt, however, have force and effect under the Bankruptcy (Scotland) Act, 1913, only in so far as consistent therewith. Accordingly, as the Act of Sederunt seems to be inconsistent with the express terms of sec. 163 of the Bankruptcy (Scotland) Act, 1913, it is

[1] Cooper *v.* Baillie, 1878, 5 R. 414.
[2] Bankruptcy (Scotland) Act, 1913, sec. 2.
[3] C. A. S., E, ii. 29, 30.
[4] Wryghte *v.* Lindsay, 1856, 19 D. 55.
[5] C. A. S., G, ii. Schedule No. 1.

thought that the latter should prevail, and that the period of reclaiming in such petition should be fourteen days. Under the Bankruptcy (Scotland) Act, 1856, sec. 164, similar petitions, however, were held to be competently presented to the Junior Lord Ordinary,[1] and this practice has been continued in petitions under sec. 163 of the Bankruptcy (Scotland) Act, 1913, with the result that the latter petitions may be reclaimed against within eight days, and cannot be reclaimed against unless the merits have been finally disposed of.

(f) *Petitions under the Companies (Consolidation) Act*, 1908.—With regard to orders or judgments pronounced in session by a permanent Lord Ordinary to whom a winding-up has been remitted, or by the Lord Ordinary on the Bills in vacation, such order or judgment, where reclaimable, is subject to review only by a reclaiming note in common form presented within fourteen days of the date of the order or judgment.[2]

(g) *Petitions under the Patents and Designs Act*, 1907.—A reclaiming note against the decision of the Lord Ordinary in a petition for the extension of a patent is incompetent, as the decision of the Lord Ordinary is final.[3]

(h) *Petitions under the Presumption of Life Limitation (Scotland) Act*, 1891.—These petitions are, in respect of review, subject to the rules and regulations for petitions coming before the Junior Lord Ordinary under the Distribution of Business Act.[4]

(i) *Petitions under the Conjugal Rights (Scotland) Amendment Act*, 1861.—Any interlocutor of the Lord Ordinary may be brought under review of the Inner House by lodging and boxing a reclaiming note within twenty-one days after the pronouncing of such interlocutor, if in session; and if the said twenty-one days expire during vacation, by lodging in the Bill Chamber a reclaiming note and boxing the same at the first box day after the expiry of the said twenty-one days.[5]

(j) *Other Petitions.*—As petitions for authority to register English and Irish judgments after the lapse of a year,[6] petitions for the appointment of an arbiter under the Small Landholders (Scotland) Act, 1911,[7] and petitions to have mid-superiorities declared forfeit,[8] are directed to be presented to the Lord Ordinary on the Bills, it is thought that, if

[1] M'Cardle *v.* M'Cardle's Judicial Factor, 1906, 8 F. 416.
[2] 8 Edw. VII. cap. 69, sec. 181; MacArthur *v.* Mackay, 1914, S. C. 547.
[3] Lawrence *v.* Comptroller-General of Patents, 1910, S. C. 683.
[4] 54 & 55 Vict. cap. 29, sec. 12.
[5] 24 & 25 Vict. cap. 86, sec. 3.
[6] 31 & 32 Vict. cap. 54, sec. 2.
[7] Scott Plummer *v.* Board of Agriculture for Scotland, 1913, 2 S. L. T. 251.
[8] 31 & 32 Vict. cap. 101, sec. 104.

the decision of the Lord Ordinary on the Bills is not final, a reclaiming note against his decision may be made within fourteen days of the date of the judgment sought to be reviewed, as in the case of other interlocutors pronounced by the Lord Ordinary on the Bills.

With regard to petitions for restoration of possession and specific performance, petitions under the Married Women's Property Act, 1881, and petitions under the Arbitration (Scotland) Act, 1894, to appoint an arbiter or oversman, all of which may be presented to any Lord Ordinary, it is thought that the usual rules which obtain in regard to ordinary actions in the Outer House will prevail.

Petitions to the Court to exercise its *nobile officium*, and which are brought before, and disposed of by, the Lord Ordinary on the Bills in vacation, seem to have their analogy in petitions under the Companies (Consolidation) Act, 1908, reviewable judgments in which may be reclaimed against within fourteen days in common form.

CHAPTER II

PETITIONS RELATIVE TO JUDICIAL FACTORS

THESE petitions, although presented to the Junior Lord Ordinary, are heard in the Bill Chamber, and are fully dealt with in the author's work on Bill Chamber Practice, p. 94 *et seq.* (*q.v.*).

CHAPTER III

PETITIONS RELATIVE TO TRUSTS

I. Under the Trusts Acts.—(1) *Generally.*—The Trusts Acts, which originally were intended to apply to gratuitous trustees, have now been held to apply to non-gratuitous trustees also.[1]

The powers conferred by the Trusts Acts are conferred subject to any prohibition contained in the trust deed.[2]

(2) *Jurisdiction.*—Petitions under the Trusts Acts are brought in the first instance before one of the Lords Ordinary officiating in the Outer House, and the power of the Lord Ordinary before whom the petition is enrolled may be exercised by the Lord Ordinary on the Bills during vacation.[3] The only exception to this seems to be petitions for the removal of trustees on the ground of insanity, physical or mental disability, or absence under sec. 8 of the Trusts Act of 1891,[4] where petitions have been held to be competently presented either to a Lord Ordinary[5] or to the Inner House.[6]

If the petition is alternatively under the Trusts Acts and to the *nobile officium* of the Court, it is competently brought in the Inner House.[7]

A petition may be competently presented in vacation to the Lord Ordinary on the Bills.[8]

(3) *For Power to Sell, Grant Feus or Long Leases, Borrow, or Excamb.* —(a) *Generally.*—The Court of Session, on the petition of trustees under any trust deed, may grant authority to the trustees (1) to sell the trust estate or any part of it; (2) to grant feus or long leases of the heritable estate or any part of it; (3) to borrow money on the security

[1] Royal Bank of Scotland, etc., Petrs., 1893, 20 R. 741; Scott *v.* Craig's Representatives, 1897, 24 R. 462, per Lord Kincairney, p. 467; Clark's Tr. *v.* M'Rostie, 1908, S. C. 196.

[2] 24 & 25 Vict. cap. 84, sec. 1; 30 & 31 Vict. cap. 97, sec. 19; 34 & 35 Vict. cap. 27, sec. 1; 47 & 48 Vict. cap. 63, sec. 3; 61 & 62 Vict. cap. 42, sec. 3.

[3] Trusts (Scotland) Act, 1867 (30 & 31 Vict. cap. 97), sec. 16.

[4] 54 & 55 Vict. cap. 44.

[5] Lees, Petr., 1893, 1 S. L. T. 42; Dickson's Trs., Petrs., 1894, 2 S. L. T. 61; Reid, Petr., 1897, 5 S. L. T. 124.

[6] Tod *v.* Marshall, 1895, 23 R. 36.

[7] Websters *v.* Miller's Trs., 1887, 14 R. 501. See also Latta, Petr., 1880, 7 R. 881.

[8] Staveleys, Petrs., 1883, 20 S. L. R. 565.

of the trust estate or any part of it; and (4) to excamb any part of the trust estate which is heritable.[1] Before granting the prayer of such petition the Court must be satisfied that the same is expedient for the execution of the trust and not inconsistent with the intention thereof.[1]

Instead of proceeding by way of petition, trustees may obtain a deed of consent from all the beneficiaries who are not subject to any disability for authority to do the foregoing acts, and the acts done under such authority, not being acts inconsistent with the intention of the trust, will be equally valid and effectual with acts done by authority of the Court on petition.[2]

The Trusts Acts do not apply to English trusts.[3]

(b) *For Power to Sell the Trust Estate.*—Power to sell will not usually be granted where the power of sale is contrary to the trust deed.[4] Accordingly, where a testator gave a power to sell his heritable estate, with the exception of certain lands, it was held that the prohibition of the power of sale of the latter was implied, and a petition for power to sell was refused;[5] and where trustees were forbidden to sell before a certain date, the Court refused a petition to sell before that date, even though a sale was expedient for the execution of the trust.[6] In the same way it was held, where trustees were empowered to sell in the event of a bond being called up and only a part thereof was demanded, that trustees had no power to sell.[7]

Where, however, the granting of a power to sell, although it may appear to be inconsistent with some of the terms of the trust deed, is not inconsistent with its main design and object, which cannot be carried out without a power of sale being granted, the Court will grant such a power.[8]

Where a testator gives power to sell certain of his heritable properties, but says nothing about the rest, there is no implication that the sale of the latter is contrary to the terms of the trust deed, and power to sell the same may be granted.[9]

[1] Trusts (Scotland) Act, 1867, secs. 3 and 19.

[2] Ibid., sec. 3.

[3] Carruthers' Trs.; Allan's Trs., 1896, 24 R. 238.

[4] Hay's Trs. *v.* Hay Miln, 1873, 11 M. 694; Hiddlestone's Trs., 1906, 13 S. L. T. 705.

[5] Whyte's Factor *v.* Whyte, 1891, 18 R. 376.

[6] Marshall's Trs., Petrs., 1897, 24 R. 478.

[7] Bryson's Trs. *v.* Clark, 1880, 8 R. 142.

[8] Weir's Trs., Petrs., 1877, 4 R. 876; Downie, etc., Petrs., 1879, 6 R. 1013; Richardson, Petr., 1898, 6 S. L. T. 241; Managers of Old Meldrum United Free Church, 1908, 15 S. L. T. 913.

[9] Gunn, etc., Petrs., 1892, 29 S. L. R. 903.

Where the trust deed directly or by implication gives a power of sale, a petition to the Court for that purpose is unnecessary.[1]

Where it is within the power of trustees to purchase there is an implied power to sell what they have purchased, and a petition for power to sell property so purchased will be granted, if expedient and not inconsistent with the purposes of the trust.[2]

The Court has refused to grant power to carry out a sale which would be of advantage to a liferenter but prejudicial to the interests of a fiar.[3]

All powers of sale conferred on trustees may be exercised by public roup or private bargain unless otherwise directed in the trust deed, or interlocutor granting the petition, or deed of consent by beneficiaries, and it is lawful to sell subject to or under reservation of a feu-duty or ground-annual and to reserve the mines and minerals.[4]

Where the upset price has not been offered, authority may be granted to sell "at the best price that can be obtained."[5]

It is unnecessary to apply for power to sell moveable property, as trustees and executors have an inherent right to sell moveable estate in the same way as their author could have done.[6]

Where a trustee has sold heritage without the authority of the Court and without a power of sale in the trust deed,[7] and where a trustee has not carried out the sale in accordance with the directions of the Court,[8] the latter will not likely ratify the sale.

(c) *For Power to Grant Feus or Long Leases.*—(i.) *Feus.*—Power to grant feus will not be granted where contrary to the truster's expressed intention.[9]

Executors have been held to be trustees in the sense of the Trusts Acts, and authority has been granted to them to feu.[10]

Application for power to grant feus is unnecessary by trustees of charitable trusts, as the latter have power at common law to do so.[11]

[1] Charlton's Trs., 1901, 9 S. L. T. 130. See also Thomson's Trs. *v.* Thomson, 1897, 25 R. 19.

[2] Cameron, etc. *v.* Hunt, 1881, 18 S. L. R. 585.

[3] Molleson *v.* Hope, 1888, 15 R. 665.

[4] Trusts (Scotland) Act, 1867, sec. 4.

[5] Jamieson's Trs., 1909, 1 S. L. T. 36.

[6] Brownlie *v.* Brownlie's Trs., 1879, 6 R. 1233, per Lord Shand, pp. 1240, 1241.

[7] Clyne, Petr., 1894, 21 R. 849.

[8] Drummond's Judicial Factor, Petr., 1894, 21 R. 932.

[9] Anderson, etc., Petrs., 1876, 3 R. 639.

[10] Pettigrew's Exrs., Petrs., 1890, 28 S. L. R. 14.

[11] Merchant Company of Edinburgh *v.* Governors of Heriot's Hospital, 1765, Mor. 5750; Mags. of Elgin *v.* Morrison, 1882, 10 R. 342; Jamieson, etc., Petrs., 1884, 21 S. L. R. 541.

(ii.) *Long Leases.*—Where there is a prohibition in the trust deed, the Court will not grant power to grant long leases.[1] Where, however, the terms of the trust deed do not imply such a prohibition, power may be granted.[2]

(d) *For Power to Borrow.*—Power to borrow must be granted either in the trust deed or by the Court.[3]

It is not necessary to obtain authority to borrow where trustees merely wish to change investments.[4] Where a testator gave authority to borrow money in order to repay "bonds or mortgages" on heritable property which might to be called up, the Court granted power to borrow money to replace a loan, the security for which was an "equitable mortgage";[5] and where a testator authorised his trustees to value, allocate, and divide an estate on the death of any of his daughters, and the time was not favourable for a sale, the Court allowed the trustees to borrow in order to pay a deceased daughter's share to her representatives.[6]

Authority to borrow may be granted, and yet the particular method of borrowing may be condemned.[7]

It may be granted without a remit.[8]

(e) *For Power to Excamb.*—Notwithstanding that trustees have been given power to sell heritage, it has been held that they were bound to get the authority of the Court to enter into a contract of excambion.[9]

(4) *For Power to Advance Part of the Capital.*—The Court may from time to time, under such conditions as they see fit, authorise trustees to advance any part of the capital of a fund destined, either absolutely or contingently, to minor descendants of the truster, being beneficiaries having a vested interest in such fund, if it shall appear that the income of the fund is insufficient or not applicable to, and that such advance is necessary for, the maintenance or education of such beneficiaries, or any of them, and that it is not expressly prohibited by the trust deed, and that the rights of parties other than the heirs or representatives of such minor beneficiaries shall not be thereby prejudiced.[10]

[1] Petrie's Trs. *v.* Ramsay, 1868, 7 M. 64.
[2] Birkmyre, etc., Petrs., 1881, 8 R. 477.
[3] Ralston *v.* M'Intyre's Factor, 1882, 10 R. 72.
[4] Henderson's Trs., Petrs., 1901, 8 S. L. T. 431.
[5] Kerr's Trs. *v.* Kerr's Curator, 1907, S. C. 678.
[6] M'Neill, etc. (Lochhead's Trs.), Petrs., 1883, 21 S. L. R. 168.
[7] Sturrock's Trs., 1897, 4 S. L. T. 228.
[8] Ross' Trs., 1900, 9 S. L. T. 122.
[9] Bruce *v.* Stewart, 1900, 2 F. 948.
[10] Trusts (Scotland) Act, 1867, sec. 7; Weir's Trs., Petrs., 1877, 4 R. 876.

"Vested interest" means primary interest, and although it may be contingent as being dependent on survivance, still, if primary, the Court may interfere.[1]

Where children as a class have a vested interest, although the interest of each child is contingent and not vested, the Court may grant advances.[2]

Where vesting is postponed to the date of the expiry of a liferent, the Court has no power to authorise trustees to make advances out of capital during the lifetime of the liferenter.[3]

The Court has no power to sanction advances already made.[4]

Where the petitioner was a widow and executrix, to whom the estate was bequeathed subject to conditions, it was held that she was not a trustee within the meaning of the Trusts Acts.[5]

With reference to the incidence of advances, see the undernoted case.[6]

(5) *For Power to Apply Trust Funds in Payment or Redemption of Debt.*—The Court may, on petition by the trustees, and after such intimation and inquiry as may be thought necessary, authorise the trustees under any trust deed to apply the whole or any part of trust funds which theyar e empowered or directed by the trust deed to invest in the purchase of heritable property to the payment or redemption of any debt or burden affecting heritable property which may be destined to the same series of heirs, and subject to the same conditions as are by the trust deed made applicable to the heritable property directed to be purchased; provided always, that such application shall not be inconsistent with the other provisions of the trust deeds.[7]

(6) *For Discharge of Trustees Resigning, and Heirs of Trustees Dying, during the Subsistence of the Trust.*—Trustees have a general power to discharge trustees who have resigned and the representatives of trustees who have died.[8]

Where a trustee who resigns, or the representatives of a trustee who has died or resigned, cannot obtain a discharge of his acts and intromissions from the remaining trustees, and when the beneficiaries of the trust refuse, or are unable, from absence, incapacity, or otherwise, to grant a discharge, the Court may, on petition to that effect, at the

[1] Pattison, etc., Petrs., 1870, 8 M. 575; Martin, etc., Petrs., 1904, 6 F. 592.

[2] Ross' Trs., Petrs., 1894, 21 R. 995. See also Clark's Trs., Petrs., 1895, 22 R. 706.

[3] Baillie's Trs., Petrs., 1896, 33 S. L. R. 589.

[4] Young's Trs., Petrs., 1895, 3 S. L. T. 192.

[5] Rigg, Petr., 1905, 13 S. L. T. 144.

[6] Main *v.* Clark's Trs., 1909, 47 S. L. R. 118.

[7] Trusts (Scotland) Act, 1867, sec. 8.

[8] Ibid., sec. 2 (2).

instance of such trustee or representative, and after such intimation and inquiry as may be thought necessary, grant such discharge; and it shall be in the power of the Court to direct that the expense of such application be paid out of the trust estate, if the Court shall consider this reasonable.[1]

The Court can only intervene when it is impossible for the resigning trustee to obtain a valid discharge either from the remaining trustees or from the beneficiaries, and if either of these is available then the Court cannot intervene.[2]

(7) *For Consent to Deed of Assumption of New or Additional Trustees.*—Where trustees have the power of assuming new trustees and the signature of a quorum of trustees cannot be obtained to a deed of assumption of new trustees, a petition by the acting trustee or trustees, or by one or more of the beneficiaries under the trust deed, must be presented to the Court in order to obtain its consent to such deed of assumption.[3] Where a sole surviving and acting trustee executed a deed of assumption of new trustees and died before a petition for the consent of the Court, which was drafted, could be presented, a petition for consent to said deed of assumption at the instance of the two residuary legatees was granted.[4]

(8) *For Appointment of New Trustees by the Court.*—Where trustees cannot be assumed under any trust deed, or when any person, who is the sole trustee acting under any such trust deed, has become insane, or incapable of acting by reason of physical or mental disability, the Court may, upon the application of any party having interest in the trust estate, after such intimation and inquiry as may be thought necessary, appoint a trustee or trustees under such trust deed, with all the powers incident to that office.[5] In the petition a warrant to complete a title to any heritable property in favour of the trustee or trustees so appointed may be craved.[5] A power may also be asked to assume new trustees. If such a power is not granted, trustees appointed by the Court cannot assume new trustees.[6]

The words of sec. 12 of the Trusts Act, 1867, are intended to comprehend every case where the trust cannot be kept up by means of powers within the trust deed, and in every such case the aid of the

[1] Trusts (Scotland) Act, 1867, sec. 9.
[2] Matthews' Trs., Petrs., 1894, 2 S. L. T. 122.
[3] Trusts (Scotland) Act, 1867, sec. 11.
[4] Lewis, Petr., 1895, 3 S. L. T. 29.
[5] Trusts (Scotland) Act, 1867, sec. 12.
[6] Ibid., sec. 13; Lennox, Petr., 1901, 9 S. L. T. 271. Here power was granted although there was no crave therefor.

Court may be invoked.[1] The words apply to lapsed trusts, whether the trust has lapsed before[1] or after[2] the death of the truster.

Where a trust has become unworkable, and the case is not one provided for by sec. 12 of the Trusts Act, 1867, the application for new trustees must be made to the *nobile officium* of the Court.[3]

Where a lady left a will which did not appoint trustees or executors, the Lord Ordinary, on a petition under sec. 12 of the Trusts Act, 1867, appointed trustees, but placed them under the supervision of the Accountant of Court.[4]

Where new trustees have been appointed in an English trust by the English Courts, it is incompetent to apply to the Scottish Courts under the Trusts Act of 1867 to have the same trustees appointed as new trustees in the same trust;[5] and the Court has refused to appoint new trustees to an English trust where the only ground for the application is that part of the trust estate is heritage in Scotland.[6]

Where there was a sole surviving trustee, and by the trust deed it was provided that two should form a quorum, a petition by the principal beneficiaries for the appointment of new trustees was held unnecessary, as the sole trustee was considered to have power to assume new trustees.[7]

Where a power of appointment of a trustee was held to be invalid, resulting in there being no trustee, new trustees were appointed by the Court.[8]

(9) *By Sole Trustee to Resign and for the Appointment of New Trustees, or of a Judicial Factor, to Administer the Trust.* — If any trustee entitled to resign his office is at the time sole trustee, he shall not be entitled to resign until, with the consent of the beneficiaries under the trust of full age, and capable of acting at the time, he shall have assumed new trustees, who shall have declared their acceptance of office; or he may apply to the Court stating his wish to resign, and praying for the appointment of new trustees, or of a judicial factor to administer the trust; and the Court, after intimation to the beneficiaries under the trust, or such of them as the Court may

[1] Graham, Petr., 1868, 6 M. 958, per Lord President Inglis. See also Allardice, etc., Petrs., 1900, 8 S. L. T. 6.

[2] Zoller, Petr., 1868, 6 M. 577.

[3] Aikman, etc., Petrs., 1881, 9 R. 213; Dick, etc., Petrs., 1899, 2 F. 316. See also Yuill *v.* Ross, 1900, 3 F. 96.

[4] Pattullo, etc., Petrs., 1908, 16 S. L. T. 637. See also Milroy *v.* Tawse, 1905, 12 S. L. T. 777.

[5] Hall, etc., Petrs., 1869, 7 M. 667.

[6] Brockie, etc., Petrs., 1875, 2 R. 923.

[7] Scott *v.* Lunn, 1908, 15 S. L. T. 1045.

[8] Bowman *v.* Bowman, 1910, 1 S. L. T. 381.

direct, shall thereafter either appoint a judicial factor,[1] or, on the application of the beneficiaries or any of them, may appoint trustees in the same manner as is provided under the 12th section of the Trusts (Scotland) Act, 1867.[2]

In a petition presented on 10th April 1896 by a trustee for the appointment of a judicial factor on a trust estate in order that he might resign, he stated that the only other trustee had intimated his resignation on 9th April 1896, and it was objected that the petition had been presented before the resignation of the other trustee had become final, the objection was repelled.[3]

Where, instead of a sole trustee wishing to resign, a whole body of trustees desire to do so together, the proper course seems to be to present a petition for the appointment of a judicial factor or of new trustees as a preliminary step. This is not in respect of the terms of sec. 10 of the Trusts Act, 1867, but is simply a reasonable course to adopt in order to carry out the general power to resign given by sec. 1 of the Trusts Act of 1861.[4] The absolute right to resign is not affected by the possibility of a judicial factor being appointed in their room who has a more limited power of administration.[5]

It is now the practice that whenever a judicial factor has been appointed by any Outer House Judge the process is transmitted to the Junior Lord Ordinary, before whom all subsequent steps are carried out.

(10) *For Completion of Title by the Beneficiary of a Lapsed Trust.*—When any person shall be entitled to the possession for his own absolute use of any heritable property or moveable or personal property, the title to which has been taken in the name of any trustee, or *curator bonis*, or factor *loco absentis*, or factor *loco tutoris*, or judicial factor, or other person who has died or become incapable of acting without having executed a conveyance of such property, it shall be lawful for the person beneficially entitled to such property to apply by petition to the Court for authority to complete a title to such property in his own name.[6] The petition specifies and describes the heritable property and refers to an inventory in which the moveable property is specified, to which such title is to be completed.[6]

The words of the statute are very precise, and are intended to apply

[1] Wyse *v.* Abbott, 1881, 8 R. 983.
[2] Trusts (Scotland) Act, 1867, sec. 10.
[3] M'Math, Petr., 1896, 4 S. L. T. 19.
[4] Maxwell's Trs. *v.* Maxwell, 1874, 2 R. 71.
[5] M'Connell's Trs., Petrs., 25 R. 330.
[6] Trusts (Scotland) Act, 1867, sec. 14.

to the case where there remains a proper beneficiary under a lapsed trust, and not to the case of those who have acquired right from the proper beneficiary.[1]

(11) *For Power to Remove Trustees in Cases of Insanity, Physical or Mental Disability, or Absence.*—Where a trustee is or becomes insane, or incapable of acting by reason of physical or mental disability, or by continuous absence from the United Kingdom for a period of six calendar months or upwards, such trustee, in the case of insanity or incapacity of acting by reason of physical or mental disability, shall, and in the case of continuous absence from the United Kingdom for a period of six calendar months or upwards may, on application by any co-trustee or beneficiary in the trust estate, be removed from office upon such evidence as shall satisfy the Court of the insanity, incapacity, or continuous absence of such trustee. In the case of a *mortis causâ* trust or of a marriage contract the application may be made either in the Court of Session or in the Sheriff Court; in all other cases the application must be made to the Court of Session.[2]

With regard to petitions for removal on the ground of insanity the same evidence of incapacity will satisfy the Court as is necessary in petitions for the appointment of curators in cases of insanity.[3] Where the petition is unopposed medical certificates will be sufficient,[3] but where opposed there is usually a remit.[4]

The only petition brought for the removal of a trustee on the ground of physical and mental disability was where the trustee was seventy-five years of age, and owing to age and disability was wholly incapacitated from attending to the affairs of the trust. A medical certificate was produced, and the Court granted the prayer of the petition.[5]

Where a trustee sailed for Australia on board a sailing vessel which was posted as missing at Lloyd's, the Lord Ordinary continued the case to allow the petitioners to lodge affidavits by the missing trustee's brother and a co-trustee, holding that the statute left it in the discretion of the Court to say what evidence should be sufficient.[6]

(12) *For Approval of Investments.*—By sec. 3 of the Trusts Act, 1884,[7] trustees under any trust may, unless specially prohibited by the constitution or terms of the trust, invest the trust funds, *inter alia*,

[1] Macknight, etc., Petrs., 1875, 2 R. 667.
[2] 54 & 55 Vict. cap. 44, sec. 8.
[3] Lees, Petr., 1893, 1 S. L. T. 42. See also Maclaren's Bill Chamber Practice, p. 127 *et seq.*
[4] A., Petr., 1898, 6 S. L. T. 149.
[5] Tod *v.* Marshall, 1895, 23 R. 36.
[6] Dickson's Trs., Petrs., 1894, 2 S. L. T. 61.
[7] 47 & 48 Vict. cap. 63, sec. 3 (7).

in "East India stock, stocks or other public funds of the Government of any colony of the United Kingdom approved by the Court of Session, and also bonds or documents of debt of any such Government approved as aforesaid, provided such stocks, bonds, or others are not payable to the bearer."

A trustee must apply to the Court by petition for approval in the case of each particular investment;[1] and where the Court was asked to approve of the investment of a certain fund, "or any other portion or portions of the said trust funds," the Court refused to approve of the latter crave, and intimated that if approval of a further investment should at any future time be desired, an additional motion in the petition should be made.[2]

With regard to investments approved or disapproved by the Court, reference is made to the undernoted cases.[3]

By the Colonial Stock Act, 1900,[4] the securities in which a trustee may invest under the powers of the Trusts (Scotland) Amendment Act, 1884, shall include any Colonial Stock which is registered in the United Kingdom in accordance with the provisions of the Colonial Stock Acts, 1877 and 1892, as amended by the Colonial Stock Act, 1900, and with respect to which there have been observed such conditions (if any) as the Treasury may by order notified in the *London Gazette* prescribe. Notwithstanding these provisions it would seem that trustees who have not put themselves under the supervision of the Accountant of Court[5] may not invest in any of the stocks so authorised without the approval of the Court to each investment.[6]

(13) *For an Order of Indemnity to a Trustee in Breach of Trust.*—Where a trustee has committed a breach of trust at the instigation, or request, or with the consent in writing, of a beneficiary, the Court may make an order for applying all or part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.[7] This applies where the beneficiary is a married woman entitled for her separate use, whether she has or has not powers of disposal or alienation.[7]

[1] Accountant of Court *v.* Crumpton, 1886, 14 R. 55, per Lord Adam, p. 58.

[2] Cunliffe's Trs., Petrs., 1893, 1 S. L. T. 371.

[3] Maclean's Tr., Petr., 1884, 12 R. 529; Shand, Petr., 1893, 1 S. L. T. 145; Brotherston, Petr., 1893, 1 S. L. T. 174; Thorburn, etc., Petrs., 1894, 2 S. L. T. 169; Robertson, etc., Petrs., 1896, 4 S. L. T. 86; Greig's Trs., Petrs., 1898, 5 S. L. T. 326; Milson, etc., Petrs., 1898, 6 S. L. T. 117.

[4] 63 & 64 Vict. cap. 62, secs. 2 and 3.

[5] 52 & 53 Vict. cap. 39, sec. 18.

[6] Menzies on Trustees, sec. 644.

[7] Trusts (Scotland) Amendment Act, 1891 (54 & 55 Vict. cap. 44), sec. 6.

The only Scottish case in which reference is made to this power of the Court is one in which indemnification from the interest of a married woman was refused,[1] but there are several English cases on the corresponding section of the English statute which is in almost identical terms.[2]

(14) *Procedure.*—All petitions under the Trusts Acts as regards procedure, disposal, and review are subject to the same rules and regulations as are enacted with respect to petitions coming before the Junior Lord Ordinary in virtue of the Act 20 & 21 Vict. cap. 56: Provided that when in the exercise of the powers pertaining to the Court of appointing trustees and regulating trusts it shall be necessary to settle a scheme for the administration of any charitable or other permanent endowment, the Lord Ordinary shall, after preparing such schemes, report to one of the Divisions of the Court, by whom the same shall be finally adjusted and settled; and in all cases where it shall be necessary to settle any such scheme, intimation shall be made to the Lord Advocate, who shall be entitled to appear and intervene for the interests of the charity or any object of the trust or the public interest.[3]

A petition by a judicial factor on a trust estate for authority to make an *interim* division of the residue of the trust estate among certain charitable institutions, according to a scheme suggested to the Court, was held not to be a scheme falling under the foregoing section of the Act.[4]

In other respects the procedure is similar to the procedure in petitions relative to judicial factors. (See Maclaren's Bill Chamber Practice, p. 94 *et seq.*)

II. Nobile Officium.—(1) *Generally.*—Besides the powers given to the Court by the Trusts Acts, the Court of Session exercises a sovereign jurisdiction, which enables it to grant a remedy in cases of necessity for which there is no provision in either the trust deed or the Trusts Acts. This equitable jurisdiction is only exercised by the Inner House, and there has recently been a tendency to restrict rather than to extend its exercise.[5]

(2) *Ordinary Trusts.*—(a) *Resignation of Trustees.*—In cases not falling under sec. 1 of the Trusts Act, 1861,[6] and which fall under the proviso of sec. 1 of the Trusts Act, 1867,[7] a trustee wishing to resign

[1] Cathcart's Trs. *v.* Cathcart, 1907, 15 S. L. T. 646.
[2] 56 & 57 Vict. cap. 53, sec. 45. See Menzies on Trustees, sec. 1227 *et seq.*
[3] Trusts (Scotland) Act, 1867, sec. 16.
[4] Macandrew, Petr., 1868, 5 S. L. R. 504.
[5] Noble's Trs., Petrs., 1912, S. C. 1230.
[6] 24 & 25 Vict. cap. 84. [7] 30 & 31 Vict. cap. 97.

must apply by petition to the *nobile officium* of the Court for its sanction to do so. Special grounds must be given before such petitions are granted. Thus, authority was given where one trustee had received an important military command which prevented his attendance at trust meetings, and another trustee was allowed to resign who was seventy-four years of age and unable to give close supervision to the work of the trust.[1] In one case a trustee who was a Sheriff-Substitute was allowed to resign upon repayment to the trust of a small legacy he had received.[2] Pressure of private business, however, is not a good ground of resignation.[3]

The Court will not ratify a resignation made previously.[4]

Power to resign may be inferred from the terms of a trust deed.[5]

(b) *Advances of Capital or Income.*—The Court may sanction advances to be made by trustees of capital, or income directed to be accumulated, to beneficiaries in circumstances not provided for by sec. 7 of the Trusts Act, 1867, or by the terms of the trust deed.[6]

(c) *Removal of Trustees.*—The Court may remove trustees for any adequate cause not set forth in sec. 8 of the Trusts Act, 1891,[7] such as misconduct, mismanagement, or adverse interest.[8]

Mere irregularity of conduct which is *in bonâ fide* will not justify removal,[9] nor will the failure of trustees to work harmoniously,[10] nor conduct authorised by the truster.[11]

Bankruptcy is a sufficient reason for removal.[12]

(d) *Appointment of Judicial Factor.*—Without removing trustees the Court has appointed a judicial factor where there is a deadlock

[1] Alison, etc., Petrs., 1886, 23 S. L. R. 362.

[2] Orphoot, Petr., 1897, 24 R. 871.

[3] Scott *v.* Muir's Trs., 1894, 22 R. 78.

[4] Maclean, Petr., 1895, 22 R. 872.

[5] Bunten *v.* Muir, 1894, 21 R. 370 ; Assets Co. *v.* Shiress, 1896, 4 S. L. T. 120.

[6] Latta, Petr., 1880, 7 R. 881 ; Thomson *v.* Miller's Trs., 1883, 11 R. 401 ; Websters *v.* Miller's Trs., 1887, 14 R. 501 ; Muir *v.* Muir's Trs., 1887, 15 R. 170 ; Colquhoun, Petr., 1894, 21 R. 671 ; Ross' Trs., 1894, 21 R. 995 ; Clark's Trs., 1895, 22 R. 706 ; Martin, etc., Petrs., 1904, 6 F. 592 ; Robertson's Trs., Petrs., 1909, S. C. 236.

[7] 54 & 55 Vict. cap. 44.

[8] Mitchell, etc., Petrs., 1864, 2 M. 1378 ; M'Whirter *v.* Latta, 1889, 17 R. 68 ; Birnie *v.* Christie, 1891, 19 R. 334 ; Stewart *v.* Chalmers, 1904, 7 F. 163 ; Cherry *v.* Patrick, 1910, S. C. 32 ; Wishart, etc., Petrs., 1910, 2 S. L. T. 229.

[9] Gilchrist's Trs. *v.* Dick, 1883, 11 R. 22.

[10] Hope *v.* Hope, 1884, 12 R. 27.

[11] Dryburgh *v.* Walker's Trs., 1873, 1 R. 31.

[12] Lamont *v.* Lamont, 1908, S. C. 1033. See also Soutar's Creditors *v.* Brown, 1852, 15 D. 89 ; Morris *v.* Bain, 1858, 20 D. 716.

or danger to the estate,[1] but not where there were only differences between the trustees.[2]

(e) *Leases of Trust Property.*—The Court has authorised trustees to grant leases of minerals as feus of Scottish heritages to English trustees holding real estate in Scotland, and whose proposal was authorised by the High Court of Justice.[3]

(f) *Sale of Trust Property.*—The Court has authorised English trustees who had the consent of the High Court of Justice to sell a portion of the trust estate situated in Scotland;[4] and a father to sell his pupil son's heritage.[5] The Court has also authorised a trustee to sell the testator's pictures under the express condition that the trustee should be entitled to bid.[6]

(g) *Purchase of Property.*—Trustees have been authorised to purchase heritage.[7]

(3) *Charitable Trusts.*—See *supra*, p. 88 *et seq.*

(4) *Procedure.*—Petitions to the *nobile officium* of the Court are presented in the Inner House, and the procedure adopted is the ordinary procedure applicable to Inner House petitions.

The petition may be disposed of on the pleadings themselves on the Summar Roll,[8] or even on the Single Bills if a remit has been made and the report is favourable.[9]

A remit is sometimes made to a man of business,[10] and in the case of charitable trusts this is the usual course pursued,[11] unless the scheme has been prepared by the Lord Ordinary in terms of sec. 16 of the Trusts Act of 1867.

Sometimes a remit is made to the Junior Lord Ordinary to dispose of the petition.[12]

[1] Whyte *v.* Whyte's Trs., 1885, 22 S. L. R. 890; Paterson, Petr., 1890, 17 R. 1059; Stewart *v.* Morrison, 1892, 19 R. 1009.

[2] Scott, Petr., 1905, 13 S. L. T. 589. See also Yuill *v.* Ross, 1900, 3 F. 96.

[3] Pender's Trs., 1907, S. C. 207.

[4] Allan's Trs., 1897, 24 R. 718.

[5] Logan, Petr., 1897, 25 R. 51.

[6] Coats' Trs., Petrs., 1914, S. C. 723.

[7] Wardlaw's Trs., Petrs., 1902, 10 S. L. T. 349. See, however, Noble's Trs., Petrs., 1912, S. C. 1230, per Lord Kinnear.

[8] Cherry *v.* Patrick, 1910, S. C. 32.

[9] General Accident Assurance Corporation, Ltd., Petrs., 1906, 8 F. 483.

[10] Noble's Trs., Petrs., 1912, S. C. 1230.

[11] Guardian of Thomson's Mortification, 1908, S. C. 1078; Stewart's Trs., Petrs., 1909, S. C. 144; Governors of Lady Burnett of Leys School, Petrs., 1911, S. C. 777.

[12] Wishart, etc., Petrs., 1910, 2 S. L. T. 229.

CHAPTER IV

ENTAIL PETITIONS

THESE petitions, although presented to the Junior Lord Ordinary, are heard in the Bill Chamber, and are fully dealt with in the author's work on Bill Chamber Practice, p. 145 *et seq.* (*q.v.*).

CHAPTER V

COMPANY PETITIONS[1]

(1) GENERALLY.—(a) *Jurisdiction.*—(i.) *In Session.*—Either Division of the Court, or, in the event of a remit to a permanent Lord Ordinary, such Lord Ordinary has jurisdiction in company petitions during session.[2] A petition for the appointment of a judicial factor under the Companies Clauses Consolidation (Scotland) Act, 1845, secs. 56, 57, is presented to the Junior Lord Ordinary.[3]

(ii.) *In Vacation.*—The Lord Ordinary on the Bills has jurisdiction in all company petitions during vacation.[4]

(b) *How to Raise an Objection to Competency or to the First Order.*—In certain classes of company petitions it may be of the utmost importance that the competency of the petition should be discussed at the outset, or that the first order should not be granted without the opponents of the petition being heard upon the competency or advisability of such an order being granted. In session, the Rolls of Court disclose when a petition is to be moved in the Single Bills. In vacation, there is no such means of knowledge, and accordingly any person anticipating the presentation in vacation of a petition affecting his interests should arrange with the Inner House clerks to be notified of the presentation of such a petition. A more prudent and satisfactory course to adopt, however, is to lodge a *caveat* whether in session or during vacation.

(c) *Review.*—(i.) *Orders by Lord Ordinary on the Bills.*—Orders or judgments pronounced by the Lord Ordinary on the Bills in vacation are subject to review by reclaiming note in common form presented

[1] In view of the imminent publication by a member of the Scottish Bar of a work dealing exhaustively with procedure and practice in company matters, the author of the present work has not considered it to be advisable to do more than give an outline of this subject.

[2] Companies (Consolidation) Act, 1908, sec. 135.

[3] Wright *v.* Cart Navigation Trs., 1904, 11 S. L. T. 708.

[4] Companies (Consolidation) Act, 1908, sec. 135; Macfie *v.* Portobello Pier Co., 1886, 24 S. L. R. 1; Niddrie and Benhar Coal Co., Ltd., Petrs., 1892, 19 R. 820; Salt Mines Syndicate, Ltd., Petrs., 1894, 1 S. L. T. 630; John Watson, Ltd., Petrs., 1895, 3 S. L. T. 108; London County and Westminster Bank, Ltd., Petrs., 1911, S. C. 1073.

within fourteen days from the date of the order or judgment,[1] except orders

(i.) As to time for proving claims.[2]

(ii.) As to the attendance of, and production of documents by, persons indebted to, or having property of, or information as to the affairs or property of, a company.[3]

(iii.) As to meetings for ascertaining wishes of creditors or contributories.[4]

(iv.) As to summoning meetings of creditors or contributories where a compromise is proposed.[5]

(v.) As to the examination of witnesses in regard to the property or affairs of a company,[6] neither of which are subject to review, reduction, suspension, or stay of execution.[7]

The following orders or judgments may be carried out and receive effect from their respective dates notwithstanding any reclaiming note against them:—[8]

Restraining or permitting commencement or continuance of legal proceedings.[9]

Appointing an official liquidator to fill a vacancy, or appointing (except to fill a vacancy caused by the removal of a liquidator by the Court) a liquidator for a winding-up voluntarily or under supervision.[10]

Sanctioning the exercise of any power by an official liquidator other than the power to appoint a law agent or to sell property.[11]

Requiring the delivery of property or documents to the official liquidator.[12]

As to the arrest and detention of an absconding contributory and his property.[13]

Limiting the powers of provisional official liquidators.[14]

For continuance of winding up under supervision.[15]

(ii.) *Orders of Permanent Lord Ordinary.*—Orders or judgments pronounced by a permanent Lord Ordinary to whom a winding up has been remitted [16] are subject to review only by reclaiming note in common form, presented within fourteen days from the date of the order or

[1] Companies (Consolidation) Act, 1908, sec. 181; Mags. of Edinburgh *v.* Union Billposting Co., Ltd., 1913, S. C. 105.
[2] Companies (Consolidation) Act, 1908, sec. 169.
[3] Ibid., sec. 174. [4] Ibid., sec. 219. [5] Ibid., sec. 120.
[6] Ibid., sec. 227. [7] Ibid., sec. 181 (2); Schedule IV. Part I.
[8] Ibid., sec. 181.
[9] Ibid., secs. 140, 142, 144, 266, 270, 271.
[10] Ibid., secs. 149, 186, 202. [11] Ibid., sec. 151. [12] Ibid., sec. 164.
[13] Ibid., sec. 176. [14] Ibid., sec. 151 (5). [15] Ibid., sec. 199.
[16] Ibid., sec. 135.

judgment, but should a reclaiming note not be presented and moved during session, the foregoing provisions regarding orders or judgments pronounced by the Lord Ordinary on the Bills during vacation apply.[1]

(iii.) *Appeals to the House of Lords.*—Subject to rules of Court, an appeal from any order or decision made or given in the winding up of a company by the Court shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the Court in cases within its ordinary jurisdiction.[2] "The Court" means the Court of Session in either Division, and the ordinary rules apply that apply to appeals to the House of Lords.[3]

(d) *Unregistered Companies.*—A company not registered under the Companies (Consolidation) Act, 1908, cannot be wound up voluntarily or subject to supervision, but can only be wound up by the Court. The conditions of its winding up are substantially the same as those of registered companies. The Court having jurisdiction is the Court where the principal place of business is situated, or, if it has more than one principal place of business, then in each part of the United Kingdom where it has a principal place of business. It may be wound up where (i.) the company is dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs; (ii.) if the company is unable to pay its debts; and (iii.) if the Court is of opinion that it is just and equitable that the company should be wound up. It is deemed to be unable to pay its debts—(*a*) if a creditor has served on the company a demand for a debt then due exceeding £50, and the company has for three weeks after said demand neglected to pay or satisfy the debt; (*b*) if an action has been instituted against any member of the company for a company debt and the company, after notice to pay said debt, has failed within ten days of said notice to pay or settle said debt; (*c*) if the *inducicæ* of a charge has expired without payment; or (*d*) if it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.[4]

(2) Petition for an Order Confirming the Reduction of Share Capital.—(a) *Generally.*—Where a company has passed and confirmed a resolution for reducing share capital it may apply by petition to the Court for an order confirming the reduction.[5]

[1] Companies (Consolidation) Act, 1908, sec. 181 (3); MacArthur *v.* Mackay, 1914, S. C. 547. See also *supra*, p. 863.

[2] Companies (Consolidation) Act, 1908, sec. 181 (1).

[3] Mags. of Edinburgh *v.* Union Billposting Co., Ltd., 1913, S. C. 105, per Lord President Dunedin, p. 107.

[4] Companies (Consolidation) Act, 1908, sec. 268.

[5] Ibid., sec. 47.

(b) *Form of Petition.*—The instance of the petition should bear the words "and reduced" added to the name of the company, otherwise on this ground alone the petition may be dismissed.[1]

Where the interests of creditors are not involved, the petition sets forth that the company, whose name and designation in full are given, is a company limited by shares; the date of its registration, and the address of its registered office. The objects of the company are then narrated, and the clauses of the memorandum and articles of association are set forth dealing with the capital of the company; the several classes of shares into which the capital is divided; the power of the company to reduce its capital; and the rights of the different classes of shareholders in connection with such reduction. The issue of the share capital is then given, and the circumstances necessitating the reduction of share capital are explained at length, ending in the holding of an extraordinary general meeting, at which a resolution to reduce is passed. The resolution is set forth *in extenso*, and its confirmation as a special resolution of the company is stated. The present financial position of the company is then briefly explained and the fact that the reduction does not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. The minute proposed to be registered is set forth *in extenso*. The prayer of the petition is usually for intimation on the walls and in the Minute-Book in common form, and for advertisement in the *Edinburgh Gazette* and in certain named local newspapers, and for answers on an *inducia* of eight days; to dispense *hoc statu* and during the dependence of the petition with the words "and reduced" as part of the name of the company; and thereafter after inquiry (if such is necessary) to pronounce an order (i.) confirming the reduction; (ii.) approving of the minute proposed to be registered; (iii.) directing the registration of the order and of the said minute and advertisement of such registration; and (iv.) dispensing altogether with the words "and reduced" as part of the name of the company.

Where the interests of creditors are involved, the necessary alterations will be made in the body of the foregoing form, and the prayer of the petition will contain the following additional craves:—

to fix a date at which every creditor entitled to any debt or claim against the company within the meaning of sec. 49 of the Companies (Consolidation) Act, 1908, shall be entitled to object to the proposed reduction; to fix a date on or before which the creditors of the company not entered in the list to be made up in terms of such section are to claim to be entered thereon or are to be excluded from objecting to the proposed reduction, and to appoint advertise-

[1] John T. Clark & Co., Ltd., Petrs., 1911, S. C. 243.

ment thereof to be made; to settle a list of creditors entitled to lodge objections; and to find that they have either consented to the reduction or that their debts have been discharged, or secured, or have determined.

(c) *First Order.*—The petition, having been printed, boxed, and lodged, appears next morning in the Single Bills, when an order for intimation on the walls and in the Minute-Book in common form and for advertisement[1] in the *Edinburgh Gazette* and in the appropriate newspapers is taken, and for all concerned to lodge answers within eight days after such intimation and advertisement.

Where it is desired that the words "and reduced" should be dispensed with *ad interim*, the question should be raised at this stage. In one case the Second Division in the interlocutor ordering intimation and advertisement dispensed in the meantime with the addition of the words "and reduced" to the company's name,[2] and this case was followed by the First Division, the words of dispensation in the latter case being "from this date and until the disposal of the petition."[3] The latter form seems to be the present practice. Some reason must be advanced for the *interim* dispensation; accordingly where no reason is adduced the dispensation *ad interim* may be refused.[4]

In one petition where the prayer was for (i.) confirmation of the reduction; (ii.) dispensing with the words "and reduced"; and (iii.) approval of the minute to be registered, and the petition did not involve either the diminution of any liability in respect of unpaid capital or the payment to shareholders of any paid-up capital, the Second Division granted the prayer of the petition on presentation in the Single Bills without intimation and advertisement.[5] In similar circumstances the same course has been followed.

The following is an example of the usual interlocutor where the words "and reduced" are dispensed with *ad interim*:—

Edinburgh, 19 .—The Lords appoint intimation of the petition to be made on the walls and in the Minute-Book in common form, and to be advertised once in the *Edinburgh Gazette*, and once in each of the *Scotsman*, *Glasgow Herald*, and *Border Advertiser* newspapers, and allow all concerned to lodge answers within eight days after such intimation and advertisement; Dispense with the addition of the words "and reduced" to the name of the company from this date and until disposal of the petition.

(d) *Who can Object.*—Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital

[1] G. Mackay & Co., Ltd., Petrs., 1914, 2 S. L. T. 310.

[2] Albany Steam Shipping Co., Ltd., Petrs., 1895, 23 R. 272.

[3] Colonial Real Property Co., Ltd., Petrs., 1896, 23 R. 547.

[4] Holland House Electric Manufacturing Co., Ltd., Petrs., 1898, 25 R. 1039.

[5] British and Burmese Steam Navigation Co., Ltd., Petrs., 1879, 7 R. 379. See, however, G. Mackay & Co., Ltd., Petrs., 2 S. L. T. 310.

or the payment to any shareholder of any paid-up share capital, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, is entitled to object to the reduction.[1] In any other case, if the Court so directs, such a creditor may object.[1]

Shareholders may object if they allege illegality or an injury to their rights,[2] and the Court has an absolute discretion in the matter and may impose such terms upon the company as it thinks fit.[3]

(e) *Second Order.*—Whether the interests of creditors are involved or not, the Court always remits to a reporter to ensure that no defective order is made.[4] Accordingly, where the interests of creditors are not involved the following is the usual interlocutor:—

Edinburgh, 19 .—The Lords remit to to inquire and report as to the regularity of the proceedings and the reasons for the proposed reduction of capital.

Where the interests of creditors are involved in the proposed reduction, a list of creditors must be settled as well as a remit made, and the interlocutor is usually in the following, or similar, terms:—

Edinburgh, 19 .—The Lords, having resumed consideration of the petition, fix the as the date[5] at which every creditor entitled to any debt or claim against the company within the meaning of sec. 49 of the Companies (Consolidation) Act, 1908, shall be entitled to object to the proposed reduction of capital; Further, fix the as the date[6] before which creditors of the company not entered on the list can claim to be entered thereon, or excluded from objecting to the proposed reduction; Appoint advertisement of this order to be made once in the *Edinburgh Gazette*, the , , and newspapers; Further, remit to to inquire and report as to the regularity of the proceedings and the reasons for the proposed reduction of capital.

(f) *Final Order.*—Where the interests of creditors are not concerned, the final interlocutor is usually in the following, or similar, terms:—

Edinburgh, 19 .—The Lords, having resumed consideration of the petition with the report by , No. of process, and heard counsel for the petitioners, Confirm the reduction of capital as set forth in

[1] Companies (Consolidation) Act, 1908, sec. 49 (1), (3); Palace Billiard Rooms, Ltd. *v.* City Property Investment Trust Corporation, Ltd., 1912, S. C. 5.

[2] Tharsis Sulphur and Copper Co., Ltd. *v.* Hoggan, 1882, 9 R. 507; British and American Trustee and Finance Corporation, Ltd. *v.* Couper, [1894] A. C. 399.

[3] Caldwell & Co. (Papermakers), Ltd., Petrs., 1915, 1 S. L. T. 233; S. C. 527; affd. 1916, 1 S. L. T. 173.

[4] Oregon Mortgage Co., Ltd., Petrs., 1910, S. C. 964; J. T. Clark & Co., Ltd., Petrs., 1911, S. C. 243; *cp.* Gartcraig Coal and Fire Co., Petrs., 1873, 10 S. L. R. 437.

[5] Usually ten days after the date of the interlocutor.

[6] Usually twenty days after the date of the interlocutor.

the petition; Approve of the minute No. of process; Authorise the registration of this order and the said minute by the Registrar of Joint Stock Companies; Dispense with the addition to the name of the company of the words "and reduced," and decern; and appoint this order and said minute to be advertised in the *Edinburgh Gazette*.[1]

In one case the Second Division authorised the company to discontinue the use of the addition "and reduced" to the company's name after the lapse of six months from the date of the resolution.[2]

Where the interests of creditors are concerned, the final interlocutor is usually in the following, or similar, terms:—

Edinburgh, 19 .—The Lords, having considered the petition along with the report by , No. of process, Approve of said report; Settle the list, No. of process, as the list of creditors entitled to object under sec. 49 of the Companies (Consolidation) Act, 1908; Find that the creditors whose names are therein entered have all consented to the proposed reduction of capital [*or* Find that the debts or claims of every creditor whose name is entered on that list have been discharged or determined; *or* Find that the creditors whose names are therein entered have consented to the reduction of capital or had their debts paid, with the exception of creditors whose claims do not amount in all to the sum of £ , and that the petitioners have duly consigned the sum of £ in the head office of the Bank of Scotland in security of such creditors' claims in the name of the reporter [*or* in the joint names of the petitioners' agents and the reporter]]; Further confirm the reduction of the capital of the company as resolved on by the special resolutions of as set forth in the petition; Approve of the minute of reduction of capital, No. of process; Dispense with the addition of the words "and reduced" to the name of the company from and after the date of this order; Authorise the registration of the present order and of the said minute by the Registrar of Joint Stock Companies in Scotland, and decern; Appoint this order and the said minute to be advertised once in each of the *Edinburgh Gazette* and the , , and newspapers.[3]

(g) *Vacation.*—Application can be made to the Lord Ordinary on the Bills in vacation.[4]

(h) *Procedure.*—The petition, having been printed, boxed, and with the necessary productions lodged, appears in the Single Bills, and the usual first order for intimation in common form, for advertisement, and answers is taken, and, where desired, for *interim* dispensation with the words "and reduced." (See *First Order*, *supra*, p. 867.) On the expiry

[1] George Morton, Ltd., Petrs., 1900, 2 F. 1032. See also The Don Fishing Co., Ltd., Petrs., 1916, 1 S. L. T. 194.

[2] West End Café Co., Ltd., Petrs., 1894, 21 R. 381.

[3] See also Walker Steam Trawl Fishing Co., Petrs., 1908, S. C. 123.

[4] Niddrie and Benhar Coal Co., Ltd., Petrs., 1892, 19 R. 820; John Watson, Ltd., Petrs., 1895, 3 S. L. T. 108; Society of Proprietors of Royal Exchange Buildings, Glasgow, Petrs., 1911, S. C. 1337.

of the *inducicæ*—usually eight days—with or without answers, the case is again enrolled, with the necessary executions. An order for a remit to a reporter is then taken, depending for its terms upon whether the interests of creditors are or are not involved. (See *Second Order, supra*, p. 868.) Where a list of creditors requires to be settled, the list is not lodged until the remit has been made, and is usually adjusted with the reporter, certified by the secretary or auditor of the company, and thereafter lodged in process. Where any creditor does not consent to the petition, and his debt or claim has not been paid, the petitioners must appropriate (i.) the full amount of the debt or claim where the company admits the full amount thereof or is willing to provide for it;[1] or (ii.) where the company does not admit, or is not willing to provide for, the full amount of the debt or claim, or if the amount is contingent or not ascertained, an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.[2] Where all the creditors consent to the petition, or their debts or claims have been paid, or their consents have been dispensed with by the Court on the company appropriating the aforementioned sums, the petition is again enrolled and finally disposed of. (See *Final Order, supra*, p. 868.)

(3) Petition for Confirmation of Alteration of Objects of Company.—(a) *When Competent.*—A company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it—

(i.) To carry on its business more economically or more efficiently;[3] or

(ii.) To attain its main purpose by new or improved means; or

(iii.) To enlarge or change the local area of its operations;[4] or

(iv.) To carry on some business which, under existing circumstances, may conveniently or advantageously be combined with the business of the company;[5] or

(v.) To restrict or abandon any of the objects specified in the memorandum.[6]

In order that the alteration may take effect it is necessary to be confirmed by the Court on petition.[7]

[1] Companies (Consolidation) Act, 1908, sec. 49 (3) (i.).

[2] Ibid., sec. 3 (ii.); Palace Billiard Rooms, Ltd. *v.* City Property Investment Trust Corporation, Ltd., 1912, S. C. 5.

[3] J. & P. Coats, Ltd., Petrs., 1900, 2 F. 829.

[4] Kirkcaldy Steam Laundry Co., Ltd., Petrs., 1904, 6 F. 778.

[5] Northern Accident Insurance Co., Ltd., Petrs., 1893, 30 S. L. R. 834; Scottish Accident Insurance Co., Ltd., Petrs., 1896, 23 R. 586; Scottish Employers' Liability and Accident Assurance Co., Ltd., Petrs., 1896, 23 R. 1016; King Line, Ltd., Petrs., 1902, 4 F. 504.

[6] Companies (Consolidation) Act, 1908, sec. 9 (1). [7] Ibid., sec. 9 (2).

General powers will not be granted before the necessity arises.[1] Objects foreign to the purposes of the memorandum of association will not be sustained,[2] nor will an alteration involving the addition of a business altogether distinct from the original business and of a speculative nature be forced on dissentient shareholders.[3] Amalgamation with and absorption in another company will not be sanctioned,[4] unless a power to do so is contained in the original memorandum of association.[5]

(b) *Form of Petition.*—The petition begins by setting forth the incorporation of the company, its registered address, the original capital of the company, and any subsequent modifications. The objects of the company are then narrated as set forth in the memorandum of association, and a print of the said memorandum and articles of association is produced.

Sec. 9 of the Companies (Consolidation) Act, 1908, is then recited *in extenso.*

The two extraordinary general meetings of the company at which a resolution to alter the memorandum has been passed and made a special resolution are then stated, and the terms of the special resolution are set forth at length.

Certificates of posting notices of said meetings to the shareholders and certified copies of the minutes of said meetings are produced.

The particular circumstances of the company's business making an alteration of the memorandum desirable are then stated, and whether there are any creditors or debenture holders of the company. If there are creditors or debenture holders, their position is briefly explained, and the same course is followed where the company is a tenant under leases.

The usual prayer of the petition is for intimation on the walls and in the Minute-Book in common form and for advertisement once in the *Edinburgh Gazette* and in certain named local newspapers, and attention should be paid to those to whom intimation should be made, and the manner in which such intimation should be made.[6] There is a crave for answers to be lodged within eight days after such intimation and advertisement, and, on resuming consideration, with or without answers, and after such inquiry as to the Court shall seem necessary, for the Court to confirm the alteration.

[1] Young's Paraffin Light and Mineral Oil Co., Ltd., Petrs., 1894, 21 R. 384.
[2] Glasgow Tramway and Omnibus Co., Ltd. *v.* Mags. of Glasgow, 1891, 18 R. 675.
[3] Western Ranches, Ltd. *v.* Nelson's Trs., 1899, 1 F. 812.
[4] John Walker & Sons, Ltd., Petrs., 1914, S. C. 280.
[5] Macfarlane, Strang & Co., Ltd., Petrs., 1915, S. C. 196.
[6] Scottish Employers' Liability and Accident Assurance Co., Ltd., Petrs., 1896, 23 R. 1016, per Lord President Robertson, p. 1018; Companies (Consolidation) Act, 1908, sec. 9 (3) (*a*).

The altered memorandum agreed to by special resolution must express *in gremio* the objects of the company and not merely by reference to the original memorandum.[1]

(c) *Who May Oppose.*—Dissentient shareholders[2] and creditors[3] may oppose.

(d) *Procedure.*—The petition is printed, boxed, and, with the necessary productions, lodged, and appears next morning in the Single Bills, when an order is taken for intimation on the walls and in the Minute-Book in common form, and for advertisement and answers in terms of the prayer of the petition. Advertisement should be made of the original article of the memorandum of association and of the new article of the memorandum proposed to be substituted therefor.[4] After the expiry of the *inducice*, with or without answers, the petition is enrolled in the Single Bills, and a remit is always made to a man of business.[5] Where there is no opposition and the report is favourable, the alteration may be confirmed in the Single Bills instead of on the Summar Roll, but intimation must be made to the Keeper of the Rolls so that the Judges may have an opportunity of previous consideration of the petition.[6] Where there is opposition, or where the report is unfavourable to the prayer of the petition, the latter is sent to the Summar Roll for discussion and disposal. With respect to every creditor who, in the opinion of the Court, is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration must be obtained or his debt or claim must be discharged or determined, or secured to the satisfaction of the Court.[7]

The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper.[8] Accordingly, it may grant confirmation on condition that the name of the company

[1] Proprietors of the Royal Exchange Buildings, Glasgow, Petrs., 1911, S. C. 1337.

[2] Western Ranches, Ltd. *v.* Nelson's Trs., 1899, 1 F. 812.

[3] Glasgow Tramway and Omnibus Co., Ltd. *v.* Mags. of Glasgow, 1891, 18 R. 675; Companies (Consolidation) Act, 1908, sec. 9 (3) (*b*).

[4] Scottish Employers' Liability and Accident Assurance Co., Ltd., Petrs., 1896, 23 R. 1016.

[5] Northern Accident Insurance Co., Ltd., Petrs., 1893, 30 S. L. R. 834; Young's Paraffin Light and Mineral Oil Co., Ltd., Petrs., 1894, 21 R. 384; Scottish Employers' Liability and Accident Assurance Co., Ltd., Petrs., 1896, 23 R. 1016; J. & P. Coats, Ltd., Petrs., 1900, 2 F. 829.

[6] General Accident Assurance Corporation, Ltd., Petrs., 1906, 8 F. 483.

[7] Companies (Consolidation) Act, 1908, sec. 9 (3) (*b*); Glasgow Tramway and Omnibus Co., Ltd. *v.* Mags. of Glasgow, 1891, 18 R. 675.

[8] Companies (Consolidation) Act, 1908, sec. 9 (4).

be changed in order to indicate the extended nature of the company's business,[1] or subject to the deletion of a phrase in the substituted article of memorandum.[2]

The Court may adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members, and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement.[3]

An office copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, must, within fifteen days from the date of the order, be delivered by the company to the Registrar of Companies, who shall register the same, and the Court may at any time extend the time for delivery of such documents to the registrar.[4]

Although in one case[5] at least the final interlocutor directed advertisement of the confirming order and of the registration with the registrar, this is not usual.

(e) *Interlocutors.*—The *first* order that is taken is usually in the following terms:—

Edinburgh, 19 .—The Lords appoint the petition to be intimated on the walls and in the Minute-Book in common form, and to be advertised once in the *Edinburgh Gazette* and once in each of the , , and newspapers; and allow all parties having or claiming interest to lodge answers within eight days after such intimation and advertisement.

The *second* order is as follows:—

Edinburgh, 19 .—The Lords remit to to inquire into the regularity of the procedure and the reason for the proposed alteration of the memorandum of association, and to report.

The *final* order is usually in the following terms:—

Edinburgh, 19.—The Lords, having considered the petition and proceedings with the report by , No. of process, and heard counsel for the petitioners, confirm the alteration of the memorandum of association with respect to the objects of the company set forth in the special resolution of the company passed on and confirmed on ; Appoint registration of this order to be made to the Registrar of Joint Stock Companies in Scotland, and on the same being registered along

[1] Scottish Accident Insurance Co., Ltd., Petrs., 1896, 23 R. 586; Scottish Employers' Liability and Accident Assurance Co., Ltd., Petrs., 1896, 23 R. 1016; *cp.* Kirkcaldy Steam Laundry Co., Ltd., Petrs., 1904, 6 F. 778.

[2] London and Edinburgh Shipping Co., Ltd., Petrs. 1909, S. C. 1.

[3] Companies (Consolidation) Act, 1908, sec. 9 (5).

[4] Ibid., sec. 9 (6).

[5] *Edinburgh Gazette*, 1903, p. 1278.

with the memorandum of association as now altered and confirmed, appoint advertisement of the registration to be made once in the *Edinburgh Gazette* and once in each of the , , and newspapers, and decern.

(4) Petition for Rectification of Register.—(a) *When Competent.*—Where the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company, or default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.[1]

As the procedure is by petition and summary, petitions for rectification of the register are usually only allowed where the grounds of the application are capable of speedy rectification or disproof.[2] In one or two cases founded on misrepresentation, however, a petition has been allowed to proceed where the averments required considerable inquiry.[3]

An ordinary action of reduction or declarator may also be raised,[4] and where it is obvious from the averments in a petition for rectification that an action of reduction is the proper course to follow, the petition is usually sisted until such an action is brought and decided.[5]

"Unnecessary delay" on the part of the company in entering on the register the fact of any person having ceased to be a member has been interpreted to mean that a petition for rectification may be presented where a transfer has not been confirmed by the directors at the first meeting held after the intimation of the transfer.[6] Unnecessary delay of itself is not sufficient ground for an order on the company to register a transfer; there must in addition be averred prejudice in consequence of the delay.[7]

[1] Companies (Consolidation) Act, 1908, sec. 32.

[2] Sleigh *v.* Glasgow and Transvaal Options, Ltd., 1904, 6 F. 420, per Lord President Kinross, p. 425. See also Kennedy *v.* North British Wireless Schools, Ltd., 1915, 1 S. L. T. 196.

[3] Chambers *v.* Edinburgh and Glasgow Aerated Bread Co., Ltd., 1891, 18 R. 1039; Blakiston *v.* London and Scottish Banking and Discount Corporation, Ltd., 1894, 21 R. 417; Gowans *v.* Dundee Steam Navigation Co., Ltd., 1904, 6 F. 613. See also Stocker *v.* Liquidators of Coustonholm Paper Mills Co., Ltd., 1891, 19 R. 17.

[4] Kinghorn *v.* The Glenyards Fireclay Co., Ltd., 1907, 14 S. L. T. 683; Mair *v.* Rio Grande Rubber Estates, Ltd., 1913, S. C. 183 (H. L.), 74; O'Meara *v.* The El Palmar Rubber Estates, Ltd., 1913, 1 S. L. T. 383.

[5] Blaikie *v.* Coats, 1893, 21 R. 150; Colquhoun's Tr. *v.* British Linen Co., 1900, 2 F. 945.

[6] Buckley (9th ed.), p. 111; Property Investment Co. of Scotland, Ltd. *v.* Duncan, 1887, 14 R. 299. See also Dodds *v.* Cosmopolitan Insurance Corporation, Ltd., 1915, S. C. 992.

[7] Property Investment Co. of Scotland, Ltd. *v.* Duncan, 1887, 14 R. 299.

It is competent to petition for rectification although calls have been decerned for and become final.[1]

It is competent to rectify the register in a petition for rectification of the list of contributories.[2]

Where an entry in the register of a company is voidable, it is incompetent after the liquidation or declared insolvency of the company for a shareholder to present a petition for rectification of the register.[3] Where, however, the names of transferors have been improperly retained on the register after liquidation, a petition for rectification will be considered;[4] and the liquidator of a company in liquidation and a company have been held entitled to present petitions for replacing the transferors of shares on the register where the transfers were void.[5]

(b) *Form of Petition.*—Where the application is by a transferee to have his name registered, the petition is addressed to the Court, and states that a transfer was granted to the petitioner of certain shares, which are described, and that the petitioner duly signed the transfer which was forwarded to the secretary of the company for registration; that the company, although repeatedly requested to do so, have refused or delayed to register said transfer (*or otherwise, as the circumstances may be*), and that the petitioner is desirous of having the register rectified to the effect of having the transferor's name removed and the petitioner's name substituted therefor. Sec. 32 of the Companies (Consolidation) Act, 1908, is then quoted at length.

The prayer is for intimation on the walls and in the Minute-Book in common form, and to be served on the company and on the transferor, and to allow them to answer within eight days, and, on resuming consideration, to order rectification of the register to be made, to direct notice of the registration to be given to the Registrar of Joint Stock Companies,[6] and to find the company in any event, and the transferor, if he shall appear and oppose, liable in expenses.

Where the application is by a shareholder to have his name deleted

[1] Stocker *v.* Liquidators of Coustonholm Paper Mills Co., Ltd., 1891, 19 R. 17; Jackson, etc., Petrs., in liquidation, Star Fire and Burglary Insurance Co., Ltd., 1902, 10 S. L. T. 279.

[2] Furness & Co. *v.* Liquidators of "Cynthiana" Steamship Co., Ltd., 1893, 21 R. 239.

[3] Alexander Mitchell *v.* City of Glasgow Bank, 1879, 6 R. (H. L.) 60; Tennent *v.* City of Glasgow Bank, 1879, 6 R. (H. L.) 69.

[4] Furness & Co. *v.* Liquidators of "Cynthiana" Steamship Co., Ltd., 1893, 21 R. 239. See also Liquidator of Florida Mortgage and Investment Co., Ltd. *v.* Bayley, 1890, 17 R. 525.

[5] General Property Investment Co. and Liquidator *v.* Matheson's Trs., 1888, 16 R. 282; *cp.* Gardiners *v.* Victoria Estates Co., Ltd., 1885, 12 R. 1356.

[6] Ewing, etc., Petrs., 1867, 39 Jur. 311.

from the register on the ground of misrepresentation, forms will be found in the session papers of the undernoted cases.[1] A form of an application by a trustee who has resigned for deletion of his name from the register may be found in the session papers of the undernoted petition.[2]

In practice, where the application is made for rectification in a voluntary liquidation, the form is by petition to the Court.[3] Where it is made in a winding-up by, or under the supervision of, the Court, the form of application is by a note to the Lord Ordinary to whom the proceedings have been remitted.[4]

It is the practice in Scotland where a firm petitions to go on the register to ask for the transfer to be made in the names of the individual partners in trust for behoof of the firm.[5]

(c) *Interlocutors.—First.—*

Edinburgh, 19 .—The Lords appoint the petition to be intimated on the walls and in the Minute-Book in common form and to be served as craved on [*insert name of company and transferors*], all designed in the petition, and ordain them to lodge answers, if so advised, within eight days after such intimation and service.

Second.—

Edinburgh, 19 .—The Lords remit to to inquire into the regularity of the procedure and the facts and circumstances set forth in the petition, and to report.

Final.—

Edinburgh, 19 .—The Lords allow the petition to be amended in terms of the minute of amendment for the petitioners, No. of process, and having resumed consideration of the petition as amended, together with the report of , No. of process; Approve of said report, order [6] to rectify the register of shareholders of the company in the following manner:—by substituting the numbers for the numbers , where these numbers respectively occur in the accounts of on folio , and of on folio ; Direct due notice of such rectification to be given to the Registrar of Joint Stock Companies in Scotland, and authorise and empower to issue certificates to the petitioners, giving effect to the alterations made on the register, and decern; Find the said [*name of company*] liable to the

[1] Sleigh *v.* Glasgow and Transvaal Options, Ltd., 1904, 6 F. 420; Gowans *v.* Dundee Steam Navigation Co., Ltd., 1904, 6 F. 613.

[2] Dalgleish *v.* Land Feuing Co., Ltd., 1885, 13 R. 223.

[3] Simpson *v.* Boson Oil Co., Ltd., 1889, 16 R. 391.

[4] Brownlie, etc., Petrs., 1898, 6 S. L. T. 249; secs. 135, 136, Companies (Consolidation) Act, 1908.

[5] Gillespie and Paterson *v.* City of Glasgow Bank, 1879, 6 R. 714; (H. L.) 104.

[6] Secretary or liquidator in a voluntary liquidation.

petitioners in the expenses of the petition and of the procedure following thereon, and remit the account thereof to the Auditor for taxation.

(5) Petition for Confirmation of Reorganisation of Capital.—(a) *When Competent.*—A company limited by shares may, by special resolution *confirmed by an order of the Court*, modify the conditions contained in its memorandum so as to reorganise its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes: Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all shareholders of the class. An office copy of the order must be filed with the Registrar of Companies within seven days of the making of the order, or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed.[1]

(b) *Form of Petition.*—Forms of petition will be found in the session papers of the undernoted cases.[2]

Advertisement of the petition does not require to be craved.[2]

(c) *Interlocutors.—First.*—

Edinburgh, 19 .—The Lords appoint the petition to be intimated on the walls and in the Minute-Book in common form, and allow all parties having or claiming interest to lodge answers within eight days thereafter.

Second.—

Edinburgh, 19 .—The Lords remit to to inquire into the facts and circumstances set forth in the petition, and the regularity of the procedure, and to report.

Third.—

Edinburgh, 19 .—The Lords, having heard counsel for the petitioners on the petition and the report by , No. of process, continue the cause and remit it back to the reporter.

Final.—

Edinburgh, 19 .—The Lords, having considered the petition as amended at the Bar, and the report by , No. of process,

[1] Companies (Consolidation) Act, 1908, sec. 45. See *In re* Australian Estates and Mortgage Co., Ltd., [1910] 1 Ch. 414.

[2] Robert A. Munro & Co., Ltd., Petrs., 1913, S. C. 456; British Assets Trust, Ltd., Petrs., 1913, S. C. 661.

and supplementary report by him, No. of process, approve of the said reports; Confirm the special resolution No. of the petitioning company passed on and confirmed on , as amended by special resolution passed on and confirmed on , all as set forth in the petition [*or the resolutions may be set forth in extenso*], modifying the conditions contained in the company's memorandum; Direct that a certified copy of this order shall be filed with the Registrar of Joint Stock Companies in Scotland in pursuance of sec. 45 of the Companies (Consolidation) Act, 1908, and decern.

(6) Petition for Power to Call a Meeting to Consider an Arrangement or Compromise with Creditors and Members.—(a) *When Competent.*—Where a compromise or arrangement is proposed between a company liable to be wound up under the Companies (Consolidation) Act, 1908, and its creditors or any class of them, or between such company and its members or any class of them, the Court may, on the application in a summary way of such company or of any creditor or member of such company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of such company or class of members, as the case may be, to be summoned in such manner as the Court directs.

If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.[1]

(b) *Form of Petition.*—Forms may be found by consulting the session papers in the undernoted cases,[2] also the undernoted report.[3]

(c) *To Whom Presented.*—The petition is presented to the Inner House, except where the company is being wound up judicially or under the supervision of the Court and a remit has been made to a permanent Lord Ordinary under sec. 136 of the Companies (Consolidation) Act 1908, in which cases a note is presented to the permanent Lord Ordinary.

(d) *Procedure and Interlocutors.*—The petition, having been printed,

[1] Companies (Consolidation) Act, 1908, sec. 120.

[2] Edinburgh American Land Mortgage Co., Ltd. *v.* Lang's Trs., 1909, S. C. 488; Dailuaine Talisker Distilleries, Ltd. *v.* Mackenzie, 1910, S. C. 913; Shandon Hydropathic Co., Ltd., Petrs., 1911, S. C. 1153.

[3] Wright *v.* Greig, Ltd., Petrs., 1910, 1 S. L. T. 353.

boxed, and lodged, comes out in the Single Bills, when the following order is usually taken :—

Edinburgh, 19 .—The Lords appoint the petition to be intimated on the walls and in the Minute-Book in common form; Order a meeting of debenture holders [*or as the case may be*] to be summoned and held for the purpose of taking into consideration, and, if so resolved, of approving of the arrangement contained in the agreement set forth in the petition; Authorise the petitioners to fix a day, hour, and place for said meeting [*or the Court may fix a day, hour, and place*], and appoint them or their agents to give seven day's notice thereof by advertisement once in the *Edinburgh Gazette* and once in the newspaper; Appoint the petitioners or their agents to post, seven days at least previous to the date of said meeting, a notice stating the object of the proposed meeting and accompanied by a form of proxy and a copy of the present petition to every debenture holder or debenture bond holder to his address as appearing on the register of debenture holders; Further, authorise the said meeting to appoint its own chairman [*sometimes the Court fixes the chairman*] and direct the chairman so appointed to report the result of the meeting to the Court.

If any person having a title and interest to appear desires to discuss the competency of the petition or wishes the first order refused, his counsel should appear at the Bar when the first order is to be moved and state his objection, in which case the interlocutor will be simply for intimation on the walls and in the Minute-Book in common form and for answers within a few days.[1] If the petition is thereafter held to be incompetent, it may be dismissed, or it may be sisted *in hoc statu* to allow necessary preliminary steps, which have been omitted, to be taken.[1] Where the petition is held to be competent, a meeting is appointed to be held in the terms of the second part of the above-mentioned interlocutor.

After the meeting has been held the chairman reports the result of the meeting to the Court, when, if there is any difficulty, a remit to a man of business may be made. A remit, however, is not usual.

The final interlocutor is usually in the following terms :—

Edinburgh, 19 .—The Lords, having considered the petition with evidence produced that the same has been intimated as ordered by the preceding interlocutor (no answers having been lodged), along with the report by Mr. , and heard counsel for the petitioners, in respect that the proposed arrangement contained in the agreement referred to in the petition has been agreed to by a majority in number representing three-fourths in value of the debenture holders present in person or by proxy at the meeting mentioned in said report; Sanction the said arrangement, and decern.

[1] Dailuaine Talisker Distilleries Co., Ltd. *v.* Mackenzie, 1910, S. C. 913.

This order may be asked for in the Single Bills where there are no answers.[1]

(7) Petitions in a Voluntary Winding-up.—(a) *Where Competent.*—Although no application to the Court is necessary to enable a company to be wound up voluntarily, circumstances may emerge in the course of the winding-up itself which will render desirable or necessary an application to the Court. Thus, if from any cause whatever there is no liquidator acting, the Court may, on the application of a contributory, appoint a liquidator;[2] or the Court may, on cause shown, remove a liquidator, and appoint another liquidator;[3] or an application may be made to the Court for the appointment of a liquidator in place of, or jointly with, a liquidator appointed by the company.[4] In the same way, a petition may be presented for the appointment of a committee of inspection.[5] Again, where a company is being wound up voluntarily, the liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding-up, or to exercise, as respects the enforcing of calls, or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court.[6] The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as the Court thinks fit, or may make such order on the application as the Court thinks fit.[7] Under this head petitions may be presented for delivery of books;[8] for rectification of the register;[9] for authority to enforce calls;[10] and to approve of the liquidator's deliverances on claims;[11] but not where a person alleging a claim of

[1] Shandon Hydropathic Co., Ltd., Petrs., 1911, S. C. 1153.

[2] Companies (Consolidation) Act, 1908, sec. 186 (viii.).

[3] Ibid., sec. 186 (ix.); Monkland Iron Co., Ltd. *v.* Dun, 1886, 14 R. 242; M'Knight & Co., Ltd. *v.* Montgomerie, 1892, 19 R. 501; Lysons *v.* Liquidator of the Miraflores Gold Syndicate, Ltd., 1895, 22 R. 605; Ker, Petr., 1897, 5 S. L. T. 126; Skinner (Hannan's Development and Finance Corporation, Ltd.), Petr., 1899, 6 S. L. T. 388; Gaunt's Exrs. *v.* Liquidators of La Mancha Syndicate, Ltd., 1907, 44 S. L. R. 316.

[4] Companies (Consolidation) Act, 1908, sec. 188; Wishart, Petr., 1908, S. C. 690; Liquidators of Bruce Peebles & Co., Ltd. *v.* Shiells, 1908, S. C. 692.

[5] Companies (Consolidation) Act, 1908, sec. 188; Marlow, Petr., 1912, S. C. 625.

[6] Companies (Consolidation) Act, 1908, sec. 193 (1).

[7] Ibid., sec. 193 (2); Liquidator of Humboldt Redwood Co., Ltd. *v.* Coats, 1908, S. C. 751.

[8] Gladstone *v.* M'Callum, 1896, 23 R. 783; Findlay *v.* Waddell, 1910, S. C. 670.

[9] Simpson *v.* Boson Oil Co., Ltd., 1889, 16 R. 391.

[10] Sdeuard, Petr., 1878, 5 R. 867; Stewart *v.* Liquidator of the Scoto-American Sugar Syndicate, Ltd., 1901, 3 F. 585. See also Mitchell, Petr., 1863, 1 M. 1116.

[11] Liquidator of Kosmoid Tubes, Ltd., Petrs., 1911, 49 S. L. R. 9.

damages against the company prays for the determination of the Court on the validity and extent of his claim,[1] or where the application is to stay actions at the instance of creditors.[2]

(b) *Form of Petition.*—The petition is addressed to the Court and must be printed. Forms of various kinds of petition will be found in the session papers of the undernoted cases.[3]

(c) *To Whom Presented.*—Petitions in a voluntary winding-up are presented to either Division of the Inner House.

(d) *Procedure.*—The petition, having been printed, boxed, and lodged, appears in the Single Bills, when a first order is taken. As a general rule there must be intimation on the walls and in the Minute-Book in common form, but there have been petitions in which intimation has been dispensed with, *e.g.* a petition for the enforcement of calls[4] and a petition for the appointment of a committee of inspection.[5]

Whether service is necessary depends upon the nature of the petition. Where the interests of any particular person or persons are involved, service will be ordered upon such person or persons, *e.g.* a liquidator, where the petition is for his removal, or upon each of the creditors, where approval is asked of the liquidator's deliverances upon claims.[6] Where the appointment of a committee of inspection was craved, both intimation and service was dispensed with,[5] and where a petition to have questions of preference settled was presented and the shareholders exceeded 700 in number, the Court dispensed with the ordinary intimation and service of the petition, and ordered only intimation on the walls and in the Minute-Book and advertisement in two newspapers.[7]

There is seldom a necessity for a remit to a man of business. If answers are lodged, the petition and answers are sent to the Summar Roll for discussion, where the case is decided. If there are no answers, the prayer of the petition may be granted in the Single Bills.

(8) Petition for Winding up by the Court.—(a) *Generally.*—A company may be wound up by the Court—

[1] Crawford *v.* M'Culloch, 1909, S. C. 1063.

[2] Sdeuard *v.* Gardner, 1876, 3 R. 577.

[3] Lysons *v.* Liquidator of the Miraflores Gold Syndicate, Ltd., 1895, 22 R. 605; Liquidator of Humboldt Redwood Co., Ltd. *v.* Coats, 1908, S. C. 751; Crawford *v.* M'Culloch, 1909, S. C. 1063; Findlay *v.* Waddell, 1910, S. C. 670; Marlow, Petr., 1912, S. C. 625.

[4] Sdeuard, Petr., 1878, 5 R. 867.

[5] Marlow, Petr., 1912, S. C. 625.

[6] Liquidator of Kosmoid Tubes, Ltd., Petrs., 1911, 49 S. L. R. 9.

[7] Monkland Iron and Coal Co. *v.* Henderson, 1883, 10 R. 494.

(i.) If the company has by special resolution resolved that the company be wound up by the Court.

(ii.) If default is made in filing the statutory report or in holding the statutory meeting.

(iii.) If the company does not commence its business within a year from its incorporation, or suspends its business for a whole year.

(iv.) If the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven.

(v.) If the company is unable to pay its debts.

(vi.) If the Court is of opinion that it is just and equitable that the company should be wound up.[1]

A company is deemed to be unable to pay its debts—

(i.) When a creditor for a sum exceeding £50 has served a demand for said debt on the company, and the latter has for three weeks thereafter neglected to pay the same or satisfy the creditor.[2]

(ii.) Where a charge for payment has expired without payment being made.[3]

(iii.) Where it is proved to the satisfaction of the Court that the company is unable to pay its debts, and in determining this question the contingent and prospective liabilities of the company must be taken into account.[4]

A petition to wind up may be applied for by a creditor or contributory notwithstanding that the company is being wound up voluntarily.[5]

Where a petition averred that a company was unable to pay its debts and produced (1) a dishonoured bill, and (2) a correspondence which showed that although the petitioner had repeatedly asked for payment of the bill, payment had not been made. The bill had not been protested nor had any charge for payment been given thereon. The Court ordered intimation and service.[6]

(b) *Who may Present.*—A petition may be presented either by the company, or by any creditor or creditors (including any contingent or

[1] Companies (Consolidation) Act, 1908, sec. 129; Pirie *v.* Stewart, 1904, 6 F. 847; Symington *v.* Symington's Quarries, 1905, 8 F. 121.

[2] Companies (Consolidation) Act, 1908, sec. 130 (i.); Stephen, Petr., 1884, 21 S. L. R. 764; Cuninghame *v.* Walkinshaw Oil Co., 1886, 14 R. 87; Commercial Bank of Scotland *v.* Lanark Oil Co., Ltd., 1886, 14 R. 147; W. & J. C. Pollok *v.* Gaeta Pioneer Mining Co., Ltd., 1907, S. C. 182.

[3] Companies (Consolidation) Act, 1908, sec. 130 (iii.); Speirs & Co. *v.* Central Building Co., Ltd., 1911, S. C. 330.

[4] Companies (Consolidation) Act, 1908, sec. 130 (iv.).

[5] Ibid., sec. 197.

[6] Gandy, Petr., 1912, 50 S. L. R. 3.

prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately.[1] A contributory, however, is not entitled to present a petition unless (i.) either the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven; or (ii.) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding-up, or have devolved on him through the death of a former holder.[2] A shareholder alone may petition for winding up on the ground of default in filing the statutory report or in holding the statutory meeting.[3]

A holder of fully paid-up shares has been held to be a contributory in the sense of being entitled to present a petition for winding up.[4]

(c) *Sisting New Petitioner.*—Where petitioning creditors do not proceed with their petition, other creditors may be sisted in their place.[5]

(d) *Form of Petition.*—Forms of petitions at the instance of creditors [6] and of shareholders [7] may be found by consulting the session papers in the undernoted cases.

(e) *Procedure.*—The petition is printed, boxed, and lodged, and appears in the Single Bills of the Division of the Inner House to which it has been presented. The usual first order is for intimation, advertisement, and service upon the company, and for answers within eight days.[8] Where the petition is not at the instance of the company itself, the company may appear by counsel in the Single Bills when the usual first order is being moved and object to the order being granted. It is quite competent for the Court to refuse to grant the usual first order where it can be instantly verified that the interests of the company or of persons other than the petitioners will be adversely affected.[9] In order that the Court may have the facts

[1] Companies (Consolidation) Act, 1908, sec. 137 (1).

[2] Ibid., sec. 137 (1) (*a*).

[3] Ibid., sec. 137 (1) (*b*).

[4] Walker, etc., Petrs., 1894, 2 S. L. T. 397.

[5] Tudor Accumulator Co., Ltd. *v.* Scott, Stirling & Co., Ltd., 1908, S. C. 331.

[6] W. & J. C. Pollok *v.* Gaeta Pioneer Mining Co., Ltd., 1907, S. C. 182; Speirs & Co. *v.* Central Building Co., Ltd., 1911, S. C. 330; Mags. of Edinburgh *v.* Union Billposting Co., Ltd., 1913, S. C. 105.

[7] Black *v.* United Collieries, Ltd., 1904, 7 F. 18; Symington *v.* Symington's Quarries, Ltd., 1905, 8 F. 121; Scobie *v.* Atlas Steel Works, Ltd., 1906, 8 F. 1052.

[8] Gandy, Petr., 1912, 50 S. L. R. 3; Wilson, etc., Petrs., 1912, 50 S. L. R. 161. In the latter case, as many creditors were in the West Indies, answers were ordered within twenty-one days.

[9] Macdonell's Trs. *v.* Oregonian Rly. Co., 1884, 11 R. 912; Black *v.* United

before it, the objectors may be asked to lodge a minute of objections,[1] or to lodge answers without an order for intimation being pronounced.[2]

Where intimation, service, and advertisement have been made and no answers have been lodged, the prayer of the petition may be granted in the Single Bills. If answers are lodged, the petition and answers are sent to the Summar Roll for discussion, where the petition is either granted or refused.

If the prayer of the petition is granted, the practice is for the Court to remit the winding-up to a permanent Lord Ordinary, before whom all subsequent proceedings in the winding-up are taken. The Lord Ordinary may report to the Division of the Court any matter which may arise in the course of the winding-up.[3]

The practice of awarding expenses by the Division has recently been altered in one particular, and where petitions for winding up are granted, the question of expenses is left to the discretion of the Lord Ordinary to whom the winding-up is remitted.[4] Such expenses are taxed as between agent and client.[5] Where the petition is presented on the ground of default in filing the statutory report or holding the statutory meeting the Court may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default.[6]

Where circumstances require, the Court may, at the first enrolment, appoint a *provisional* liquidator.[7]

(9) Incidental Notes in a Winding-up by the Court.—(a) *Generally.*—Where a petition has been presented for a compulsory winding-up order, subsequent applications in the petition are made by note. Notes may be presented both before and after a winding-up order is granted. Where a note is presented *before* a winding-up order is granted, it is presented to the Division to which the original petition has been presented, and it is printed, boxed, and lodged in the usual way. Where a note is presented *after* an order for winding up is made, it is presented to the permanent Lord Ordinary to whom the

Collieries, Ltd., 1904, 7 F. 18 ; *cp.* Wotherspoons *v.* Brescia Mining and Metallurgical Co., Ltd., 1896, 24 R. 207.

[1] Macdonell's Trs. *v.* Oregonian Rly. Co., 1884, 11 R. 912; Black *v.* United Collieries, Ltd., 1904, 7 F. 18.

[2] Wotherspoons *v.* Brescia Mining and Metallurgical Co., Ltd., 1896, 24 R. 207.

[3] Companies (Consolidation) Act, 1908, sec. 136.

[4] Wishart, Petr., 1908, S. C. 690.

[5] M'Gregor *v.* Ballachulish Slate Quarries, Ltd., 1908, S. C. 1. See also Leith and East Coast Steam Shipping Co., Ltd., 1911, 48 S. L. R. 622.

[6] Companies (Consolidation) Act, 1908, sec. 141 (2).

[7] Wilson, etc., Petrs., 1912, 50 S. L. R. 161.

winding-up has been remitted,[1] and it may either be printed or in manuscript. Printing in the latter case is discouraged and is only advisable where service of the note is required on a large number of persons. It should be addressed to the Court and not to the permanent Lord Ordinary, and the Division of the Court which has made the remit and the name of the permanent Lord Ordinary to whom the remit is made should be marked on the note. The question of intimation, advertisement, and service depends upon the circumstances of each individual case. A reference to some of the most common notes is given below, and forms of these notes may be obtained by an examination of the session papers of the cases quoted relative to the same.

(b) *Note to Stay Proceedings after Presentation of Petition for Winding up but Before Winding-up Order is Made.*—This note is printed and boxed, and presented to the Inner House.[2]

(c) *Note for Leave to Proceed with Action against Company where a Winding-up Order has been made.*[3]—Where an action has been brought without leave the action may be sisted in order that leave may be applied for.[4] It is not *pars judicis* to enforce the provisions of the Act regarding the necessity of obtaining leave of the Court to raise an action.[5]

(d) *Note to Stay Winding up After Order for Winding up has been Made.*[6]

(e) *Note by Liquidator for Permission to Resign.*[7]

(f) *Note for Removal of a Liquidator.*[8]

(g) *Note for Appointment of a New Liquidator.*[9]

[1] Pearston, Petr., 1911, 48 S. L. R. 755.

[2] Companies (Consolidation) Act, 1908, sec. 140; Benhar Coal Co. *v.* Sime, 1878, 6 R. 316. See also New Glenduffhill Coal Co., Ltd. *v.* Muir & Co., 1882, 10 R. 372.

[3] Companies (Consolidation) Act, 1908, sec. 142; Liquidators of California Redwood Co., Ltd. *v.* Walker, 1886, 13 R. 810; Aikman, 1900, 7 S. L. T. 301; note for Bell's Trs. in Holmes Oil Company in Liquidation, 1901, 8 S. L. T. 360; Coclas *v.* Bruce Peebles & Co., Ltd., 1908, 16 S. L. T. 7.

[4] D. M. Stevenson & Co. *v.* Radford and Bright, 1902, 10 S. L. T. 82; Challoner *v.* Scottish Improved Dwellings Co., Ltd., 1904, 12 S. L. T. 498.

[5] Hill *v.* Black, 1914, S. C. 913.

[6] Companies (Consolidation) Act, 1908, sec. 144; Liquidators of Insurances Trust and Agency, Ltd. *v.* Foulis, 1894, 1 S. L. T. 592.

[7] Companies (Consolidation) Act, 1908, sec. 149 (6); Jamieson, Petr., 1877, 14 S. L. R. 667.

[8] Companies (Consolidation) Act, 1908, sec. 149 (6); Lysons *v.* Liquidator of Miraflores Gold Syndicate, Ltd., 1895, 22 R. 605; Skinner, Petr., 1899, 6 S. L. T. 388.

[9] Companies (Consolidation) Act, 1908, sec. 149 (7); Gray, etc., Petrs., 1910, S. C. 358; Pearston, Petr., 1911, 48 S. L. R. 755; Glasgow Commercial Co., Ltd., 1913, 1 S. L. T. 117.

(h) *Note by Liquidator to Fix his Remuneration.*[1]

(i) *Note by Liquidator for Power.*—(i.) To bring or defend an action.[2]

(ii.) To carry on the business of the company.[3]

(iii.) To appoint a law agent.[4]

(iv.) To sell the property of the company.[5]

(v.) To do all acts and execute deeds in name of company.[6]

(vi.) To make a claim in the bankruptcy of a contributory, etc.[7]

(vii.) To draw, accept, make, and indorse a bill for the company.[8]

(viii.) To raise money.[9]

(ix.) To take out letters of administration to a deceased contributory.[10]

(j) *Note to Settle List of Contributories.*[11]—Incidentally the register may be rectified.[12]

(k) *Note for Order to Require Delivery of Property.*[13]

(l) *Note for Order to Make Payment of Debts by Contributory.*[14]—This order must be distinguished from an order under sec. 179 of the Companies (Consolidation) Act, 1908. Intimation must be made to each of the parties against whom decree is sought.[15]

[1] City of Glasgow Bank Liquidators, 1880, 7 R. 1196; Scottish Drug Depôt, Ltd., 1894, 2 S. L. T. 45; Buchanan *v.* French, Ltd., 1908, 16 S. L. T. 408.

[2] Companies (Consolidation) Act, 1908, sec. 151 (1) (*a*); Millar, Petr., 1890, 18 R. 179.

[3] Companies (Consolidation) Act, 1908, sec. 151 (1) (*b*); Liquidator of Burntisland Oil Co., Ltd. *v.* Dawson, 1892, 20 R. 180; M'Intyre, Petr., 1893, 30 S. L. R. 386.

[4] Companies (Consolidation) Act, 1908, sec. 151 (1) (*d*); Empire Guarantee and Insurance Corporation, Ltd., 1911, 2 S. L. T. 292.

[5] Companies (Consolidation) Act, 1908, sec. 151 (2) (*a*); British Canadian Lumbering and Trading Co., Ltd., 1886, 14 R. 160; Tait, Petr., 1907, 15 S. L. T. 135; Belhaven Engineering and Motors, Ltd., 1912, 2 S. L. T. 473.

[6] Companies (Consolidation) Act, 1908, sec. 151 (2) (*b*); Belhaven Engineering and Motors, Ltd., 1912, 2 S. L. T. 472.

[7] Companies (Consolidation) Act, 1908, sec. 151 (2) (*c*).

[8] Ibid., sec. 151 (2) (*d*).

[9] Ibid., sec. 151 (2) (*e*).

[10] Ibid., sec. 151 (2) (*f*); Collie, Petr., 1865, 3 M. 1064; Currie on Confirmation of Executors (3rd ed.), p. 98.

[11] Companies (Consolidation) Act, 1908, sec. 163; Collie, Petr., 1865, 3 M. 1064; Couper, 1882, 9 R. 1130.

[12] Bonnington Sugar Refining Co. *v.* Thomson's Trs., 1879, 6 R. 80; 6 R. (H. L.) 90.

[13] Companies (Consolidation) Act, 1908, secs. 164 and 174; Dunlop *v.* Donald, 1893, 21 R. 125; Davidson, 1905, 13 S. L. T. 752; Ker *v.* Hughes, 1907, S. C. 380; Liquidators of Eglinton Chrome Tanning Co., Ltd. *v.* Donald, 1907, 14 S. L. T. 731; Liquidator of Donaldson & Co., Ltd. *v.* White and Park, 1908, S. C. 309; Liquidators of Life and Health Assurance Association, Ltd., Petrs., 1909, 2 S. L. T. 252.

[14] Companies (Consolidation) Act, 1908, sec. 165.

[15] Liquidators of Benhar Coal Co., Ltd., Petrs., 1882, 9 R. 763.

(m) *Note for Order to Make Calls.*[1]

(n) *Note for Sanction of Court.*—(i.) To pay a class of creditors in full.[2]

(ii.) To make a compromise with creditors or persons claiming to be creditors.[3]

(iii.) To compromise calls, debts, and liabilities of contributories.[4]

(o) *Note for Order upon Promoters, Directors, etc., to Repay Money.*[5]

(p) *Note for Order to Call Meetings of Creditors or Contributories.*[6]

(q) *Note for Order for Inspection by Creditors and Contributories of the Company's Books, etc.*[7]

(10) Petition for Winding up under Supervision.—(a) *Generally.*—When a company has by special or extraordinary resolution resolved to wind up voluntarily, the Court may make an order that the voluntary winding up shall continue, but subject to such supervision of the Court and with such liberty for creditors, contributories, or others to apply to the Court, and generally on such terms and conditions as the Court thinks just.[8] In such circumstances the procedure is by *petition* to the Inner House.[8] This petition is printed and boxed in the usual way. An application may also be made in a petition for compulsory winding up. The procedure in the latter case is by a *note* in the petition for winding up, and not by a separate petition.[9]

The liquidator appointed at the meeting of shareholders may be superseded by the Court.[10]

(b) *Incidental Notes.*—While the liquidator in a winding-up subject to supervision may exercise all his powers without the sanction or intervention of the Court in the same manner as if the company were

[1] Companies (Consolidation) Act, 1908, secs. 166 and 179; Collie, Petr., 1865, 3 M. 1064; Sdeuard, Petr., 1878, 5 R. 867. See also Mitchell, Petr., 1863, 1 M. 1116.

[2] Companies (Consolidation) Act, 1908, sec. 214 (1) (i.).

[3] Ibid. (ii.).

[4] Ibid. (iii.); Ecuadorian Association, Ltd. *v.* Fox, 1906, 14 S. L. T. 47 and 699. See also Tait, 1899, 6 S. L. T. 372; Taylor, 1905, 13 S. L. T. 718.

[5] Companies (Consolidation) Act, 1908, sec. 215; Liquidators of City of Glasgow Bank *v.* Mackinnon, 1881, 9 R. 535.

[6] Companies (Consolidation) Act, 1908, sec. 219; Pattisons, Ltd., 1899, 7 S. L. T. 24.

[7] Companies (Consolidation) Act, 1908, sec. 221; Halden *v.* Liquidator of Scottish Heritable Security Co., 1887, 14 R. 633.

[8] Companies (Consolidation) Act, 1908, sec. 199; Christie, etc., Petrs., 1876, 3 R. 623; M'Knight & Co., Ltd. *v.* Montgomerie, 1892, 19 R. 501; Lysons *v.* Liquidator of the Miraflores Gold Syndicate, Ltd., 1895, 22 R. 605; Gaunt's Exrs. *v.* Liquidators of La Mancha Syndicate, Ltd., 1907, 44 S. L. R. 316.

[9] Drysdale and Gilmour *v.* Liquidator of International Exhibition of Electrical Engineering, etc., 1890, 18 R. 98; Seafield Preserve Co., Ltd., Petrs., 1911, S. C. 3. See also Aitken, etc., Petrs., 1888, 26 S. L. R. 129.

[10] Argylls, Ltd. *v.* Ritchie and Whiteman, 1914, S. C. 915.

being wound up altogether voluntarily,[1] this does not apply to the powers of a liquidator under sec. 214 of the Companies (Consolidation) Act, 1908, which require the sanction of the Court. Again, while secs. 147 to 149 inclusive, except subsec. (10) of the last section, and secs. 152 to 162 inclusive, and secs. 173 and 175 do not apply to a winding up under supervision of the Court, an order for winding up subject to supervision is for all other purposes, including the staying of actions and other proceedings, the making and enforcement of calls, the power to remit to a permanent Lord Ordinary, and the exercise of all other powers, deemed to be an order for winding up by the Court.[2] Accordingly, the notes incidental to a petition for winding up under supervision are for all practical purposes similar in practice to the notes incidental to a petition for judicial winding up, and their procedure is identical.

(11) Petition for the Enforcement of Orders Throughout the United Kingdom.—Prior to the Act of Sederunt, 21st June 1883, it seems to have been the practice to present a petition to the Inner House to enforce in Scotland the orders of the English and Irish Courts granted in an English or Irish winding-up proceeding. By the said Act, however, it is made competent, in the case of decrees for the payment of money,[3] to produce an office copy of any order made by the Courts having jurisdiction in England or Ireland respectively, in cases of bankruptcy or winding up, to the Clerk of the Bills, who registers the same *in extenso* in a register kept for that purpose, and appends to such office copy a certificate signed by him of such registration; and the same, being so registered and certified, is a sufficient warrant to officers of Court to charge for payment of the sums recoverable under such order, with expenses, in the same manner as if such order had been a decree originally pronounced in the Court of Session on the date of such registration.[4] In cases other than payment, the procedure is by petition to the Inner House in the usual manner of Inner House petitions.[5] In the same way orders made by the Scottish Courts in a Scottish winding-up will be enforced in England and Ireland.[6]

(12) Petition to Sanction Proposed Transfer of Business

[1] Companies (Consolidation) Act, 1908, sec. 203 (1).

[2] Ibid. (2).

[3] Johnstone's Trs. *v.* Roose, 1884, 12 R. 1.

[4] A. S., 21st June 1883; C. A. S. (1913), E, iv.

[5] Queensland Mercantile and Agency Co., Ltd. *v.* Australasian Investment Co., Ltd., 1888, 15 R. 935; Companies (Consolidation) Act, 1908, sec. 180.

[6] Liquidators of California Redwood Co., Ltd. *v.* Walker, 1886, 13 R. 810.

UNDER THE ASSURANCE COMPANIES ACT, 1909.—Where it is intended to amalgamate two or more assurance companies, or to transfer the assurance business of any class from one assurance company to another company, the directors of any one or more of such companies may apply to the Court, by petition, to sanction the proposed arrangement.[1]

The petition may be presented in name of the company, although the statute directs the petition to be presented by the directors.[2] The petition is first intimated and advertised. The life policy-holders have a right to object.[3] Particulars of the proposed transfer should be intimated to the policy-holders, but this may be dispensed with.[4] The Court then remits to a man of business, who reports, and, after counsel are heard, the petition is either granted or refused.

[1] 9 Edw. VII. cap. 49, sec. 13 (1).

[2] Empire Guarantee and Insurance Corporation, Ltd., Petrs., 1911, S. C. 1296.

[3] 9 Edw. VII. cap. 49, sec. 30 (*d*).

[4] City of Glasgow Life Assurance Co. *v.* Scottish Union and National Insurance Co., Petrs., 1913, 2 S. L. T. 38.

CHAPTER VI

PETITIONS RELATIVE TO SEQUESTRATION

THESE petitions, when not presented in the Sheriff Court, are Bill Chamber petitions, and are fully dealt with in the author's work on Bill Chamber Practice, p. 176 *et seq.* (*q.v.*).

CHAPTER VII

PETITIONS FOR CUSTODY OF, AND ACCESS TO, CHILDREN

(1) GENERALLY.—Petitions for the permanent custody of, and access to, children are petitions to the *nobile officium* of the Court of Session, and accordingly must be presented during session to the Inner House.[1] In vacation they may be presented to the Lord Ordinary on the Bills.[2]

(2) LEGITIMATE CHILDREN.—(a) *Father's Right.*—A father has an absolute legal right to the custody of his legitimate children. The father's right is subject, however, to the control of the Court of Session.[3] Accordingly it has been held that he is not entitled to their custody until they have been weaned,[4] or where he has become insane,[5] or where his association with his children would be detrimental to their welfare.[6]

The fact that a father is resident abroad,[7] or has been convicted of theft,[8] has been held not to disentitle him *per se* to his right to regulate their upbringing and education. Ordinary adultery may not be sufficient to prevent a father from obtaining the custody of his children,[9] but where the father's adultery is committed under aggravated circumstances the Court will not give him their custody.[10] In one case

[1] Hood *v.* Hood, 1871, 9 M. 449; M'Callum *v.* M'Callum, 1893, 20 R. 293; Guthrie *v.* Guthrie, 1906, 8 F. 545; A. B. *v.* C. B., 1906, 8 F. 973, per Lord M'Laren; Fraser, Parent and Child (3rd ed.), p. 294; 49 & 50 Vict. cap. 27, sec. 9.

[2] Edgar *v.* Fisher's Trs., 1893, 21 R. 59. See also Fraser, Parent and Child (3rd ed.), p. 294; Buchan *v.* Cardross, 1842, 4 D. 1268; 49 & 50 Vict. cap. 27, sec. 9.

[3] Baillie *v.* Agnew, 1775, 5 Brown's Supp. 526; Thomson, Petr., 1829, 1 Jur. 201; Cameron, Petr., 1847, 9 D. 1401.

[4] Lilley *v.* Lilley, 1877, 4 R. 397; Bloe *v.* Bloe, 1882, 9 R. 894; A. C. *v.* B. C., 1902, 5 F. 108, per Lord Justice-Clerk Macdonald, p. 111.

[5] A. B. *v.* C. D., 1850, 12 D. 1297.

[6] Lang *v.* Lang, 1869, 7 M. 445; Nicolson *v.* Nicolson, 1869, 7 M. 1118; Steuart *v.* Steuart, 1870, 8 M. 821; Pagan *v.* Pagan, 1883, 10 R. 1072; Beattie *v.* Beattie, 1883, 11 R. 85; Leys *v.* Leys, 1886, 13 R. 1223; Rintoul *v.* Rintoul, 1898, 1 F. 22; Marchetti *v.* Marchetti, 1901, 3 F. 888.

[7] Pagan *v.* Pagan, 1883, 10 R. 1072; Sleigh *v.* Sleigh, 1893, 30 S. L. R. 272; *cp.* Moncreiff, Petr., 1891, 18 R. 1029.

[8] A. C. *v.* B. C., 1902, 5 F. 108.

[9] Lang *v.* Lang, 1869, 7 M. 445; Nicolson *v.* Nicolson, 1869, 7 M. 1118; Steuart *v.* Steuart, 1870, 8 M. 821.

[10] Ketchen *v.* Ketchen, 1870, 8 M. 952.

the father was given the custody of the sons and the mother the custody of the daughters.[1]

The fact that a father is poor will not prevent him from obtaining custody, provided the children will not be put to hardship so great as to suffer in health.[2]

Where a child has been forcibly removed from the custody of her father, the Court may grant a warrant to restore possession,[3] and failing this, to sequestrate the respondent's estate.[4]

Where a father petitions for the custody of his child who has been brought up by a person other than the mother, the Court may ordain the father to pay the money which has been expended on its maintenance.[5] (See also *Illegitimate Children, infra,* p. 897.)

A father may make an application under sec. 5 of the Guardianship of Infants Act, 1886, as well as a mother.[6]

In an action of separation or divorce the father, if at fault, may be declared to be a person unfitted to have the custody of the children of the marriage, and in such a case the father shall not, upon the death of the mother, be entitled to the custody and guardianship of such children.[7]

(b) *Mother's Right.*—(i.) *Where Father Alive.*—The mother of a legitimate child has a right to its custody up till it has been weaned.[8] After that date she has no right to its custody unless the father is insane,[9] or is morally unfit to have its custody.[10]

The mother of a pupil child may provisionally nominate some fit person or persons to act as guardian or guardians to such pupil child after her death jointly with the father, and the Court, after her death, if it be shown to its satisfaction that the father is for any reason unfitted to be the sole guardian, may confirm the mother's provisional appointment, or make such other order as the Court shall think fit.[11]

[1] Symington *v.* Symington, 1875, 2 R. (H. L.) 41.

[2] Leys *v.* Leys, 1886, 13 R. 1223.

[3] Hutchison *v.* Hutchison, 1890, 18 R. 237. See also Earl of Buchan *v.* Lady Cardross, 1842, 4 D. 1268; Leys *v.* Leys, 1886, 13 R. 1223; *cp.* Robertson, Petr., 1911, S. C. 1319.

[4] Edgar *v.* Fisher's Trs., 1893, 21 R. 59. See also Ross *v.* Ross, 1885, 12 R. 1351.

[5] Soutar *v.* Carrie, 1894, 21 R. 1050.

[6] Beedie *v.* Beedie, 1889, 16 R. 648.

[7] 49 & 50 Vict. cap. 27, sec. 7; Fairley *v.* Fairley, 1904, 12 S. L. T. 140.

[8] Lilley *v.* Lilley, 1877, 4 R. 397; Bloe *v.* Bloe, 1882, 9 R. 894; A. C. *v.* B. C., 1902, 5 F. 108, per Lord Justice-Clerk Macdonald, p. 111.

[9] A. B. *v.* C. D., 1850, 12 D. 1297.

[10] Lang *v.* Lang, 1869, 7 M. 445; Nicolson *v.* Nicolson, 1869, 7 M. 1118; Steuart *v.* Steuart, 1870, 8 M. 821; Beattie *v.* Beattie, 1883; 11 R. 85; Rintoul *v.* Rintoul, 1898, 1 F. 22; Marchetti *v.* Marchetti, 1901, 3 F. 888.

[11] 49 & 50 Vict. cap. 27, sec. 3 (2).

Upon the application of the mother of any pupil child, the Court may make such order as it may think fit regarding the custody of such child, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian.[1] A father may make a similar application.[2]

(ii.) *Where Father Dead.*—On the death of the father of a pupil child the mother, if surviving, is the guardian, either alone, where no other guardian has been appointed by the father, or jointly with any guardian appointed by the father.[3] Where the father has appointed a guardian other than the mother, the latter has a preferable right to the custody of the child until the child reaches the age of seven years,[4] and even during pupillarity.[5] In a case where the father directed in his will that his pupil children should be removed from the control and influence of their mother, the Court allowed the mother to have them for three days in each fortnight in vacation;[6] and where a mother had married a second time and gone to reside abroad, she was granted the custody of her pupil children against a tutor-nominate.[7]

The rights of the mother are, however, under the control of the Court of Session, and the latter may make such orders in the interests of the child as it may think just. Thus, where no guardian has been appointed by the father, or if the guardian appointed by him is dead or refuses to act, the Court may from time to time appoint a guardian to act jointly with the mother;[8] and if the mother is thought to be an unfit custodier, she may be deprived of the custody of the child, which may be handed over to a tutor-nominate or dative or a factor *loco tutoris* or any other suitable third party.[9]

The mother of any child may by deed or will appoint any person or persons to be guardian or guardians of such pupil after the death of herself and the father of such child (if such child be then unmarried), and where guardians are appointed by both parents they shall act

[1] 49 & 50 Vict. cap. 27, sec. 5.

[2] Beedie *v.* Beedie, 1889, 16 R. 648.

[3] Guardianship of Infants Act, 1886 (49 & 50 Vict. cap 27), sec. 2.

[4] Erskine's Inst. i. 7. 7 ; Bell's Prin., sec. 2083 ; Campbell *v.* Campbell, 1833, 11 S. 544 ; Dallas *v.* Dundas, 1845, 8 D. 318.

[5] Johnston *v.* Otto, 1849, 11 D. 718 ; A. B. *v.* C. D., 1850, 12 D. 1297 ; Maquay *v.* Campbell, 1888, 15 R. 606.

[6] Allan *v.* Allan's Trs., 1869, 41 Jur. 617.

[7] Maquay *v.* Campbell, 1888, 15 R. 606.

[8] 49 & 50 Vict. cap. 27, sec. 2 ; Martin *v.* Stewart, 1888, 16 R. 185.

[9] Stair, i. 6. 15 ; Erskine's Inst. i. 7. 7 ; Denny *v.* Macnish, 1863, 1 M. 268 ; Muir *v.* Milligan, 1868, 6 M. 1125 ; Gulland *v.* Henderson, 1878, 5 R. 768.

jointly.[1] If the guardians cannot agree upon a question affecting the welfare of the pupil, any of them may apply to the Court for its direction.[2]

The Court may, on pronouncing a decree for judicial separation or divorce, declare the mother, if at fault, to be a person unfitted to have the custody of the children (if any) of the marriage; and in such a case the mother shall not, upon the death of the father, be entitled to the custody or guardianship of such children.[3]

By the Criminal Law Amendment Act, 1885,[4] and the Children Act, 1908,[5] power is given to interfere with the mother's custody of her child in the circumstances therein set forth.

(c) *Right of the Child.*—When a child has arrived at the age of puberty, any strong and unbiassed expression of feeling on its part against the person desiring custody will be taken into consideration, and it will require a very strong case of conflict between the wishes of a young person on the one hand and his or her safety or welfare on the other to justify the Court in enforcing the latter's choice of residence against the former.[6]

In order that the Court may ascertain the opinion of the child the Court usually appoints a curator *ad litem.*

The Custody of Children Act, 1891, does not interfere or affect the power of the Court to consult the wishes of a child in considering what order ought to be made under that Act, or diminish the right which a child possesses to the exercise of its own free choice.[7]

(d) *Rights of Other Persons.*—Persons other than parents or guardians may petition the Court in the interests of children. Thus a brother,[8] a tutor-at-law,[9] a factor *loco tutoris*,[10] a maternal grandfather,[11] a paternal grandfather,[12] and a paternal grandmother[13] have been allowed to be

[1] 49 & 50 Vict. cap. 27, sec. 3 (1). [2] Ibid., sec. 3 (3).

[3] Ibid., sec. 7. See Fairley *v.* Fairley, 1904, 12 S. L. T. 140.

[4] 48 & 49 Vict. cap. 69.

[5] 8 Edw. VII. cap. 67, secs. 12 and 21.

[6] Bankton, i. 6. 1 ; More's Notes to Stair, p. xxxi. ; Harvey *v.* Harvey, 1860, 22 D. 1198, per Lord Justice-Clerk Inglis, pp. 1210, 1211 ; Flannigan *v.* Bothwell Inspector, 1892, 19 R. 909 ; Fisher *v.* Edgar, 1894, 21 R. 1076.

[7] 54 Vict. cap. 3, sec. 4.

[8] Morrison *v.* Quarrier, 1894, 21 R. 889 and 1071.

[9] Walker *v.* Walker, 1824, 2 S. 788 (N. E. 651).

[10] A. B. *v.* C. D., 1837, 9 Jur. 536 ; Paul, Petr., 1838, 16 S. 822 ; Denny *v.* Macnish, 1863, 1 M. 268 ; Muir *v.* Milligan, 1868, 6 M. 1125 ; Gulland *v.* Henderson, 1878, 5 R. 768 ; Moncreiff, Petr., 1891, 18 R. 1029.

[11] Black *v.* Ferguson, 1866, 4 M. 807 ; Reilly *v.* Quarrier, 1895, 22 R. 879.

[12] M'Lay *v.* Thornton, 1868, 41 Jur. 68 ; Kincaid *v.* Quarrier, 1896, 23 R. 676.

[13] Smith *v.* Smith's Trs., 1890, 18 R. 241 ; Flannigan *v.* Bothwell Inspector, 1892, 19 R. 909.

heard in petitions presented in what were conceived to be the interests of children, although the Court did not always consider their petitions favourably.

(e) *Orphans.*—Where both parents are dead, the tutor-nominate or dative is entitled to custody unless such tutor is the child's nearest heir,[1] in which case the nearest cognate of the child will be preferred.[2]

All rights to the custody of orphans are subject to the control of the Court, which has for its guiding rule the welfare of the child.[3] Accordingly, where the nearest male agnate of orphans, who had been placed by their mother in a home where they were well cared for, petitioned the Court for their custody, the Court refused to disturb the arrangement.[4] The Court decided in the same way where the petition was at the instance of the paternal grandmother.[5] A Canadian guardian appointed by the mother of an orphan who was being looked after by his father's trustees in Scotland was refused the custody of the orphan until it was shown that it would be beneficial to the interests of the child.[6]

The nearest male agnate, although he has no power of custody of orphans, is entitled to intervene on their behalf,[7] and accordingly where the nearest male agnate petitioned for the custody of orphans who had been placed in a Protestant institution by their maternal grandmother, the Court granted the petition in order that they should be brought up in the religion of their father, who was a Roman Catholic.[8] In a later case, where the paternal uncle and nearest male agnate presented a petition, calling as respondent a tutor appointed by the mother and craving the Court to ordain the respondent to bring up children in the Roman Catholic religion, or otherwise to ordain him to deliver the children to the petitioner, the Court refused the petition, holding that as the mother had appointed the respondent, who was a Protestant, to be guardian, and had expressed a desire that the children should be brought up as Protestants, the guardian was entitled to give them a Protestant education.[9]

[1] Stair, i. 6. 15; Erskine's Inst. i. 7. 7; Chalmers *v.* Ld. Gadgirth, 1611, Mor. 16239; Gibson *v.* Dunnet, 1824, 3 S. 249 (N. E. 175).

[2] Bell's Prin., sec. 2083; Higgins *v.* Boyd, 1821, 1 S. 50 (N. E. 54).

[3] Morrison *v.* Quarrier, 1894, 21 R. 1071; Alexander *v.* M'Garrity, 1903, 5 F. 654.

[4] Kincaid *v.* Quarrier, 1896, 23 R. 676.

[5] Smith *v.* Smith's Trs., 1890, 18 R. 241; Flannigan *v.* Bothwell Inspector, 1892, 19 R. 909.

[6] Fenwick *v.* Hannah's Trs., 1893, 20 R. 848.

[7] Morrison *v.* Quarrier, 1894, 21 R. 889.

[8] Reilly *v.* Quarrier, 1895, 22 R. 879.

[9] Murray *v.* Maclay, 1903, 6 F. 160.

(f) *Interim Custody and Interim Interdict.*—A petition to the Inner House for *interim* custody pending an action of divorce or separation and aliment is quite competent, notwithstanding the right given to the Lord Ordinary by the 9th section of the Conjugal Rights (Scotland) Amendment Act, 1861.[1] Accordingly the Court has refused to sist a petition by a husband for the custody of his child until a decision was obtained in an action of separation and aliment raised by his wife against him.[2]

The Court may, pending the decision of a petition for the permanent custody of a child, order that the child be handed over to a third party,[3] or grant *interim* interdict against the respondent parting with the child,[4] or withdrawing it from Scotland.[5]

Petitions for *interim* orders for custody may be brought under sec. 5 of the Guardianship of Infants Act, 1886.[6]

(g) *Access.*—The Court may, on the application of the mother of any pupil (who may apply without next friend), make such order as it may think fit regarding the access to such pupil of either parent, having regard to the welfare of the pupil and to the conduct of the parents and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just.[7] Where made in the Court of Session, such application is made to either Division of said Court, and in vacation to the Lord Ordinary on the Bills.[8] A father may make a similar application.[9]

A father has no absolute right to refuse access by the mother to her children.[10] If the mother leaves her husband without good reason, it will depend upon circumstances whether she will obtain access.[11]

[1] M'Callum *v.* M'Callum, 1893, 20 R. 293 ; Stevenson *v.* Stevenson, 1894, 21 R. (H. L.) 96 ; Reid *v.* Reid, 1901, 3 F. 330.

[2] Beattie *v.* Beattie, 1883, 11 R. 85 ; *cp.* Brydon *v.* Brydon, 1907, 44 S. L. R. 860. See also Stevenson *v.* Stevenson, 1894, 21 R. (H. L.) 96.

[3] Marchetti *v.* Marchetti, 1901, 3 F. 888.

[4] Lumsden, Petr., 1882, 20 S. L. R. 240.

[5] Robertson, Petr., 1911, S. C. 1319.

[6] Mackenzie *v.* Mackenzie, 1887, 25 S. L. R. 183.

[7] Guardianship of Infants Act, 1886 (49 & 50 Vict. cap. 37), sec. 5. See also A. B. *v.* C. D., 1847, 10 D 229.

[8] Guardianship of Infants Act, 1886, sec. 9.

[9] Beedie *v.* Beedie, 1889, 16 R. 648.

[10] M'Iver *v.* M'Iver, 1859, 21 D. 1103.

[11] Lilley *v.* Lilley, 1877, 4 R. 397 ; Mackenzie *v.* Mackenzie, 1881, 8 R. 574 ; Bloe *v.* Bloe, 1882, 9 R. 894 ; Mackenzie *v.* Mackenzie, 1887, 25 S. L. R. 183 ; Mackellar *v.* Mackellar, 1898, 25 R. 883.

Where the mother has been divorced for adultery, the matter of access to the children is in general left in the hands of the father, and if he refuses access it is not likely that the Court will interfere,[1] especially if the mother is leading an immoral life.[2]

(3) Illegitimate Children.—Prior to the passing of the Custody of Children Act, 1891,[3] the legal right of a mother to the custody of her illegitimate child was absolute, and she could not by agreement deprive herself of the right to its custody.[4] This right died with her.[5] The father, when the child arrived at the age of seven years, might, however, make an offer to the mother to take charge of the child, and, if he was refused, could stop alimenting it,[6] except where a change of guardianship would be detrimental to the child.[7] Where the mother of the child was dead, the putative father could make such an offer to the custodier of the child irrespective of the latter's age, and if he were refused, could cease to pay aliment.[8] Where the putative father denied paternity, he had no such right when he made such an offer.[9]

Notwithstanding this legal right of the mother, the Court was always entitled, on application being made to it, to consider the interests of the child itself as of paramount importance, particularly its health, its future prospects, and its moral education. Accordingly, where the mother of an illegitimate child gave the child when young to a stranger to adopt, and it appeared that the mother had no settled place of abode, and no means of supporting the child, which was in a delicate state of health, the Court refused the mother's petition for custody.[10] In two early cases where the father of natural children had on his death left them his fortune, the Court took the children from the custody of the mother, who was unfitted to associate with, or educate, them.[11]

In selecting the guardian for the illegitimate child of a woman who had died, the Court gave effect to the wishes of the deceased mother.[12]

[1] Bowman *v.* Graham, 1883, 10 R. 1234 ; Ziegler *v.* Hamilton, 1908, 45 S. L. R. 525.
[2] Shirer *v.* Dixon, 1885, 12 R. 1013.
[3] 54 Vict. cap. 3.
[4] Macpherson *v.* Leishman, 1887, 14 R. 780.
[5] Brand *v.* Shaws, 1888, 15 R. 449.
[6] Corrie *v.* Adair, 1860, 22 D. 897 ; Simpson *v.* Cassels, 1865, 3 M. 396 ; Westlands *v.* Pirie, 1887, 14 R. 763.
[7] Brown *v.* Halbert, 1896, 23 R. 733.
[8] Brown *v.* Ferguson, 1912, S. C. 22.
[9] Caldwall *v.* Stewart, 1773, 5 Brown's Supp. 390 ; Watson *v.* Keay, 19th February 1825, F. C.; Grant *v.* Yuill, 1872, 10 M. 511.
[10] Sutherland *v.* Taylor, 1887, 15 R. 224.
[11] Whitson *v.* Speid, 1825, 4 S. 42 (N. E. 44) ; Baxter *v.* Forsyth, 1825, 4 S. 139 (N. E. 141).
[12] Brand *v.* Shaws, 1888, 16 R. 315.

By the *Custody of Children Act*, 1891, where the parent of a child applies by petition to the Court of Session for an order for the production of the child and the Court is of opinion that the parent has deserted or abandoned the child, or has otherwise conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may in its discretion decline to make the order.[1] It also enacts that where a parent has (*a*) abandoned or deserted his child, or (*b*) allowed his child to be brought up by another person at that person's expense, or by a parish council, for such a length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties, the Court will not make an order for the delivery of the child to the parent unless the parent has satisfied the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child.[2] Accordingly the Court has refused a petition by a mother for the custody of her child where it has been of opinion that its interests would be better cared for by the persons in whose custody it had been placed at an early age.[3]

The last-mentioned Act also provides that if at the date of the petition the child is being brought up by another person, or is boarded out by the parish council, the Court may in its discretion, if it order the child to be given up to the parent, further order that the parent shall pay to such person, or to such parish council, the whole of the costs properly incurred in bringing up the child, or such portion thereof as shall seem to the Court to be just and reasonable, having regard to all the circumstances of the case.[4] The Court in ordering the payment of such costs to be made refused to make such payments a condition of the delivery of the child.[5]

It is still a question whether the Custody of Children Act, 1891, applies to cases originating in the Sheriff Court and appealed.[6]

(4) Procedure.—The petition is printed and boxed in the ordinary way, and there is nothing particular to be noticed in procedure except where an inquiry into the averments made on the petition and answers (if any) is required. In some cases the proof is heard before one of the Judges of the Division, who reports it to the Division to which he belongs.[7] In other cases a remit is made to the Sheriff for that purpose.[8]

[1] Sec. 1.

[2] Sec. 3.

[3] Mackenzie *v.* Keillor, 1892, 19 R. 963. See also Campbell *v.* Croall, 1895, 22 R. 869; Mitchell *v.* Wright, 1905, 7 F. 568.

[4] Sec. 2.

[5] Kerrigan *v.* Hall, 1901, 4 F. 10. See also Soutar *v.* Carrie, 1894, 21 R. 1050.

[6] Mackenzie *v.* Keillor, 1892, 19 R. 963.

[7] 31 & 32 Vict. cap. 100, sec. 62.

[8] Mitchell *v.* Wright, 1905, 7 F. 568.

In a recent case the interlocutor remitting to the Sheriff was in the following terms:—

> The Lords, of consent, remit to the Sheriff-Substitute of Lanarkshire at Glasgow . . . to inquire into the circumstances set forth in the petition and answers; to take the evidence adduced by the parties; and to report *quam primum;* further, if he shall see cause to do so, to report upon the demeanour and credibility of the witnesses.[1]

A remit is sometimes made to a member of the Bar.[2]

Where any person deliberately refuses to obtemper the orders of the Court, the remedy depends upon whether the party is personally subject to the jurisdiction of the Court by being present within the territory or whether the party has only property within the territory. In the former case the Court may imprison for contempt;[3] in the latter case the Court may sequestrate the offending party's estate.[4] (See also *Petitions—Generally, supra*, p. 825 *et seq.*)

[1] Scott *v.* Scott, 1913, 2 S. L. T. 278.
[2] Campbell *v.* Croall, 1895, 22 R. 869.
[3] Muir *v.* Milligan, 1868, 6 M. 1125; Leys *v.* Leys, 1886, 13 R. 1223.
[4] Ross *v.* Ross, 1885, 12 R. 1351; Edgar *v.* Fisher's Trs., 1893, 21 R. 59.

CHAPTER VIII

PETITIONS FOR RECALL OR RESTRICTION OF ARRESTMENT AND INHIBITION

(1) ARRESTMENT.—(a) *Jurisdiction.*—Formerly petitions for the recall or restriction of arrestment could only be presented in the Inner House, but now it is competent to present them to the Lord Ordinary before whom any summons containing warrant of arrestment is enrolled, or before whom any action on the dependence whereof letters of arrestment have been executed has been or shall be enrolled.[1] The Inner House has still a co-ordinate jurisdiction in such cases.[2]

The Inner House has sole jurisdiction in cases where there is no process pending before the Outer House, or where the process is depending in the Inner House.[3]

The Lord Ordinary on the Bills during vacation may recall or restrict arrestments which have been used on a summons which is in dependence before a Lord Ordinary,[4] or on a summons which has not been called or enrolled.[5]

(b) *When Competent.*—The *common debtor* may always petition for the recall or restriction of arrestments as being nimious and oppressive.[6]

Whether or not *the arrestee* can present a petition depends upon whether what is arrested is (*a*) a claim for money or a debt; or (*b*) a corporeal moveable.

(*a*) Where what is arrested is *a claim for money or a debt*, an arrestee cannot competently petition for recall, but must await a furthcoming.[7]

(*b*) Where what is arrested is a *corporeal moveable*, and the arrestee can instantly show that the subject arrested is his own property, a petition for recall at his instance is competent.[8] If the arrestee

[1] Debtors (Scotland) Act, 1838 (1 & 2 Vict. cap. 114), sec. 20.

[2] Hart, Petr., 1864, 3 M. 336 ; *cp.* Gardiner *v.* Blackwood, 1866, 1 S. L. R. 136.

[3] Matthew *v.* Patullo, 1858, 21 D. 18 ; Latham *v.* Edinburgh and Glasgow Rly. Co., 1866, 4 M. 1084.

[4] 1 & 2 Vict. cap. 114, sec. 20.

[5] Morison *v.* Rennie, 1847, 10 D. 146.

[6] 1 & 2 Vict. cap. 114, sec. 20 ; Barclay, Curle & Co., Ltd. *v.* Sir James Laing & Sons, Ltd., 1908, S. C. 82, per Lord President Dunedin.

[7] Barclay, Curle & Co., Ltd., *supra*, per Lord Dunedin.

[8] Duffus and Lawson *v.* Mackay, 1857, 19 D. 430 ; Schultz *v.* Robinson and Niven, 1861, 24 D. 120 ; Grant *v.* Grant, 1867, 6 M. 155 ; Bildstein *v.* Bock & Co.,

admits that the subject arrested belongs to the common debtor, but at the same time says that he has certain claims upon it, such as a lien in respect of charges for repairs upon it, a petition at his instance is not competent, as he can make his claim in a furthcoming.[1] If, however, the arrestee makes no such admission, the fact that the corporeal moveable is in his hands is *primâ facie* evidence that it is his property, except in certain cases, such as where he is a warehouseman of goods, and accordingly if the arrester cannot make out a *primâ facie* case that the corporeal moveable arrested belongs to the common debtor, the arrestee may present a petition for recall of the arrestment. Where the arrester makes out such a *primâ facie* case, it is a matter of circumstances whether the arrestee can petition for recall.[2]

A person who is neither the arrestee nor the common debtor cannot petition for recall and raise questions as to ownership.[3]

Other persons interested may apply to the Inner House for recall of arrestments on caution. Thus, a mortgagee in possession of a ship was a successful petitioner in an application to the Inner House to recall upon caution the arrestment of the ship on the dependence of an action against the owner.[4]

In a recent action of damages by the owners of one steamer against the owners of another steamer with which it had been in collision, the pursuers arrested the defenders' vessel on the dependence, and when the defenders presented a petition for recall the pursuers pleaded that recall would prevent them from working out their maritime lien, but the Court, holding that an arrestment on dependence was not the appropriate form for such a purpose, recalled on caution.[5]

The undernoted cases illustrate the grounds on which arrestments will be recalled.[6]

1872, 9 S. L. R. 512; Barclay, Curle & Co., Ltd., *supra*, per Lord President Dunedin.

[1] Barclay, Curle & Co., Ltd. *v.* Sir James Laing & Sons, Ltd., 1908, S. C. 82, per Lord President Dunedin.

[2] Ibid.; 1908, S. C. (H. L.) 1.

[3] Vincent *v.* Chalmers & Co.'s Tr., 1877, 5 R. 43; Brand *v.* Kent, 1892, 20 R. 29; Barclay, Curle & Co., Ltd., *supra*, per Lord Dunedin; "Nordsoen" *v.* Mackie, Koth & Co., 1911, S. C. 172.

[4] Stewart *v.* Macbeth and Gray, 1882, 10 R. 382. See also M'Phedron and Currie *v.* M'Callum, 1888, 16 R. 45.

[5] Clan Line Steamers, Ltd. *v.* Earl of Douglas Steamship Co., Ltd., 1913, S. C. 967.

[6] Earl of Stair *v.* Agnew, 1823, 2 S. 107 (N. E. 100); Jolly *v.* Grahame, 1830, 8 S. 361; Mylne *v.* Blackwood, 1832, 10 S. 430; Hopetoun's Trs. *v.* Johnstone, 1838, 1 D. 138; Wilson *v.* Gloag, 1840, 2 D. 1233; Seton *v.* Hawkins, 1842, 5 D. 396; Paul *v.* Henderson, 1852, 24 Jur. 310; Hamilton *v.* Bruce's Trs., 1857, 19 D. 745; Neilson *v.* Stewart, 1862, 24 D. 956; Cullen *v.* Buchanan, 1862, 24 D. 1280; Rintoul

(c) *At what Stage Competent.*—In ordinary actions a petition under the Debtors (Scotland) Act, 1838, for restriction or recall of arrestment should only be presented to the Judge before whom the cause depends after defences have been lodged, unless the matter is very urgent, in which case the application may be made by a statement at the bar.[1]

(2) INHIBITION.—The recall of an inhibition cannot be obtained by means of an ordinary action; it must be by petition.[2]

Formerly a petition for recall could only be presented to the Inner House,[3] but by the Titles to Land Consolidation (Scotland) Act, 1868,[4] it is competent to the Lord Ordinary, before whom any summons containing warrant for inhibition is enrolled as Judge therein, or before whom any action on the dependence whereof letters of inhibition have been executed, has been or shall be enrolled as Judge therein, and to the Lord Ordinary on the Bills in time of vacation, on the application of the defender or debtor by petition duly intimated to the creditor or pursuer, to which answers may be ordered, to recall or restrict such inhibition on caution, or without caution, and dispose of the question of expenses, as shall appear just.

Where an inhibition has not been recorded, a suspension to prevent it being put upon record is not competent;[5] the proper procedure is by petition for recall.[6]

The petition is usually at the instance of the defender, but it may be presented by the pursuer.[7]

A defender who has been successful in an action is not bound to be at the expense of extracting the decree so as to get the inhibition scored; he may present a petition for recall.[8]

The undernoted cases illustrate the grounds upon which inhibition will be recalled.[9] (See *Jurisdiction, supra,* pp. 95, 96.)

& Co. *v.* Bannatyne, 1862, 1 M. 137; Macfarlane *v.* Sanderson, 1868, 40 Jur. 189; Dobbie, Petr., 1871, 8 S. L. R. 523; Macdonald *v.* Stewart's Trs., 1871, 9 S. L. R. 72; Wilson *v.* Mackie, 1875, 3 R. 18; Symington *v.* Symington, 1875, 3 R. 205; James *v.* James, 1886, 13 R. 1153; Millar *v.* Millar, 1907, 15 S. L. T. 205.

[1] Buchanan *v.* Black, 1882, 9 R. 926, per Lord Rutherfurd-Clark, pp. 927, 928.

[2] Baring Bros. & Co. *v.* Wight, 1824, 2 S. 727 (N. E. 609).

[3] Greig, etc., Petrs., 1866, 4 M. 1103.

[4] 31 & 32 Vict. cap. 101, sec. 158.

[5] Craig *v.* Anderson, 1776, 5 Brown's Supp. 482.

[6] Russell *v.* Johnston, 1827, 6 S. 255; Dove *v.* Henderson, 1865, 3 M. 339.

[7] Caledonian Iron Co. *v.* Clyne, 1831, 10 S. 141.

[8] Jack *v.* Dalrymple, 1828, 7 S. 219; Sheriff *v.* Balmer, 1842, 4 D. 453.

[9] Hamilton *v.* Fullerton, 1823, 2 S. 264 (N. E. 235); 1825, 1 W. & S. 531; Turnbull's Tr. *v.* Turnbulls, 1823, 2 S. 459 (N. E. 411); Muckarsie *v.* Williamson, 1824, 2 S. 771 (N. E. 640); Pedie *v.* Stewart, 1830, 8 S. 710; Hamilton *v.* Bruce's

(3) Procedure.—Procedure differs according to the circumstances in which the petition is presented.

If the petition is in respect of a process depending in the Inner House, or of a process not depending in the Outer House, the petition is presented to the Inner House. It is addressed to the Court, and should be printed and boxed, and the further procedure does not differ in any material respect from an ordinary Inner House petition.

If the petition is in respect of a process depending in the Outer House and is presented to the Lord Ordinary before whom the process is or shall be enrolled, the petition is addressed to such Lord Ordinary.[1] It need not be printed and boxed, although in practice this is customary. The subsequent procedure does not differ in any material respect from an ordinary Outer House petition. It must be intimated to the creditor unless in exceptional circumstances,[2] and answers may be ordered and the Lord Ordinary may recall or restrict the arrestment or inhibition on caution, or without caution, and dispose of the question of expenses as shall seem just.[3]

(4) Motion to Recall or Restrict.—It has been held that inhibitions may be recalled in the Outer House by a simple motion,[4] and an opinion has been expressed that in cases of urgency a statement at the bar would be sufficient to have arrestment recalled.[5] In practice, recall or restriction of arrestment or inhibition used in an action enrolled in the Outer House is granted by simple motion.

(5) Reclaiming.—The judgment of a Lord Ordinary in a petition for recall or restriction of arrestment or inhibition is subject to review of the Inner House by a reclaiming note duly lodged within ten days from the date thereof.[3] (See *supra*, p. 844.)

(6) Expenses.—See Maclaren on Expenses, p. 117 *et seq.*[6]

Trs., 1857, 19 D. 745; Cullen *v.* Buchanan, 1862, 24 D. 1280; Weir *v.* Otto, 1870, 8 M. 1070; Ketchen *v.* Grant, 1871, 9 M. 966; Stevens *v.* Campbell, 1873, 11 M. 772; Symington *v.* Symington, 1875, 3 R. 205; Burns *v.* Burns, 1879, 7 R. 355; Morton *v.* Smith, 1902, 9 S. L. T. 396.

[1] Gardiner *v.* Blackwood, 1866, 1 S. L. R. 136.

[2] Mellis, Petr., 1872, 9 S. L. R. 630.

[3] 1 & 2 Vict. cap. 114, sec. 20; 31 & 32 Vict. cap. 101, sec. 158.

[4] Barbour's Trs. *v.* Davidsons, 1878, 15 S. L. R. 438, and unreported cases therein referred to.

[5] Buchanan *v.* Black, 1882, 9 R. 926, per Lord Young, p. 928.

[6] See also Weir *v.* Buchanan, 1876, 4 R. 8; Jack *v.* M'Caig, 1880, 7 R. 465.

CHAPTER IX

PETITIONS (1) BY A DESERTED WIFE FOR A PROTECTION ORDER; (2) FOR RECALL OF A PROTECTION ORDER; AND (3) BY A MARRIED WOMAN FOR AUTHORITY TO GRANT DEED WITHOUT HER HUSBAND'S CONSENT

(1) By a Deserted Wife for a Protection Order.—(a) *Generally.*—Although it is still competent, under the Conjugal Rights (Scotland) Amendment Act, 1861, for a deserted wife to apply by petition for a protection order, such petitions are practically unknown in the Court of Session. The reason for this is that the provisions of the Married Women's Property (Scotland) Act, 1877, exclude the *jus mariti* and right of administration of the husband from the wife's earnings, and that the provisions of the Married Women's Property (Scotland) Act, 1881, exclude the *jus mariti* from the wife's whole moveable estate in marriages after the passing of the last-mentioned Act, and in marriages before the said Act from property acquired thereafter, except where the husband has, before the passing of the Act, by irrevocable deed made a reasonable provision for his wife in the event of her surviving him. Consequently there are very few cases in which the necessity for a protection order can possibly arise. (See *Petitions —Generally, supra*, p. 825 *et seq.*)

(b) *Where Competent.*—By the Conjugal Rights (Scotland) Amendment Act, 1861,[1] a wife deserted by her husband may, at any time after her desertion, apply by petition to any Lord Ordinary of the Court of Session, or in time of vacation to the Lord Ordinary on the Bills, for an order to protect property which she has acquired or may acquire by her own industry, and property which she has succeeded to or may succeed to or acquire right to after such desertion, against her husband or his creditors, or any person claiming in or through his right.

(c) *Intimation, Service, and Induciæ.*—The petition is intimated in the Minute-Book and served upon the husband personally on an *induciæ* of eight days, if within Scotland; and edictally on an *induciæ* of twenty-one days, if furth of Scotland.[1]

[1] 24 & 25 Vict. cap. 86, sec. 1.

(d) *Answers.*—The husband, or any creditor of the husband, or any other person claiming in or through his right, has a right to lodge answers.[1] The only relevant answers to a petition for a protection order are (1) that the respondent is not in desertion;[2] (2) that he has a reasonable cause for living apart from the petitioner; and (3) an offer made in good faith by the husband to resume the society of his wife.[3] In order that the husband may be in desertion it is not necessary that it should be wilful and malicious. Desertion in the sense of the Act simply means that a husband has left his wife without providing for her maintenance and without reasonable cause of absence.[4]

What is "reasonable cause" is not easy to define. "The necessities of trade or business may carry a man away from home so suddenly that he may have to leave at an hour's or a moment's notice, without time to provide for his wife before starting. But that would not be desertion without reasonable cause. But when you come to consider reasonable cause arising from the conduct of the wife, the matter is more delicate. I am not clear that it can be affirmed that any conduct on the part of the wife will justify desertion by the husband that would not ground an action of separation, or form a defence to an action of adherence."[3]

(e) *Proof.*—Evidence of desertion must be given whether answers have been lodged or not.[5] Where the proof is taken by the Lord Ordinary himself, he may either write the evidence with his own hand, or dictate it to a clerk, or have it taken down by an expert shorthand writer. The Lord Ordinary may, however, on special cause shown, grant a commission to take the proof elsewhere than in Edinburgh.[1]

(f) *Interlocutor and Intimation thereof.*—The Lord Ordinary, if satisfied after proof of the fact of desertion and that the same was without reasonable cause, may pronounce an interlocutor giving protection to the wife, and intimation of such interlocutor must be made in one or more newspapers published within the county within which the wife is resident.[1]

(g) *When Interlocutor takes Effect.*—The interlocutor granting protection takes effect when intimated as aforesaid, unless the Lord Ordinary, either at the time of the pronouncing thereof, or within forty-eight hours thereafter, order that his interlocutor shall not take

[1] 24 & 25 Vict. cap. 86, sec. 1.

[2] Kennedy *v.* Kennedy, 1866, 1 S. L. R. 134.

[3] Chalmers *v.* Chalmers, 1868, 6 M. 547, per Lord President Inglis, p. 550.

[4] Turnbull, Petr., 1864, 2 M. 402, per Lord President M'Neill, p. 405; Chalmers *v.* Chalmers, 1868, 6 M. 547, per Lord President Inglis, p. 549.

[5] Walker, Petr., 1862, 24 D. 300.

effect until the advising of a reclaiming note, or such other period as he may think fit.[1]

(h) *How Long Operative.*—Such order of protection shall, when there has been appearance by the husband, continue operative until such time as the wife shall again cohabit with her husband, or until the Lord Ordinary, upon a petition by the husband, shall be satisfied that he has ceased from his desertion and cohabits with his wife.[1]

(i) *Effect of Interlocutor.*—After an interlocutor of protection is pronounced and duly intimated, the property of the wife as aforesaid shall belong to her as if she were unmarried: Provided always, that such protection shall not extend to property acquired by the wife of which the husband or his assignee or disponee has before the date of presenting said petition obtained full and complete lawful possession, nor shall such protection affect the right of any creditor of the husband over property which he has before the date thereof duly attached by arrestment, followed by a decree of furthcoming, or which such creditor has before the said date duly poinded, and of which he has carried through and reported a sale.[2]

It has been held that "complete and lawful possession" in the sense of the Conjugal Rights Act, 1861, sec. 16, means something more than a good title to possess, and implies not control merely but actual possession.[3]

An order of protection has the effect of a decree of separation *a mensa et thoro* in regard to the property, rights, and obligations of the husband and of the wife, and in regard to the wife's capacity to sue and be sued.[4] "Rights" is not here used as applying to all the rights of a husband, but only to patrimonial rights.[5]

(j) *Review.*—All interlocutors of the Lord Ordinary may be brought under review of either Division by reclaiming note lodged and boxed within twenty-one days of pronouncing such interlocutor, if in session, and if the said twenty-one days expire in vacation, by lodging in the Bill Chamber a reclaiming note and boxing the same at the first box day after the expiry of said twenty-one days.[1]

(2) For Recall of a Protection Order.—(a) *Where Answers were Not Lodged in the Original Petition.*—It shall be lawful for the husband, or any creditor or other person claiming in or through his right, if such creditor, husband, or other person have not lodged answers to a petition at the instance of the wife for a protection order, to apply by petition to

[1] 24 & 25 Vict. cap. 86, sec. 3.
[2] Ibid., sec. 4.
[3] Clark *v.* Clark, 1881, 8 R. 723.
[4] 24 & 25 Vict. cap. 86, sec. 5.
[5] Walker, Petr., 1862, 24 D. 300.

the Lord Ordinary by whom such order was made for the recall thereof; and the Lord Ordinary shall appoint such petition to be answered by the wife, and thereafter dispose of the application as he shall think just. The interlocutor which he pronounces is published in the same manner as the interlocutor in the petition for a protection order.[1] The other procedure is similar to the procedure in the original petition.

If the prayer for recall is granted, the wife is placed in the position in which she stood prior to the protection order, "but such recall shall not affect any right or interest onerously and *bonâ fide* acquired by any third party from the wife before said recall."[1] (See *Petitions—Generally, supra*, p. 825 *et seq.*)

(b) *Where the Husband has Made Appearance in the Original Petition.*—A petition for recall may be presented by a husband who has made appearance in the original petition. In such a petition the husband must satisfy the Lord Ordinary that he has ceased from his desertion and is cohabiting with his wife, and the Lord Ordinary may require the husband to find security for such period as he may appoint that he shall continue to cohabit with her. Upon being so satisfied and security found, if required, the order for protection will be recalled.[2]

"Such recall shall not affect any right or interest acquired by the wife while the said order subsisted, which right and interest shall remain vested in her, exclusive of the husband's *jus mariti* and right of administration; nor shall it affect any right or interest acquired by a third party during such period, or any third party through or from her while the said order subsisted; and until such order be recalled, it shall not be competent for the husband to institute an action of adherence against his wife."[2]

Publication of the recall is made in the same way as the publication of the order for protection.[2]

(3) By a Married Woman for Authority to Grant Deed Without her Husband's Consent.—Where a wife is deserted by her husband, or is living apart from him with his consent, a Judge of the Court of Session or Sheriff Court, on petition addressed to the Court, may dispense with the husband's consent to any deed relating to her estate.[3] This petition may be presented to any Outer House Judge.[4] It sets forth the circumstances under which the consent of the husband is

[1] 24 & 25 Vict. cap. 86, sec. 2.

[2] Ibid., sec. 3.

[3] Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. cap. 21), sec. 5.

[4] Ibid.; Niven, Petr., 1883, 20 S. L. R. 587; Gibson, Petr., 1893, 1 S. L. T. 323; M'Lennan *v.* M'Lennan, 1908, S. C. 164.

asked to be dispensed with and craves for intimation and service upon the husband.

Answers may be lodged to the effect (1) that there was no desertion; or (2) that the separation was not voluntary.[1]

In general there must be a proof of the petitioner's averments whether answers have been lodged or not,[2] and proof may be taken on commission.[3] Where answers have been lodged the petitioner is entitled to ask for a judgment upon the facts as disclosed by the respondent without the necessity of a proof simply in order that the respondent may put in the mouth of witnesses what he has put in his answers.[1]

It is no bar to a wife getting a dispensation that she is living in adultery apart from her husband, at least where no answers are lodged;[3] or that the husband, although *de facto* living apart from his wife, has repeatedly protested against her continuing to do so.[1]

In a petition to the *nobile officium* of the Court by a married woman whose husband was confined in a lunatic asylum, the husband's consent was dispensed with to a bond and disposition in security over a heritable property belonging to her or to any disposition or other deed of transfer of the property.[4]

[1] M'Lennan *v.* M'Lennan, 1908, S. C. 164.
[2] Niven, Petr., 1883, 20 S. L. R. 587; Gibson, Petr., 1893, 1 S. L. T. 323.
[3] Niven, Petr., 1883, 20 S. L. R. 587.
[4] Dunnachie, Petr., 1910, S. C. 115.

CHAPTER X

PETITIONS UNDER THE PRESUMPTION OF LIFE ACT

(1) JURISDICTION.—The Court of Session has exclusive jurisdiction where the total amount or value of the estate in Scotland, the right to which depends upon the death of an absent person, exceeds £500 sterling.[1] The petition is brought in the first instance before any one of the Lords Ordinary in the Outer House, and the power of the Lord Ordinary before whom the petition is enrolled may be exercised by the Lord Ordinary on the Bills during vacation.[1]

(2) FOR A FINDING OF DEATH.—(a) *Where Competent.*—Where a person has disappeared and has not been heard of for seven years or upwards, the Court may, on a petition being presented and after such procedure and inquiry by advertisement or otherwise as it may direct, find that such person has disappeared, and find what was the date on which he was last known to be alive, and find on the facts proved or admitted that he died at some specified date within seven years after the date on which he was last known to be alive, and, where there is no sufficient evidence that he died at any definite date, find that he shall be presumed to have died exactly seven years after the date on which he was last known to be alive.[2]

Where it is desired to presume a person to have died earlier than seven years after his being last heard of, there must be such proof of death at such date as to overcome the presumption of life under the old law.[3]

(b) *Where Incompetent.*—It is not competent to use a petition for a finding of death under the Presumption of Life Limitation (Scotland) Act, 1891, in order to support a claim against the insurers under a policy of assurance upon the life of any person who has disappeared.[4]

(c) *No Presumption Regarding Marriage or Issue.*—There is no provision under the Presumption of Life Act, 1891, whereby it may be held that the absent person whose death has been declared died

[1] Presumption of Life Limitation (Scotland) Act, 1891 (54 & 55 Vict. cap. 29), sec. 12 (1).

[2] Ibid., sec. 3.

[3] Williamson *v.* Williamson, 1886, 14 R. 226.

[4] 54 & 55 Vict. cap. 29, sec. 11.

without being married and without leaving issue.[1] This point, however, may be competently raised and decided in a subsequent multiplepoinding.[1]

(d) *Who may Petition.*—Any person entitled to succeed to an estate on the death of a person who has disappeared and has not been heard of for seven years or upwards may petition, as may also any person entitled to an estate the transmission of which to the petitioner depends on the death of such absent person, or the fiar of any estate burdened with a liferent in favour of such absent person.[2] The purchaser of a policy of insurance on the life of a person who has disappeared has no such right.[3]

Any number of persons may be conjoined in one petition relating to the estate of the same absent person, and any person having a limited right to the estate of an absent person may appear as petitioner to the effect of having such right made effectual subject to the provisions of the Presumption of Life Act, 1891.[4]

New petitioners may be sisted.[5]

(e) *Effect of Judgment Granting the Prayer.*—The person presenting the petition and any other person entitled to succeed to any estate on the death of the person who has disappeared, or entitled to any estate the transmission of which, or the disburdening of which from a liferent, depends on the death of the person who has disappeared, may make up titles to and enter into possession of and sell or dispose of or burden such estate as if the said person had actually died at the date on which the Court had found that he is proved or presumed to have died:[2] Provided always, that nothing in the Presumption of Life Act, 1891, shall entitle any person to any part of the moveable succession of a person who has disappeared if the latter was not a domiciled Scotsman at the date at which he is proved or presumed to have died.[2]

The person who has disappeared, or any person deriving right from him to any estate preferably to the person obtaining a judgment in his favour under the Presumption of Life Act, 1891, may demand and receive back the estate or its value from the person found entitled to it by said judgment, subject to a claim for meliorations and without any income which may have accrued from said estate before notice of

[1] Davidson *v.* Ewen, 1895, 3 S. L. T. 162; Shepherd's Trs. *v.* Brown, 1902, 9 S. L. T. 487. See also Peterhead School Board *v.* Yule's Trs., reported in article in Scots Law Times, vol. i. p. 67.

[2] 54 & 55 Vict. cap. 29, sec. 3.

[3] Murray *v.* Chalmers, 1913, 1 S. L. T. 223.

[4] 54 & 55 Vict. cap. 29, sec. 9.

[5] Morrison, etc., Petrs., 1882, 19 S. L. R. 442; Thomson, etc., Petrs., 1882, 19 S. L. R. 738.

the demand.[1] This right expires at the end of thirteen years from the date of making up a title, or obtaining possession where a title does not admit of being made up by registration in a public register.[2]

(3) For Authority to Sell.—When one of two or more *pro indiviso* proprietors of heritable estate in Scotland has disappeared and has not been heard of for seven years or upwards, and the other *pro indiviso* proprietor or proprietors shall desire to sell the said estate, it shall be competent to such other *pro indiviso* proprietor or proprietors to present a petition to the Court setting forth the said facts, and after such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner or petitioners to sell the said estate by public roup or private bargain, as the Court may think fit.[3]

The title granted by the *pro indiviso* proprietor or proprietors under such authority shall be as good and valid to the purchaser as if the absent person had been a party to the sale and conveyance, and in the case of such a sale the share of the price belonging to the absent person shall be paid into bank for behoof of such absent person and shall be deemed to be heritable estate of the said absent person, and, as such, shall be subject to the provisions of the Presumption of Life Act, 1891.[3]

(4) Procedure.—As regards procedure, disposal, and review, such petitions are subject to the same rules and regulations as are enacted with respect to petitions coming before the Junior Lord Ordinary in virtue of the Distribution of Business Act, 1857, and any Act amending the same.[4] (See Maclaren's Bill Chamber Practice, p. 94 *et seq.*)

Advertisement may be dispensed with where the whole circumstances raised by the petition have already been advertised in connection with a multiplepoinding.[5]

A new petition is competent where new facts regarding the absent person emerge after the finding in a previous petition.[6]

A proof is always necessary, and may be before the Lord Ordinary,[7] or on commission.[8] With regard to what evidence is necessary, an examination of the undernoted case may be useful.[9] (See *Petitions—Generally, supra*, p. 825 *et seq.*)

[1] 54 & 55 Vict. cap. 29, sec. 6.
[2] Ibid., sec. 7.
[3] Ibid., sec. 4.
[4] Ibid., sec. 12 (1).
[5] Bell, Petr., 1899, 7 S. L. T. 43. See also Davidson, etc. *v.* Ewen, 1895, 3 S. L. T. 162.
[6] Andrews, Petr., 1901, 9 S. L. T. 117.
[7] Dear and Lumgair, 1905, 12 S. L. T. 862.
[8] Williamson *v.* Williamson, 1886. 14 R. 226.
[9] Dear and Lumgair, 1906, 13 S. L. T. 850.

CHAPTER XI

PETITIONS UNDER THE FINANCE ACT, 1894

WHERE the value of the property in respect of which a dispute arises under this Act[1] exceeds £10,000, the decision or claim of the commissioners may be reviewed by petition (marked for one of the Divisions of Court) to the Lord Ordinary in Exchequer causes, or, in his absence or inability, to the Lord Ordinary on the Bills.

The procedure is fully set forth in the Codifying Act of Sederunt, 1913, Book C, Chap. viii.

[1] 57 & 58 Vict. cap. 30, sec. 10.

CHAPTER XII

PETITIONS UNDER THE PATENTS AND DESIGNS ACT, 1907

The procedure in petitions for extension of patents under sec. 18 of this Act,[1] and for review of the decision of the Comptroller under secs. 20, 26, or 27, is fully set forth in the Codifying Act of Sederunt, 1913, Book C, Chap. vi.

Where an extension of letters-patent was refused by the Lord Ordinary, it was held that his decision was final.[2]

[1] 7 Edw. VII. cap. 29.

[2] Lawrence *v.* Comptroller-General of Patents, 1910, S. C. 683.

CHAPTER XIII

PETITION AND COMPLAINT

(1) Generally.—There are some matters of a more or less criminal nature in which the Court of Session has jurisdiction, such as malversation, misconduct, or gross neglect of Inferior Judges and officers of Court, or where the authority of the Court has been treated with contempt or defied, and in these matters the usual procedure is by petition and complaint.

(2) Misconduct of Inferior Judges and Officers of Court.—The procedure by which malversation, misconduct, or gross neglect on the part of such persons is brought to the notice of the Court has varied.

In the case of clerks, extractors, etc., of the Supreme Court the procedure is by petition and complaint.[1]

With regard to judicial factors, proceedings have usually arisen on a report by the Accountant of Court, followed by proceedings resembling those of a petition and complaint;[2] but a petition and complaint may be presented,[3] and even a simple petition.[4]

The only case against a tutor-at-law has been by way of petition and complaint.[5]

Clerks of Inferior Courts are proceeded against by petition and complaint.[6]

Judges of Inferior Courts other than Sheriffs or salaried Sheriff-Substitutes are usually proceeded against by summary complaint,[7] and law agents and notaries public by petition to remove.[8] Sheriffs and salaried Sheriff-Substitutes are removed by the Secretary for Scotland

[1] Lang *v.* Lang, 1831, 9 S. 748; Lord Advocate *v.* Bruce, 1837, 15 S. 1184.

[2] Accountant of Court *v.* Jaffray, 1851, 14 D. 292; Accountant of Court *v.* M'Allister, 1853, 16 D. 301; Accountant of Court *v.* Wilkie, 1856, 18 D. 793.

[3] Mackenzie *v.* Gibson, 1845, 7 D. 560.

[4] Marshall *v.* Chisholm, 1901, 3 F. 642.

[5] Butchart *v.* Butchart, 1851, 13 D. 1258.

[6] Sellar *v.* Duff, 11th February 1809, F. C.; Syme *v.* Murray, 19th January 1810, F. C.; Campbell *v.* M'Cowan, 1824, 3 S. 246 (N. E. 173); M'Farlanes *v.* A. B., 1830, 5 S. 537 (N. E. 504); affd. 4 W. & S. 123; H.M. Advocate *v.* Suter, 1836, 14 S. 622.

[7] Angus, Complainer, 1751, Mor. 14976; Duffs *v.* Sutherland, 1793, Mor. 14981; Anderson *v.* Spence, 1830, 8 S. 820.

[8] Incorporated Society of Law Agents *v.* Laing, 1893, 21 R. 267; Glasgow Procurators *v.* Colquhoun, 1900, 2 F. 1192.

upon a report presented at his instance by the Lord President of the Court of Session and the Lord Justice-Clerk for the time being.[1]

Trustees and commissioners in sequestrations are sometimes removed by petition and complaint,[2] sometimes on a report by the Accountant of Court,[3] and sometimes by petitions of creditors.[4] The undernoted additional cases may be referred to as examples of removal in such cases.[5]

The Local Government Board may apply by summary petition under the Public Health (Scotland) Act, 1897,[6] or under the Poor Law Act,[7] where a local authority refuses or neglects to do what is by law required of them. The procedure is by petition and complaint.

A petition and complaint is not a competent process for the recovery of documents,[8] or for recovery of a sum of money.[9]

(3) Breach of Interdict.—Where a person defies, or treats with contempt, the authority of the Court by breach of interdict, the proper method of bringing the matter before the Court is by petition and complaint.[10] The *de facto* knowledge of an interdict is sufficient, and may be proved by parole evidence.[11] Intention to commit a breach of interdict is not a sufficient ground for a petition and complaint.[12] A petition and complaint is usually only good against persons actually named in the interdict,[13] but where a person interdicted assumes a partner, and the new partnership proceeds to do what the original partner was interdicted from doing, the petition and complaint may be

[1] Sheriff Courts (Scotland) Act, 1907, sec. 13.

[2] Bankruptcy (Scotland) Act, 1913, secs. 157, 165. See also Sanders *v.* Kibble, 1823, 2 S. 196 (N. E. 173); Aytoun *v.* Macculloch, 1824, 3 S. 80 (N. E. 54); Baillie *v.* Anderson, 1844, 6 D. 1376; Paterson *v.* Robson, 1872, 11 M. 76.

[3] Bankruptcy (Scotland) Act, 1913, sec. 158. See also Accountant in Bankruptcy *v.* Gow, 1862, 1 M. 124; Accountant in Bankruptcy *v.* Peacock's Tr., 1867, 6 M. 158; Lang *v.* Hally, 1870, 8 M. 753; Accountant in Bankruptcy *v.* Davie, 1884, 11 R. 1013.

[4] Bankruptcy (Scotland) Act, 1913, sec. 71. See also Brown *v.* Burt, 1848, 11 D. 338; *cp.* Henderson *v.* Bulley, 1849, 11 D. 1470.

[5] Ewing *v.* Laurie, 1824, 3 S. 234 (N. E. 164); affd. 2 W. & S. 19; Burton *v.* Eadie, 1831, 9 S. 573; Lowden *v.* Christie, 1835, 13 S. 389; Richmond & Co. *v.* M'Phun, 1854, 16 D. 546.

[6] 60 & 61 Vict. cap. 38, sec. 147; Board of Supervision *v.* Local Authority of Montrose, 1872, 11 M. 170; Board of Supervision *v.* Local Authority of Pittenweem, 1874, 1 R. 1124.

[7] 8 & 9 Vict. cap. 83, sec. 87; Board of Supervision *v.* Parochial Board of Glasgow, 1850, 12 D. 627; Board of Supervision *v.* Parish of Dull, 1855, 17 D. 827.

[8] White *v.* Mags. of Dunbar, 1915, S. C. 395.

[9] Bell *v.* Jameson, 1848, 10 D. 1413.

[10] For other contempts of Court, see *supra*, p. 131 *et seq.*

[11] Welsh *v.* Stewart, 1818, 1 Murray, 403-5; Clark *v.* Stirling, 1839, 1 D. 955.

[12] Hunter *v.* Wilson, 1848, 10 D. 893.

[13] Pattison *v.* Fitzgerald, 1823, 2 S. 536 (N. E. 468).

presented against the new partnership without the necessity of a new interdict.[1] Where there is an interdict for a specific period and the interdict is thereafter continued, and a breach of the renewed interdict has taken place, it has been held that personal intimation of the renewal of the interdict to the respondent is unnecessary.[2]

The *sentence* for breach of interdict varies according to the gravity of the offence. In cases where there has been no intention wilfully to disregard the order of the Court, but where the breach has been committed through inadvertence, the Court has ordered the respondent to pay the expenses of the petition and complaint,[3] or a small pecuniary fine.[4] Where more serious, the Court has imposed a fine, and ordained the respondent to find security not to repeat the offence;[5] or has ordained the respondent to restore matters to their original condition at his own cost, and to pay all expenses.[6] If, however, the breach is wilful, the Court will award imprisonment.[7] It may also award imprisonment to the respondent and ordain him to pay the expenses of the proceedings, and authorise the petitioner to restore matters to their original condition at the expense of the respondent.[8] For other forms of contempt of Court, see *supra*, pp. 134, 135.

(4) Procedure.—A petition and complaint is presented to the Inner House,[9] and, being of the nature of a criminal proceeding, the concurrence of the Lord Advocate is necessary.[10] A conclusion for a sum of money to the complainer without punishment is incompetent.[11] The petition and complaint is boxed to the Inner House and appears on the Single Bills, when an order is taken for service upon the respondent and for answers in writing within fifteen days, and usually for the appearance of the respondent at the bar. The case may then be remitted to the Junior Lord Ordinary or any other Lord Ordinary if it shall seem expedient to do so. The Division may, however, decide to hear the

[1] Dudgeon *v.* Thomson & Co., 1876, 3 R. 604; 1877, 3 App. Cas. 34; Harvie *v.* Ross, 1886, 14 R. 71.

[2] Henderson *v.* Maclellan, 1874, 1 R. 920.

[3] Anderson *v.* Connacher, 1850, 13 D. 405; Fraser's Trs. *v.* Cran, 1879, 6 R. 451.

[4] Taylor *v.* Kilgour, 1844, 17 Jur. 89.

[5] Lord Gray *v.* Petrie, 1848, 10 D. 718.

[6] Lord Blantyre *v.* Dunn, 1845, 7 D. 299.

[7] Macleod's Trs. *v.* Macpherson, 1883, 10 R. 792; Mackenzie *v.* Coulthart, 1889, 16 R. 1127; Boswell's Trs. *v.* Pearson, 1885, 24 S. L. R. 32.

[8] Earl of Galloway *v.* Nixon, 1877, 5 R. 28.

[9] Ramage *v.* Steel, 1843, 6 D. 146; M'Pherson *v.* Thorne, 1844, 6 D. 422; M'Neill *v.* Scott, 1866, 4 M. 608.

[10] Duke of Northumberland *v.* Harris, 1832, 10 S. 366; Usher *v.* Mags. of Edinburgh, 1839, 1 D. 639; Mackenzie *v.* Thomson, 1843, 5 D. 771; Bell *v.* Gow, 1862, 1 M. 84; Paterson *v.* Robson, 1872, 11 M. 76.

[11] Bell *v.* Jameson, 1848, 10 D. 1413.

petition itself without any remit to a Lord Ordinary.[1] After the time allowed for answers, or after answers have been given in, the petition may be enrolled for further procedure before the Lord Ordinary or the Division as the case may be. If there is a plea to the relevancy, this must first be disposed of.[2] If the averments in the petition are denied, a proof is led before the Lord Ordinary[3] or one of the Judges of the Division,[4] or on commission.[5] Notwithstanding the provision in sec. 86 of the Act of Sederunt, 11th July 1828, a jury trial is not usually allowed.[3] The proof is reported to the Division, and counsel are heard, and a decision arrived at. If answers are not lodged, the respondent will be ordained to appear personally at the bar, and on cause shown may be allowed further time to answer. When counsel are heard upon the proof, or if the respondent stands confessed by no answers being lodged, the respondent must appear personally at the bar. If the respondent fails to attend, an interlocutor will be issued appointing him personally to attend under certification that if he do not obtemper the order a warrant will be issued for his apprehension, and should he still fail to appear, a warrant for his apprehension will be issued.[6] The personal presence of the respondent at the proof or sentence has been dispensed with in particular cases. In one case[7] where the Court only inflicted a fine the respondents were not present. In another case[8] where there was no fine imposed, but expenses were awarded against the respondents, it was not thought necessary for them to be personally present. In a later case,[9] as the respondent had been ill and the complainer did not insist upon his presence, he was fined a small sum in absence; and it has now been finally decided that the presence of the respondent is unnecessary.[10]

[1] A. S., 11th July 1828, secs. 83, 89.

[2] Henderson *v.* Maclellan, 1874, 1 R. 920.

[3] Dudgeon *v.* Thomson and Donaldson, 1876, 3 R. 974.

[4] Macleod's Trs. *v.* Macpherson, 1883, 10 R. 792; Welsbach Incandescent Gas Light Co., Ltd. *v.* M'Mann, 1901, 4 F. 395.

[5] Menzies *v.* Macdonald, 1864, 2 M. 652; Mackenzie *v.* Coulthart, 1889, 16 R. 1127.

[6] Duke of Atholl *v.* Robertson, 1872, 10 M. 298; Welsbach Incandescent Gas Light Co., Ltd. *v.* M'Mann, 1901, 4 F. 395.

[7] Hamilton *v.* Caledonian Rly. Co., 1847, 10 D. 41.

[8] Anderson *v.* Connacher, 1850, 13 D. 405.

[9] Walker *v.* Junor, 1903, 5 F. 1035.

[10] Stark's Trs. *v.* Duncan, 1906, 8 F. 429.

CHAPTER XIV

PARLIAMENTARY ELECTION PETITIONS

The procedure in these petitions is so fully dealt with in the Codifying Act of Sederunt, 1913, Book J, Chap. i., and Blair's Election Manual and Blair and Chapel's Parliamentary Elections Handbook, that a reference to these books is considered sufficient. It is to be regretted, however, that the General and Additional General Rules of Procedure made by Lords Cowan and Jerviswoode, dated 27th November 1868 and 13th January 1869, have been incorporated in the Codifying Act of Sederunt without having been revised, in view of the Corrupt and Illegal Practices Prevention Act, 1883, and the Clerks of Session (Scotland) Act, 1913. In particular, it should be noted that *two* Judges conduct the trial of election petitions, and that there is only *one* Principal Clerk of Session.

CHAPTER XV

PETITIONS RELATIVE TO APPEALS TO THE HOUSE OF LORDS

(1) For Leave to Appeal.—(a) *Generally.*—An appeal to the House of Lords from a judgment of either Division of the Court of Session on the merits of a cause is competent except where appeal is excluded by statute. Interlocutory judgments of either Division, however, can only be appealed where (1) there is a difference of opinion among the Judges of the Division; or (2) leave to appeal is given by the Division.[1]

Applications for leave should be by petition.[2]

Notwithstanding a refusal of leave, cases have been appealed to the House of Lords, and the latter has dismissed the respondent's petition to refuse the appeal as incompetent, holding that the interlocutor appealed against was an interlocutor on the merits.[3]

Where the Court is in doubt about the competency of granting leave to appeal, leave may be given subject to the House of Lords dealing with the matter when it comes before it.[4]

(b) *Time for Appeal.*—Formerly an appeal lay from a decree or order of the Court of Session if the petition of appeal was lodged with the Clerk of Parliament or the clerk assistant within *two* years from the day of signing the last interlocutor appealed from, or before the end of fourteen days to be accounted from and after the first day of the session or meeting of Parliament next ensuing the said two years; provided that if the appellant was out of Great Britain he might appeal within two years after his return, but not over five years from the date of the interlocutor appealed from; and that if the appellant was a *minor* or *non compos mentis*, it was competent for him, or his heirs or representatives, to enter an appeal within two years after full age

[1] 48 Geo. III. cap. 151, sec. 15; 6 Geo. IV. cap. 120, sec. 5; Revised Standing Orders of the House of Lords (1907), No. ix.

[2] H.M. Advocate *v.* Fleming, 1864, 2 M. 1032, at p. 1064.

[3] North British Bank *v.* Collins, 1852, 15 D. (H. L.) 29; Orr Ewing's Trs. *v.* Orr Ewing, 1885, 13 R. (H. L.) 1; Mann *v.* Edinburgh Northern Tramways, 1892, 20 R. (H. L.) 7.

[4] Adam *v.* Allan, 1841, 3 D. 1147, per Lord Moncreiff; Cullen *v.* Black, 1851, 13 D. 1184, per Lord President Boyle.

or recovery or after the death of the disqualified person and the opening of his succession.[1]

The period of two years above mentioned has been reduced to one year,[2] and there is a prospect of a further reduction.

An order has been pronounced by the Inner House after the time for appeal has elapsed in order to allow an appellant to appeal against both the order pronounced and the interlocutor which he failed to appeal against in time.[3]

Where in a *jury trial* an exception has been taken on a matter of law arising at the trial, and the Inner House has pronounced an interlocutor disposing of the exception, an appeal may be taken to the House of Lords within *fourteen* days after the interlocutor has been pronounced, if Parliament is sitting, or, if Parliament is not sitting, within *eight* days after the commencement of the next session of Parliament. A copy of the exception certified by one of the Clerks of Session is attached to the petition of appeal.[4]

An appeal from an interlocutor of the Inner House on a question of law appearing in the notes of evidence of the Lord Ordinary trying issues without a jury trial may be taken within the same time as appeals against interlocutors upon bills of exception.[5]

(c) *Form of Petition.*—The petition is addressed to the Court, and narrates the raising of the action and its conclusions; that defences were lodged and a record made up; that after hearing parties the Lord Ordinary, upon a certain date, pronounced an interlocutor, the terms of which are set forth *in extenso;* that a reclaiming note was presented against the said interlocutor; and that the Court, upon a certain other date, pronounced an interlocutor therein, the terms of which are also set forth *in extenso.* The petition then proceeds to state that the petitioner has been advised that the latter interlocutor is (*or* that both interlocutors are) erroneous and contrary to law, and that the petitioner proposes to appeal to the House of Lords, but that as the Court was unanimous, and as the conclusions of the action are not exhausted by the interlocutor or interlocutors appealed against, it is necessary to obtain leave to appeal in terms of the Act 48 Geo. III. cap. 151, sec. 15.

The reasons on which the petition is based are then set forth.

The prayer is a simple crave to the Court to grant authority to

[1] Judicature Act, 1825 (6 Geo. IV. cap. 120), sec. 25.
[2] Revised Standing Orders of the House of Lords (1907), No. i.
[3] Horne *v.* Breadalbane Trs., 1839, 1 D. 436.
[4] 55 Geo. III. cap. 42, sec. 7.
[5] 13 & 14 Vict. cap. 36, sec. 47.

present a petition of appeal to the House of Lords in common form against the said interlocutor or interlocutors. There is no crave for expenses.

(d) *Discretion of Court.*—The Court has absolute discretion in granting or refusing the prayer of the petition. Leave is not often granted, and when granted it is only where the Court has had difficulty, or where the Judges have come to the same conclusion on different grounds.[1]

In the following cases the Court *granted* leave to appeal:—

Where the interlocutor sustained a party's title to sue an action of interdict, the defender consenting meantime to interdict.[2]

Where the interlocutor was in substance a final judgment owing to the refusal of the other party to proceed further.[3]

Where the interlocutor, in special circumstances, sustained relevancy.[4]

Where the interlocutor had been agreed by the parties to be disposed of in the first instance.[5]

Where the petitioner found caution for violent profits and presented his petition promptly.[6]

Where the rest of the case was separable.[7]

Where, in a petition of disentail, the Court ordered the man of skill to consider objections to his report, and remitted to a medical man to report on the petitioner's life.[8]

The Court has *refused* leave in the following cases:—

Where the question was one of procedure;[9]

Where the interlocutor was one dealing with the manner of proof;[10]

Where a second appeal seemed probable;[11]

[1] Liquidators of Western Bank *v.* Douglas, 1860, 22 D. 447. See, however, Skinner *v.* Dunbar, 1849, 11 D. 1014.

[2] Duff *v.* Fraser, 1829, 8 S. 283. See also Duke of Hamilton *v.* Aikman, 1831, 9 S. 594; Duke of Athol *v.* Torrie, 1850, 12 D. 691.

[3] Walker *v.* Kelty's Tr., 1841, 3 D. 967.

[4] Landell *v.* Purves, 1842, 4 D. 1543.

[5] Losh, Wilson, and Bell *v.* Martin, 1857, 19 D. 267.

[6] Gardner *v.* Beresford's Trs., 1877, 4 R. 1091. See also Duke of Athol *v.* Torrie, 1850, 12 D. 691.

[7] Lord Advocate *v.* Duke of Hamilton, 1891, 29 S. L. R. 272.

[8] Anderson *v.* Bankes, 1899, 2 F. 72.

[9] M'Murray *v.* Allan, 1855, 17 D. 1098; Whitehill *v.* Glasgow Corporation, 1915, S. C. 1015.

[10] Pringle *v.* Dunsmure, 1877, 14 S. L. R. 498; Scottish Rights-of-Way and Recreation Society, Ltd. *v.* Macpherson, 1886, 14 R. 74; Hope *v.* Hope's Trs., 1898, 36 S. L. R. 220; Frame *v.* Caledonian Rly. Co., 1914, S. C. 93.

[11] Stewart *v.* Kennedy, 1888, 16 R. 521; Edinburgh Northern Tramways Co. *v.* Mann, 1891, 18 R. 1140, at p. 1152.

Where the Court thought the case should be heard as a whole after proof;[1]

Where the petitioner was allowed certain issues but refused a third;[2]

Where a plea of no jurisdiction was repelled;[3]

Where title to sue was upheld;[4]

Where relevancy was upheld;[5]

and in the undernoted cases.[6]

(e) *Procedure.*—This petition is a step in process. It is printed, boxed and lodged, and intimated[7] to the agents of the opposite party, along with six copies of the petition. It is disposed of on the Single Bills.

(f) *Expenses.*—See Maclaren on Expenses, p. 123 *et seq.*

(2) Petition for Interim Execution or Regulation Pending Appeal.—(a) *Generally.*—When an order for service on the respondent of a petition of appeal to the House of Lords has been intimated,[8] and the respondent wishes to have *interim* possession or execution and payment of expenses already incurred, he may lay a copy of appeal before the Judges of the Division to which the cause belongs, and the said Division, or any four of the Judges thereof, shall have power to regulate such matters according to their sound discretion, having a just regard

[1] Liquidators of City of Glasgow Bank *v.* Mackinnon, 1881, 9 R. 535.

[2] Yeatmans, Petrs., 1877, 5 R. 293; *cp.* Stewart *v.* Kennedy, 1889, 16 R. 890.

[3] Hibbert, Petr., 1870, 7 S. L. R. 266; Longworth *v.* Hope, 1865, 3 M. 1049.

[4] Morrison *v.* Fleshers of Edinburgh, 1854, 16 D. 377; Gordon *v.* Davidson, 1864, 2 M. 758; Mackenzie, Petr., 1875, 12 S. L. R. 622.

[5] Barr, etc., Petrs., 1855, 17 D. 681; Gordon *v.* Davidson, 1864, 2 M. 758.

[6] Stirling & Sons *v.* Stirling and Robertson, 1822, 1 S. 555 (N. E. 508); Hunter *v.* Dickson, 1827, 5 S. 417 (N. E. 396); Tutors of Earl of Eglintoun *v.* Walker, 1827, 5 S. 418 (N. E. 396); Miller and Carrick *v.* Morrisons, 1827, 5 S. 671 (N. E. 626); Mags. of Wigton *v.* M'Clymont, 1834, 12 S. 459; Fraser *v.* Fraser, 1836, 14 S. 582; Dundee Harbour Trs. *v.* Dougall, 1848, 11 D. 181; Ranken *v.* Drew, 1855, 17 D. 484; Kerr *v.* Pattison, 1855, 17 D. 786; Leadhills Mining Co. *v.* Scots Mining Co., 1856, 18 D. 594; Blaikie *v.* Duncan, 1857, 19 D. 1095; East of Fife Rly. Co. and Baird *v.* Tulloch, 1859, 32 Jur. 2; Cullen *v.* Buchanan, 1862, 24 D. 1132; Duke of Buccleuch *v.* Cowan, 1866, 4 M. 475; Western Bank *v.* Baird's Trs., 1866, 4 M. 1071; Hamilton & Co., Petrs., 1868, 5 S. L. R. 371; Kennedy *v.* Bell, 1868, 6 M. 1062; Lawson *v.* Lawson's Trs., 1872, 11 M. 168; Caledonian Insurance Co. *v.* Gilmour, 1891, 19 R. 64; Duke of Sutherland *v.* Marquess of Stafford, 1892, 19 R. 504; Assets Co. *v.* Shirres' Trs., 1897, 24 R. 418; Grant *v.* Mackenzie, 1899, 1 F. 889; Broatch *v.* Jackson, 1900, 2 F. 968.

[7] A. S., 17th February 1914.

[8] Lindsay *v.* Lindsay, 11th July 1811, F. C.; National Exchange Co. *v.* Drew, 1858, 20 D. 837; Tulloch *v.* Davidson's Exrs., 1858, 20 D. 1319; Fleming *v.* Robertson, 1859, 21 D. 1204; Glasgow and Londonderry Steam Packet Co. *v.* Clyde Shipping Co., 1859, 22 D. 2; Edinburgh Northern Tramways Co. *v.* Mann, 1891, 19 R. 24. See also North British Rly. Co. *v.* Budhill Coal and Sandstone Co., 1909, S. C. 504.

to the interests of the parties, as they may be affected by the affirmance or reversal of the judgment or decree appealed from.[1]

The application for *interim* possession or execution and payment of expenses already incurred is by petition.[2]

Four Judges must sit in the Inner House to dispose of the petition,[3] and for this purpose an Outer House Judge may be called in.[4] The Inner House cannot remit to the Lord Ordinary on the Bills during vacation to dispose of the question.[5]

The petition may be granted *quoad* expenses and refused *quoad* the rest of the case.[6]

(b) *Form of Petition.*—Forms may be found in Juridical Styles, vol. iii. p. 739, and the Scots Style Book, vol. v. p. 52.

It is incompetent to include in the prayer a crave for a warrant which might be necessary only in the event of the party decerned against refusing to obey the Court's orders.[7]

(c) *When Granted or Refused.*—Although the Court has absolute discretion, it usually grants the prayer of the petition, unless the appellant shows cause to the contrary.[8]

Where the *interim* execution is for money, the Court usually imposes the condition that the petitioner shall find caution for repetition in case of a reversal,[9] except in consistorial cases;[10] or ordains the appellant to consign the amount of the decree in favour of the respondent.[11]

Where the *interim* execution is with respect to possession, the Court may impose such condition as it thinks fit.[12] Thus, it may give posses-

[1] 48 Geo. III. cap. 151, sec. 17 ; M'Beath *v.* Forsythe, 1887, 15 R. 8.

[2] Writers to the Signet *v.* Graham, 1823, 2 S. 456 (N. E. 409) ; A. B. *v.* C. B., 1884, 11 R. 1060 ; Williamson *v.* Macpherson & Co., 1904, 7 F. 231.

[3] 48 Geo. III. cap. 151, sec. 17.

[4] Paterson's Trs., Petrs., 1828, 6 S. 1086 ; Campbell, Petr., 1854, 17 D. 61.

[5] Granger *v.* Geils, 1857, 19 D. 1010.

[6] Brock *v.* Cabbell, 1823, 2 S. 291 (N. E. 255).

[7] Stevenson *v.* Stevenson, 1894, 21 R. 617.

[8] M'Beath *v.* Forsythe, 1887, 15 R. 8.

[9] Ross *v.* Matheson & Son, 1847, 10 D. 222, per Lord Justice-Clerk Hope ; Cochrane *v.* Bogle, 1849, 12 D. 302 ; Russell *v.* Kirkland, 1858, 20 D. 772 ; Gray *v.* Low, 1859, 21 D. 723 ; Steel Co. of Scotland *v.* Tancred, Arrol & Co., 1889, 26 S. L. R. 465 ; King, Brown & Co. *v.* Anglo-American Brush Electric Light Corporation, 1891, 18 R. 540 ; North British Rly. Co. *v.* Budhill Coal and Sandstone Co., 1909, S. C. 504.

[10] Forster *v.* Forster, 1871, 9 M. 829 ; A. B. *v.* C. B., 1884, 11 R. 1060. See also Sassen *v.* Campbell, 1824, 3 S. 163 (N. E. 110).

[11] Reid *v.* Hope's Trs., 1826, 4 S. 531 (N. E. 539) ; Ross *v.* Matheson & Son, 1847, 10 D. 222, per Lord Justice-Clerk Hope.

[12] Mackenzie *v.* Mags. of Dingwall, 1833, 11 S. 248.

sion to the respondent and ordain him to find caution to secure the appellant's rights in the event of a reversal;[1] or it may leave the possession with the appellant and ordain the latter to find caution, or make consignation in the event of an affirmance;[2] or, while allowing execution to proceed, may supersede the extract for a time.[3] *Interim* execution may be granted although the result of a reversal may be to deprive the appellant of the full benefit of his success.[4]

If the expenses which have been awarded by the interlocutor appealed from are not taxed before the appeal has been entered, it is quite competent for the Court, under a petition for *interim* execution, to remit the account of expenses to the Auditor to tax, and thereafter to decern and allow *interim* execution.[5] In a recent case[6] the Court, before the order for service of an appeal had been made, approved of the Auditor's report, and granted decree for expenses subject to repetition.

Execution for expenses pending appeal may be granted if modification of expenses has been made prior to appeal.[7] If, however, expenses are found due subject to modification, and an appeal is entered to the House of Lords before modification has taken place, *interim* execution will not be granted.[8]

Interim execution for expenses will *not* be granted where the appeal is on the ground of the merits alone, as final execution may be obtained of the decree for expenses.[9] An *interim* decree for the expenses of a petition for *interim* execution is not usually made.[10] *Interim* execution only extends to what is actually found due in the interlocutor appealed from, and does not extend to sums which become exigible in respect of said decree since its date.[11] *Interim* execution will not be granted where the interlocutor appealed from only awards the respondent an

[1] Farquharson *v.* Adam, 1841, 4 D. 7; Aikman, Petrs., 1859, 21 D. 1374.

[2] Earl of Mansfield *v.* Henderson, 2nd March 1815, F. C.; Duke of Hamilton *v.* Buchanan, 1878, 5 R. 588.

[3] Ballachulish Slate Quarries Co., Ltd. *v.* Grant, 1903, 5 F. 1105.

[4] Young *v.* Collins, 1852, 14 D. 746; Stevenson *v.* Stevenson, 1894, 21 R. 617.

[5] Paterson *v.* Paterson, 1849, 11 D. 905; Cochrane *v.* Bogle, 1849, 12 D. 302; M'Beath *v.* Forsythe, 1887, 15 R. 8; Gibson *v.* Clark, 1896, 23 R. 389.

[6] North British Rly. Co. *v.* Budhill Coal and Sandstone Co., 1909, S. C. 504.

[7] Brown *v.* Jeffray, 1821, 1 S. 229 (N. E. 217).

[8] Gordon *v.* Hyslop & Co., 1821, 1 S. 121 (N. E. 119); Hogarth *v.* Balmer, 1830, 8 S. 1017; Williamson *v.* Macpherson & Co., 1904, 7 F. 231; *cp.* Baillie *v.* Lady Saltoun, 1823, 2 S. 128 (N. E. 120).

[9] Forster *v.* Forster, 1871, 9 M. 829.

[10] Steel Co. of Scotland *v.* Tancred, Arrol & Co., 1889, 26 S. L. R. 465; King, Brown & Co. *v.* Anglo-American Brush Electric Light Corporation, 1891, 18 R. 540. See also Irving *v.* Scot, 1831, 9 S. 645; Forster *v.* Forster, 1871, 9 M. 829.

[11] Campbell *v.* Dixon, 1821, 1 S. 75.

indefinite right or sum which will require further procedure to ascertain.[1]

Although the Court refuses *interim* execution it may grant *interim* management.[2]

(d) *Amendment of Petition.*—An amendment of a petition for *interim* execution is not allowed after answers are lodged; a new petition should be presented.[3]

(e) *Supplementary or Second Petition.*—Where a petition was presented for *interim* execution for expenses, a supplementary petition praying for execution for principal, interest, and expenses was held to be incompetent.[4]

Where a petition for *interim* execution pending appeal to the extent of £250 was *granted* without caution, a second petition craving execution to the further extent of £50, without caution, was granted.[5]

Where a petition for *interim* execution has been *refused*, it is incompetent to entertain a second petition, although the Court be satisfied that the first was erroneously refused.[6]

(f) *Procedure.*—This petition is a step in process. It is printed, boxed, and lodged, and intimated[7] to the agents of the opposite party, with six copies of the petition. It is disposed of on the Single Bills. Answers have been allowed to be lodged.[3]

(g) *Expenses.*—See Maclaren on Expenses, p. 124 *et seq.*

(3) Petition to Apply Judgment.—(a) *Generally.*—The judgments of the House of Lords, on appeal from the Court of Session, are seldom framed so as to admit of a decree being extracted without the intervention of the Court below. The cause, therefore, necessarily returns that the judgment may be applied; and this is done sometimes by an express remit, but more frequently without any remit, except that which is held to be implied in the judgment itself. Whether the remit be express or implied, it imposes upon the Division the performance of the judicial acts requisite to complete the procedure.[8]

It is the duty of the Court of Session to carry out without delay the

[1] Grant *v.* Commissioners of Caledonian Canal, 13th February 1813, F. C.; Moffat *v.* Moffat, 7th July 1813, F. C.; Brodie *v.* Brodie, 22nd November 1814, F. C.

[2] Granger *v.* Geils, 1857, 19 D. 1010.

[3] Kirkland and Sharpe *v.* Gibson, 1831, 10 S. 167.

[4] Kirkland and Sharpe *v.* Wilson's Creditors, 1832, 10 S. 377. See also Berry *v.* Anderson, 1823, 2 S. 261 (N. E. 232).

[5] Melrose *v.* Hunter, 1831, 9 S. 902.

[6] Brown *v.* Jeffrey, 1822, 2 S. 104 (N. E. 97).

[7] A. S., 17th February 1914.

[8] Stewart *v.* Scot, 1836, 14 S. 692, per Lords Medwyn and Corehouse, p. 700.

judgment of the House of Lords and not to allow any objection thereto to be entertained.[1]

(b) *Where Petition Competent or Incompetent.*—Where anything remains to be done after or in consequence of a judgment of the House of Lords, the proper mode of bringing the case before the Court of Session is by printed petition.[2] Where there is a simple affirmance and the appeal is dismissed, the mere production of the judgment is sufficient to enable the Division to apply it;[3] and if a petition is in such circumstances presented, expenses will not be given.[4] In a recent special case which was appealed to the House of Lords and the interlocutor of the Court of Session was reversed and it was remitted back "to do therein as shall be just and consistent with this judgment," the Court held that the petition was competent but unnecessary, and the respondent was found entitled to expenses.[5]

(c) *Form of Petition.*[6]—The petition narrates the various steps in the cause in the Court of Session, setting forth the interlocutors of the Lord Ordinary and the Inner House, and the result of the appeal to the House of Lords, with the judgment of the latter *in extenso.* It also narrates whether the expenses incurred in the House of Lords have been paid or not, as the case may be, and that there has been execution pending appeal and no repetition, if such be the case.

Where the House of Lords' expenses have been paid, the *prayer* is for the Court to apply the judgment of the House of Lords previously narrated; to assoilzie the petitioner (or as the case may be); to find the respondent in the petition liable in the expenses in the Court of Session, and to remit to the Auditor to tax and report and thereafter to decern, etc., or to do otherwise, etc.

Where the expenses of the House of Lords have *not* been paid there is a further crave for the amount thereof.

Where *interim* execution has been carried out and repetition has

[1] Stewart *v.* Agnew, 1823, 1 Shaw's App. 413, per Lord Redesdale, p. 426; Davidson *v.* Robertson, 1827, 5 S. 751 (N. E. 702); Robarts *v.* Court, 1839, 1 D. 1150; Lord Lovat *v.* Fraser, 1843, 5 D. 1200; Stuart *v.* Moore, 1861, 23 D. 902, per Lord Justice-Clerk Inglis; General Assembly of the Free Church of Scotland *v.* Lord Overtoun, 1904, 7 F. 202.

[2] Russel *v.* Earl of Breadalbane, 1825, 4 S. 335 (N. E. 340); Ferrie *v.* Ferrie, 1853, 15 D. 766; Anstruther *v.* Anstruther's Trs., 1873, 11 M. 955.

[3] Ricketts, Petr., 1861, 23 D. 1014; Peters *v.* Mags. of Greenock, 1893, 20 R. 924. See also Morris, Petrs., 1866, 5 M. 112.

[4] Wilson *v.* Fraser, 1824, 3 S. 189 (N. E. 128); Mackenzie *v.* Mags. of Dingwall, 1832, 11 S. 224; Duncan *v.* River Clyde Trs., 1853, 15 D. 707.

[5] Reid's Trs. *v.* Dawson, 1915, S. C. 844.

[6] Juridical Styles, vol. iii. p. 741; Scots Style Book, vol. v. p. 53 *et seq.*

not been made, a crave for repetition of the sums paid with interest is asked for and for delivery of the bond of caution.

Should the decree of the Court of Session have been extracted while the case was under appeal, and if further discussion is necessary after the appeal is decided, there should be a crave to grant warrant to, and authorise, the Lord Clerk Register and his deputies to transmit the process to the Clerk of Court.

Care should be taken not to ask for more than is included in the judgment of the House of Lords, otherwise the expenses of the petition will be refused.[1]

If the House of Lords have given a special finding for a specified sum of expenses, these expenses should not be specially craved.[2]

(d) *Procedure.*—The petition is printed, boxed, and lodged in the usual way, and intimated by leaving six copies with the agents for the respondents. A certificate of intimation is written on the principal petition in the following or similar terms:—[3]

I, , do hereby certify that I this day intimated that this petition had been boxed and would be moved in the ordinary course of the rolls by leaving six copies thereof at the place of business of Messrs. , the agents for the respondents. [*Signature.*]

[*Date.*]

The petition is disposed of on the Single Bills.[4]

Answers have been allowed to be lodged.[5]

(e) *Expenses.*—Generally speaking, where the House of Lords has altered, added to, or reversed an interlocutor of the Court of Session, the expenses of the petition to apply the judgment will be allowed.[6] Where, however, the judgment of the House of Lords is simply an affirmance of the interlocutor appealed against, a petition to apply judgment is not now considered necessary, and the expense of such a petition will not be allowed to the petitioner.[7] For fuller details, see Maclaren on Expenses, p. 130 *et seq.*

[1] Fleeming *v.* Howden, 1868, 7 M. 79; Roger *v.* J. & P. Cochrane, 1910, S. C. 1.

[2] Earl of Minto *v.* Eliott's Trs., 1833, 11 S. 770.

[3] Juridical Styles, vol. iii. p. 743; A. S., 17th February 1914.

[4] General Assembly of the Free Church of Scotland *v.* Lord Overtoun, 1904, 7 F. 202.

[5] Stewart *v.* Clyne's Trs., 1836, 14 S. 815.

[6] Davidson *v.* Lockwood, 1824, 3 S. 176 (N. E. 118); Brodie *v.* Sinclair, 1831, 10 S. 99; Collins and Feely *v.* Young, 1853, 15 D. 702; Bovill *v.* Dickson, 1857, 19 D. 356; Duke of Hamilton *v.* Graham, 1872, 9 S. L. R. 304; Watt *v.* Ligertwood, 1874, 1 R. 1122. See also Teacher's Trs. *v.* Calder, 1900, 2 F. 372.

[7] Wilson *v.* Fraser, 1824, 3 S. 189 (N. E. 128); Mackenzie *v.* Mags. of Dingwall, 1832, 11 S. 224; Duncan *v.* River Clyde Trs., 1853, 15 D. 707; Ricketts, Petr., 1861, 23 D. 1014; Peters *v.* Mags. of Greenock, 1893, 20 R. 924.

(4) Application for an Advance of Money to Carry on Appeal. —A curator *ad litem* has been awarded a sum of money to enable him to carry on an appeal to the House of Lords. In one case where the pupil's father was the appellant, the House stayed proceedings until reasonable means should be provided by the appellant to enable the curator to the pupils to defend the interests of the children on the appeal.[1] In another case, where the Court of Session by a majority decided a special case presented by parents and their minor children in favour of the parents, the curator *ad litem* to the children presented a note to the Court asking for an order on the trustee to advance to him a sum of money, as expenses, to enable him to prosecute an appeal to the House of Lords, and the Court, in view of the fact that there was a dissenting judgment in favour of the children's contentions, granted the order as craved.[2]

Such an advance is confined to the case of actions between parents and children.[3]

[1] Studd *v.* Cook, 1883, 10 R. (H. L.) 53 ; 8 App. Cas. 577.
[2] Crum Ewing's Trs. *v.* Bayly's Trs., 1910, S. C. 994.
[3] Walker *v.* Whitwell, 1914, S. C. 560.

CHAPTER XVI

PETITIONS UNDER THE NATIONAL INSURANCE ACT, 1911[1]

WHERE the Insurance Commissioners desire, instead of themselves deciding whether any class of employment is, or will be, employment within the meaning of Part I. of the National Insurance Act, 1911, to submit the question for the decision of the Court of Session in a summary way, they shall institute proceedings for that purpose by presenting a petition to one of the Divisions of the Court, and shall crave service upon the person, or one of the persons, as between whom and the commissioners the question has arisen.[2] The Court shall thereafter proceed in the petition in such way as shall seem necessary and proper.[3] The form of the petition and the procedure which has been adopted therein may be gathered from an examination of the session papers and reports of the undernoted cases.[4]

[1] 1 & 2 Geo. V. cap. 55, sec. 66.

[2] C. A. S., D, vii. 1.

[3] Ibid., 2.

[4] Scottish Insurance Commissioners *v.* Edinburgh Royal Infirmary, 1913, S. C. 751; Scottish Insurance Commissioners *v.* Church of Scotland, 1914, S. C. 16; Scottish Insurance Commissioners *v.* M'Naughton, 1914, S. C. 826.

CHAPTER XVII

PETITIONS UNDER THE BRITISH LAW ASCERTAINMENT ACT, 1859

WHERE in any action pending in any Court within His Majesty's dominions such Court is of opinion that it is necessary or expedient for the proper disposal of the case to ascertain the law applicable to the facts of the case as administered in any other part of His Majesty's dominions, a case setting forth the facts may be adjusted and approved of by such Court in which the questions of law arising out of the same on which such Court desires the opinion of another Court are stated, and an order is made remitting the case to the other Court for its opinion. Any of the parties to the action may then present a petition to the Court whose opinion is desired praying said last-mentioned Court to hear parties or their counsel and pronounce its opinion on the questions of law stated on the case, or to pronounce its opinion without hearing parties or their counsel. The Court may appoint an early hearing.[1] The form of petition may be found by a reference to the session papers in the undernoted cases.[2]

[1] 22 & 23 Vict. cap. 63, sec. 1.

[2] Guthrie and Others, Petrs., 1880, 7 R. 1141; Bradford *v.* Young, 1884, 11 R. 1135.

CHAPTER XVIII

LANDS CLAUSES ACT PETITIONS

THESE petitions are presented to the Junior Lord Ordinary and are dealt with by him in the Bill Chamber. (See Maclaren's Bill Chamber Practice, p. 221 *et seq.*)

CHAPTER XIX

NOTE TO DISPENSE WITH PRINTING

It is in the power of the Court to dispense with printing either in the Outer House or Inner House. Thus, where the question in the Outer House was the competency of an action, the Lord Ordinary (of consent) dispensed with printing;[1] and in the Inner House, where an appellant, although not on the poor's roll, or making application for its benefit, was in poor circumstances,[2] printing was dispensed with.

In cases where the pursuer, appellant, or reclaimer has obtained the benefit of the poor's roll, printing is always dispensed with.[3] In other cases it is a matter entirely within the discretion of the Court, and depends upon the circumstances of each individual case.

In two recent cases the Court dispensed with printing in the following circumstances:—In the former case, a trustee in bankruptcy sued the bankrupt and his son for reduction of a deed purporting to be granted by the bankrupt in favour of his son at a time when the former was insolvent. Decree of reduction was granted in the Outer House. The bankrupt reclaimed, and presented a note to dispense with printing. He gave as his reasons the fact that he was a bankrupt, that the proof had lasted thirteen days, and that voluminous documents had been produced. The Court granted the prayer of the note.[4] In the latter case, a mother, after the death of her husband, who had been living apart from her, presented a petition for custody of the child of the marriage who was living with his paternal grandmother, and the Second Division remitted the petition and answers to the Sheriff to take evidence. The petitioner thereafter presented a note to the Lord Justice-Clerk to dispense with printing the proof, and, on promise of a typewritten copy of the same for each Judge, printing was dispensed with.[5]

Lord President Dunedin, on one occasion when opposition was made

[1] Walker *v.* Crawford, 1902, 10 S. L. T. 362.

[2] Dolan *v.* Anderson and Lyall, 1885, 12 R. 1190; Ross *v.* Gray, 1887, 14 R. 768; C. A. S., D, iii. 1, 2.

[3] Dolan *v.* Anderson and Lyall, 1885, 12 R. 1190 (report of Auditor, p. 1191, note).

[4] Forrest *v.* M'Gregors, 1914, First Division (unreported).

[5] Scott *v.* Scott, 1913, 2 S. L. T. 278 (not reported on this point).

to the prayer of a note asking for a dispensation with printing, intimated that the question was one for the Court alone, and that the opposite party had no *locus standi* to state objections.

In the Outer House an application for dispensing with printing may be made by motion.[1] In the Inner House the procedure is by a note to the Lord President of the Division. (See *supra*, p. 835.)

Application to the Inner House for dispensing with printing in appeals must be made within eight days of the receipt of the process by the clerk,[2] and, if granted, it is only necessary to lodge two copies of the bare note of appeal in manuscript.[3] Where printing is dispensed with *in hoc statu* and the dispensation is afterwards absolutely refused, the Court should appoint a day upon which prints should be lodged.[4]

[1] Coldstream's Procedure, p. 16.
[2] Allan *v.* Sandeman, 1881, 8 R. 563.
[3] Dolan *v.* Anderson and Lyall, 1885, 12 R. 1190.
[4] Ross *v.* Gray, 1887, 14 R. 768.

PART IX

REVIEW, REMOVAL, AND REPORT

CHAPTER I

INNER HOUSE ROLLS

The Rolls of the Inner House are the Single Bills, the Summar Roll, the Short Roll, the Long Roll, and the Jury Cause Roll.

(1) The Single Bills.—The Single Bills is the Motion Roll of either Division of the Inner House. It derives its name from the word "bill," which means a petition, and it is called the "Single" Bills from the fact that when the bill is moved no answers have been made thereto.[1]

It is in this roll that all petitions, reclaiming notes, appeals, and all applications of whatever nature first appear in the Inner House. Proceedings which require to be boxed appear automatically in the Single Bills of the following day after being boxed. Other proceedings require to be enrolled.

If the respondent has any objection to state to the competency of a reclaiming note or appeal, it is usually taken and disposed of in the Single Bills, although the question of competency is sometimes reserved for discussion at the hearing of the cause. If there is no objection to the competency stated and upheld, the case is sent to the Summar or Short Roll, as the case may be,[2] except in the case of a reclaiming note against a decree by default, which is usually disposed of in the Single Bills.

Certain points in company petitions have been disposed of in the Single Bills. Thus where a person interested becomes aware that an order for intimation, service, and advertisement in a petition for winding up is about to be moved in the Single Bills, he may appear in the Single Bills and successfully oppose such an order being made.[3] Again, in petitions for the reduction of capital where the reporter has reported in favour of the application, the reduction has been granted in the Single Bills. Intimation, however, must be made to the Keeper of the Rolls of the intention to move for disposal of applications in this way.[4] Again, where there is objection to the

[1] New Form of Process (2nd ed.), 1799, p. 125; Shand's Practice, p. 752.
[2] C. A. S., D, i. 2.
[3] Macdonell's Trs. *v.* Oregonian Rly. Co., 1884, 11 R. 912; Black *v.* United Collieries, Ltd., 1904, 7 F. 18.
[4] General Accident Assurance Corporation, Ltd., Petrs., 1906, 8 F. 483.

liquidator named in a petition for winding up, the objection should be stated verbally and disposed of in the Single Bills.[1]

Where it is desired to make a motion in an Inner House cause, a note containing the names of the parties, the purpose of the enrolment, and the agent's name is lodged before one o'clock on the previous day with the clerk of the President of the Division, and notice of the enrolment must be given to the opposite party.

(2) Summar Roll.—This is the roll to which causes which require early despatch are sent from the Single Bills. Bill Chamber and Exchequer causes, appeals in bankruptcy, reclaiming notes against interlocutory judgments, adjustments of issues, and petitions are sent to this roll. Causes which in the usual course of business would be sent to the Short Roll, but in which either party, owing to special circumstances, is desirous of having an early hearing, should not be moved to the Summar Roll, but should be moved to the Short Roll, and a note presented to the President of the Division asking for an early hearing on the Short Roll, and briefly stating the grounds on which a preference over other litigants is claimed.

Several cases from the Summar Roll are put out for hearing each week, usually for Tuesdays and Saturdays.

(3) Short Roll.—This is the ordinary Debate Roll of the Inner House, to which all causes which cannot claim the privilege of entering the Summar Roll are sent. Causes in this roll are put out for hearing in the order of the dates of their enrolment, unless in exceptional cases. Two sections of the roll are usually put out weekly for hearing, one section for Tuesday and Wednesday immediately after the Summar Roll, and the other section for Thursday and Friday. If the hearing of the first section is not concluded on Wednesday, it is usually continued until Thursday and Friday, having preference over the section put out for the latter days. Counsel are required to be prepared to debate a cause on the first day for which it is put out.

Where in the Single Bills a cause is moved to the Short Roll an early hearing may be granted on cause shown.[2]

Where a cause has already been sent to the Short Roll, either party who is desirous of obtaining an early hearing may present a note to the President of the Division asking for such a hearing, and setting forth the ground or grounds upon which he contends that he is entitled to a preference over other litigants on that roll. This note is moved in the Single Bills, where it is disposed of.

[1] Hume *v.* Directors of Highland Peat Fuel Co., 1876, 3 R. 881.
[2] Murray *v.* Fraser, 1915, 1 S. L. T. 72, per Lord Dundas.

(4) Long Roll.—This is the roll to which cases on the Summar or Short Rolls are put by the Keeper of the Rolls of either Division whenever they are sisted to await further orders of Court, or where an *interim* order has been granted, or where they are at avizandum, or where they have been continued for any reason.

(5) Jury Cause Roll.—The Keepers of the Rolls of the First and Second Division of the Court respectively shall keep a separate roll, to be entitled "Jury Cause Roll," in which shall be entered all causes originating in the Sheriff Court, in which issues have been adjusted by the Division, unless at the time of the adjustment of issues the Court has remitted the cause to the Outer House, and all causes originating in the Court of Session in which orders appointing the same to be tried at the jury sittings have been pronounced and the process transmitted to the Inner House in terms thereof.[1]

[1] C. A. S., F, i. 1.

CHAPTER II

RECLAIMING NOTES

(1) GENERALLY.—Where a judgment pronounced in the Outer House is desired to be submitted to review, the procedure is to present a reclaiming note to the Division of the Inner House which has been selected by the pursuer at the beginning of the cause. The particular Division of the Court so selected is disclosed by the *partibus* of the summons. (See *supra*, p. 349.) It may, however, happen from various causes that the reclaiming note will not be heard before the Division to which it was presented, but before another Division. (See *Transfer of Causes, infra*, p. 957.)

It is competent to reclaim against an interlocutor pronounced before the record is closed and where the reclaiming note is presented before the record is closed.[1]

It is competent to reclaim on the question of expenses, but this is severely discouraged.[2]

It is not incompetent for a party to lodge a reclaiming note after his opponent has already reclaimed, but it is a matter for the Auditor to consider whether the later reclaiming note was necessary, and, if not, to disallow its expense.[3]

In a consistorial cause it is competent for the defender to reclaim, although he has neither entered appearance, lodged defences, nor taken part in the proof.[4]

It is incompetent for a party to reclaim against an interlocutor pronounced on his own motion,[5] except the interlocutor does not give effect to his motion.[6]

It is incompetent to reclaim against an interlocutor approving of

[1] Spence *v.* Spence, 1914, S. C. 887. See also Burnside *v.* Aitchison & Co., 1827, 6 S. 229; Fraser *v.* Gordon, 1833, 12 S. 21; Dombrowitski *v.* Dombrowitski, 1895, 22 R. 401.

[2] Fleming *v.* North of Scotland Banking Co., 1881, 9 R. 11; Bowman's Trs. *v.* Scott's Trs., 1901, 3 F. 450; Barrie *v.* Caledonian Rly. Co., 1902, 5 F. 30; Caldwell *v.* Dykes, 1906, 8 F. 839; Wyllie *v.* Fisher, 1907, S. C. 686; Jack *v.* Black, 1911, S. C. 691.

Fairgrieve *v.* Chalmers, 1912, S. C. 118.

[4] Ross *v.* Ross, 1897, 24 R. 1029.

[5] Watson *v.* Russell, 1894, 21 R. 433.

[6] Ruthven *v.* Ruthven, 1905, 42 S. L. R. 562.

the Auditor's report where no objections thereto have been lodged,[1] although it is competent where objections have been lodged,[2] or appear *ex facie* of the Auditor's report,[3] or where the reclaimer avers *ultra vires*.[4]

The Court will not consider an incompetent reclaiming note, even of consent of parties.[5]

Reclaiming notes from judgments pronounced in the Bill Chamber are dealt with in the author's work on Bill Chamber Practice (*q.v.*).

(2) Form of Reclaiming Note.—On the top of the front page there must be a distinctive letter of the alphabet (A, B, C, etc.) printed in large heavy type.[6] Then comes a short heading in the following form:—

First Division. Lord , Ordinary.
[*Date*]
Reclaiming Note
for Pursuers
in causa
A. & Company
v.
B. and Others.
X. & Y., W.S., Agents for Pursuers
and Reclaimers
Z. & Co., S.S.C., Agents for Defenders
and Respondents.

Mr. , Clerk.[7]

Then follows the interlocutor (*or* interlocutors) submitted to review,[8] with the Lord Ordinary's note.[9] After this comes the address:—

"Unto the Right Honourable the Lords of Counsel and Session," followed by "Reclaiming Note for Pursuer [*or* Defender, *as the case may be*] *in causa*," and the names and designations of the parties as set forth in the summons, with the addition of "*Reclaimer*" and "*Respondent*" respectively, *e.g.* "*Pursuer and Reclaimer*" or "*Defender and Reclaimer*" and "*Pursuer and Respondent*" or "*Defender and Respondent*" as the case may be.

Reclaiming notes only bear in general terms that the interlocutor

[1] Tennents *v.* Romanes, 1881, 8 R. 824; Thompson & Co. *v.* King, 1883, 10 R. 469; Stirling-Maxwell's Trs. *v.* Kirkintilloch Police Commissioners, 1883, 11 R. 1.
[2] Stirling-Maxwell's Trs. *v.* Kirkintilloch Police Commissioners, 1883, 11 R. 1.
[3] Innes *v.* M'Donald, 1899, 1 F. 380.
[4] Crichton Bros. *v.* Crichton, 1901, 4 F. 271.
[5] Burns *v.* Waddell & Son, 1897, 24 R. 325.
[6] C. A. S., A, iii. 5.
[7] C. A. S., D, i. 1; Milne's Tr., Reclaimer, 1842, 5 D. 68.
[8] 6 Geo. IV. cap. 120, sec. 18.
[9] Jones *v.* Somervell's Tr., 1907, S. C. 545, per Lord Stormonth-Darling.

or interlocutors reclaimed against are submitted to review.[1] Accordingly there is no prayer, and the reclaiming note only contains the following words:—

Of this date [*date in margin*] Lord , Ordinary, was pleased to pronounce the prefixed interlocutor [*or* interlocutors], which is [*or* are] humbly submitted to review.

According to Justice, etc.

[*Signature of Counsel.*]

This is followed in practice by an index. Then must come a print of the closed record, where the record has been closed,[2] except in cases of decree by default.[3] In practice, any interlocutors pronounced since the date of closing the record are added. It has been held that a reclaiming note is not incompetent where the closed record has not been appended so long as the closed record has been timeously boxed;[4] and that where there were several separate defenders, a reclaiming note taken against a judgment deciding the case as regards one might omit any reference in the appended closed record to the other defenders.[5]

Where the record has not been closed,[6] there must be appended copies of the summons, with amendment, if any, and defences (except summonses of multiplepoinding,[7] adjudication, constitution,[8] wakening, transference, and *cessio bonorum*, and defences therein).[9]

Mere clerical errors in the reclaiming note will be allowed to be corrected,[10] but an error in a material part may be visited with dismissal of the note.[11]

[1] Court of Session Act, 1868, sec. 51.

[2] 6 Geo. IV. cap. 120, sec. 18; C. A. S., D, i. 2; Bell *v.* Ogilvie, 1862, 24 D. 375; Miller *v.* Simpson, 1863, 2 M. 225; M'Evoy *v.* Brae's Trs., 1891, 18 R. 417; Wallace *v.* Braid, 1899, 1 F. 575; Blackwood *v.* Summers, Oxenford & Co., 1899, 1 F. 868; M'Lachlan *v.* Nelson & Co., Ltd., 1904, 6 F. 338; *cp.* Hutchison *v.* Hutchison, 1908, S. C. 1001; Henderson *v.* D. & W. Henderson, 1912, S. C. 171.

[3] Wilson *v.* Stark, 1844, 6 D. 692; M'Connochie *v.* Binnie, 1848, 11 D. 89; Milne *v.* Scott, 1858, 20 D. 1224; Young *v.* Mackenzie, 1859, 21 D. 1358; National Exchange Co. *v.* Drew and Dick, 1860, 23 D. 27.

[4] M'Lachlan *v.* Nelson & Co., Ltd. 1904, 6 F. 338; Davidson *v.* Scott, 1915, S. C. 838; *cp.* Blackwood *v.* Summers, Oxenford & Co., 1899, 1 F. 868. See *infra*, paragraph (6), Lodging, p. 944.

[5] Mercer *v.* Duncan, 1838, 16 S. 1048. See also Scottish Missionary Society *v.* Bell, 1856, 19 D. 30.

[6] Fraser *v.* Gordon, 1833, 12 S. 21. See also Burnside *v.* Aitchison & Co., 1827, 6 S. 229; Fleming *v.* Morrison, 1835, 13 S. 859; Dombrowitski *v.* Dombrowitski, 1895, 22 R. 401.

[7] A. B. *v.* Auld, 1837, 15 S. 468.

[8] Ballandene *v.* Chrystal, 1831, 10 S. 168.

[9] C. A. S., D, i. 2.

[10] Milne's Tr., 1842, 5 D. 68; Mackenzie *v.* Cameron, 1853, 15 D. 664.

[11] Carter *v.* Johnston, 1847, 9 D. 598; Don *v.* Richardson, 1859, 21 D. 751; Gibson *v.* M'Kean, 1900, 2 F. 1079.

(3) Signature of Counsel.—A reclaiming note should be signed by counsel.[1] In special cases, however, the Court has relaxed this rule and allowed the reclaimer himself to sign.[2]

(4) Printing.—In the ordinary case it is imperative that the papers described under the heading *Form of Reclaiming Note* (*supra*) should be printed,[3] unless within the reclaiming days a dispensation has been obtained. This may be obtained on a note presented to the President of the Division on cause shown.[4] Amendments on the summons or record made in the Outer House must generally be printed,[5] where made before the date of the interlocutor reclaimed against.[6]

Besides the aforementioned papers, the proof, if any,[7] must be printed, and also any documents or productions which have been referred to in the Lord Ordinary's judgment,[8] or which either of the parties, or both combined, desires to rely upon at the hearing. These are usually prepared as an appendix or appendices, and need not be printed until shortly before the reclaiming note is put out for hearing. Where the respondent desires to print an appendix he should first communicate with the other side before printing.[9]

In a recent case where the reclaimers printed and boxed a reclaiming note and record with interlocutors, but had not printed and boxed the notes of evidence when the case came on for hearing, they proposed an amendment which, if allowed, would do away with the necessity of referring to the notes of evidence. The Court allowed the case to proceed without the notes of evidence being printed, and allowed the minute of amendment to be received on payment of expenses from closing the record.[10]

All papers printed for the use of the Court must be printed in

[1] Hawks *v.* Donaldson, 1899, 2 F. 95. See also Watt *v.* Johnston, 1863, 1 M. 269 (note); Jaffray *v.* Jaffray, 1863, 2 M. 355; Smith *v.* Lord Advocate, 1897, 5 S. L. T. 56.

[2] Brown *v.* Whyte, 1900, 2 F. 1039; Davies *v.* Davies, 1901, 4 F. 3.

[3] 6 Geo. IV. cap. 120, sec. 18. See, however, Fisken *v.* Fisken, 1900, 3 F. 7; Pedrus Steamship Co., Ltd. *v.* Burntisland Harbour Commissioners, 1909, S. C. 1421, where, although certain interlocutors were not printed, the reclaiming note was not held to be incompetent.

[4] Trinity House of Leith *v.* Clark, 1910, S. C. 746.

[5] Muir *v.* Muir, 1874, 2 R. 26; Williamson *v.* Howard, 1899, 1 F. 864; *cp.* Adam *v.* Adam's Trs., 1903, 5 F. 863; Sharp's Tr. *v.* T. Y. Paterson & Co., Ltd., 1912, S. C. 972.

[6] Montgomerie & Co. *v.* Young Bros., 1904, 6 F. 340; Pedrus Steamship Co., Ltd. *v.* Burntisland Harbour Commissioners, 1909, S. C. 1421.

[7] Thomson *v.* Thomson, 1840, 2 D. 839.

[8] Clyne *v.* Stewart, 1830, 9 S. 20 (note); Wilson *v.* Macara, 1847, 9 D. 903; Birnie *v.* Sibbald, 1855, 18 D. 33.

[9] H. R. Marsden, Ltd. *v.* Brunton & Sons, 1914, 2 S. L. T. 96.

[10] Stevens *v.* Motherwell Entertainments, Ltd., 1914, S. C. 957.

type not smaller than that known as "English," and shall have alphabetical reference letters printed on the outer margin.[1]

It is necessary to print the words "Bill Chamber" on a reclaiming note against an interlocutor of the Lord Ordinary on the Bills.[2]

(5) Boxing.—It is imperative that prints of the papers set forth in *Form of Reclaiming Note* (*supra*) should be boxed to the Court prior to the expiry of the reclaiming days, except in special circumstances.[3]

This does not apply to reclaiming notes under sec. 28 of the Court of Session Act, 1868;[4] nor to reclaiming notes under the Personal Diligence Act, 1838,[5] where nothing is said about boxing. Such reclaiming notes, however, should be boxed immediately after lodging.[6]

No documents must be boxed which have not been lodged in process.[7]

Where any proceeding or document has already been printed and boxed as an appendix to a reclaiming note, it is not necessary at a subsequent stage to box the same again; it is sufficient to refer to such former paper, by its description and date, as containing the same in the appendix thereto.[8] Where, however, a reclaiming note against an interlocutory judgment has been before the Inner House, and the cause is remitted back to the Outer House where amendments are made upon the record, it is necessary that such amendments should be printed upon the original record (*see previous paragraph*), and the record as amended must be boxed again to the Inner House when a reclaiming note is taken against a final judgment.[9] (See also *supra*, p. 836.)

(6) Lodging.—In the usual case not only must a reclaimer box prints of his reclaiming note within the reclaiming days, but he must also at the same time lodge the principal reclaiming note with the closed record appended thereto in the office of the Clerk of the Division of the Inner House to which the cause belongs.[10] Where the last day

[1] C. A. S., A, iii. 3; Glenny *v.* M'Phail, 1826, 5 S. 100 (N. E. 93), note; Burrell *v.* Van t'Hoff, 1915, S. C. 832.

[2] A. *v.* B., 1859, 21 D. 203.

[3] 6 Geo. IV. cap. 120, sec. 18; Ross *v.* Herde, 1882, 9 R. 710; Watt's Trs. *v.* More, 1890, 17 R. 318; M'Evoy *v.* Brae's Trs., 1891, 18 R. 417; Wallace *v.* Braid, 1899, 1 F. 575; *cp.* Hutchison *v.* Hutchison, 1908, S. C. 1001; Henderson *v.* D. & W. Henderson, 1912, S. C. 171.

[4] Bain *v.* Allan, 1884, 11 R. 650. See also C. A. S., C, ii. 4.

[5] Lockhart *v.* Cumming, 1851, 13 D. 996; Joel *v.* Gill, 1860, 22 D. 357; Henderson *v.* Henderson, 1888, 16 R. 5.

[6] Bain *v.* Allan, 1884, 11 R. 650, per Lord Shand.

[7] Grierson *v.* Miller, 1912, S. C. 173.

[8] C. A. S., D, i. 2.

[9] Dougall's Trs. *v.* Lornie, 1900, 2 F. 1123; Lee *v.* Maxton, 1904, 6 F. 346.

[10] Joel *v.* Gill, 1860, 22 D. 357, per Lord Justice-Clerk Inglis. See, however, Davidson *v.* Scott, 1915, S. C. 838, and cases therein cited.

for lodging is a Sunday,[1] or a day on which the clerk's office is not open, the reclaiming note may be lodged on the following day.[2] In exceptional circumstances, however, the ordinary rule has been relaxed. Thus where copies of the reclaiming note were boxed within the reclaiming days, but owing to a misunderstanding the principal reclaiming note was not lodged until later, the cause was sent to the roll,[3] and in a case where copies of the reclaiming note with the closed record appended thereto were duly boxed, but the principal reclaiming note was lodged with and accepted by the clerk without having appended thereto a copy of the closed record, the discussion was allowed to proceed.[4]

In certain cases reclaiming notes are directed to be "lodged" or "presented" within a limited time, and nothing is said about boxing. Thus, under the Personal Diligence Act, 1838, sec. 20, a reclaiming note against an interlocutor of the Lord Ordinary in a petition for loosing arrestments requires merely to be "lodged" within ten days from the date of the interlocutor,[5] whether the reclaiming days expire during session or in vacation.[6]

In the same way, where a reclaiming note is directed to be "presented" within a specified time, lodging the reclaiming note is sufficient, although this does not relieve the reclaimer from boxing the reclaiming note as soon as possible thereafter.[7]

Where a reclaiming note is presented to a Clerk of Court after the process has been transmitted to the Extractor, the Clerk of Court proceeds to the Extractor's office, and if extract has been issued he refuses to receive the note; if extract has not been issued, he examines the note to see whether it is competent. If it is incompetent, he refuses to receive it; if it is competent, he receives it, but only upon the reclaimer's agent immediately paying the actual expense incurred by the Extractor. The process is then retransmitted to the Clerk of Court's office. Payment to the Extractor as aforesaid is without prejudice to any question by whom the burden thereof shall be ultimately borne. The consent or refusal of the clerk to receive a reclaiming note does not affect the question of its competency.[8]

[1] Russell *v.* Russell, 1874, 2 R. 82.

[2] Craig *v.* Jex-Blake, 1871, 9 M. 715; Henderson *v.* Henderson, 1888, 16 R. 5; Blackburn *v.* Lang's Trs., 1905, 8 F. 290; C. A. S., A, iii. 19.

[3] Harris *v.* Haywood Gas Coal Co., 1877, 4 R. 714.

[4] Davidson *v.* Scott, 1915, S. C. 838.

[5] Lockhart *v.* Cumming, 1851, 13 D. 996; Henderson *v.* Henderson, 1888, 16 R. 5.

[6] Lockhart *v.* Cumming, 1851, 13 D. 996.

[7] Bain *v.* Allan, 1884, 11 R. 650.

[8] C. A. S., C, ii. 15.

Prints must be lodged within office hours.[1]

(7) Intimation, and Delivery of Six Copies, of the Reclaiming Note to the Other Party.—At the same time as the reclaimer boxes his reclaiming note he must give notice of his application for review to the other side. This is done by delivering six copies of the reclaiming note to the known agent of the opposite party.[2]

Failure to deliver these copies does not necessarily render the reclaiming note incompetent. Sec. 18 of the Judicature Act is directory and not imperative, and if the respondent has not suffered any prejudice, the reclaiming note may be sent to, or continued on, the roll on payment of a sum of modified expenses.[3] It may, however, be refused as incompetent.[4]

It is unnecessary to deliver six copies of the reclaiming note where the latter is a reclaiming note against a decree by default.[5]

(8) Effect of Reclaiming Note.—Every reclaiming note, whether presented before or after the whole cause has been decided in the Outer House, shall have the effect of submitting to the review of the Inner House the whole of the prior interlocutors of the Lord Ordinary of whatever date, not only at the instance of the party reclaiming, but also at the instance of all or any of the other parties who have appeared in the cause, to the effect of enabling the Court to do complete justice, without hindrance from the terms of any interlocutor which may have been pronounced by the Lord Ordinary, and without the necessity of any counter reclaiming note.[6] Thus, where a cause has been determined with the exception of expenses and the latter question is decided by a subsequent interlocutor, a reclaiming note against this interlocutor brings up the whole cause.[7] Care, however, must be observed to see that the reclaiming note is lodged timeously, as the time within which a reclaiming note can be lodged against an interlocutor dealing with expenses varies according to the nature of the interlocutor. While

[1] Burrell *v.* Van t'Hoff, 1915, S. C. 832. [2] 6 Geo. IV. cap. 120, sec. 18.

[3] Burroughes & Watts, Ltd. *v.* Watson, 1910, S. C. 727. See also Lothian *v.* Tod, 1829, 7 S. 525; Bell *v.* Warden, 1830, 8 S. 1007 (note); Taylor *v.* M'Donald, 1844, 6 D. 637; Campbell's Trs. *v.* Campbell, 1868, 6 M. 563; Allan's Trs. *v.* Allan & Sons, 1891, 19 R. 15.

[4] Pollock *v.* Harkness, 1835, 13 S. 1072; Fraser *v.* Carnegie, 1839, 1 D. 886.

[5] Cullen *v.* Burden and Whyte, 1851, 13 D. 526; Mitchell *v.* Douglas, 1855, 17 D. 772.

[6] Court of Session Act, 1868, sec. 52; Stirling-Maxwell's Trs. *v.* Grant, 1886, 13 R. 854; Bonner's Tr. *v.* Bonner, 1902, 4 F. 429.

[7] Lamond's Trs. *v.* Croom, 1872, 10 M. 690, per Lord President Inglis, p. 692; Bannatine's Trs. *v.* Cunninghame, 1872, 10 M. 317; Crellin's Tr. *v.* Muirhead's Judicial Factor, 1893, 21 R. 21, per Lord Young; Inglis *v.* National Bank of Scotland, Ltd., 1911, S. C. 6, per Lord President Dunedin, p. 9.

interlocutors awarding expenses which have previously been reserved,[1] or awarding expenses subject to modification,[2] or modifying expenses after the account has been taxed,[3] may be reclaimed against within twenty-one days, an interlocutor dealing with objections to the Auditor's report can only be reclaimed against within ten days.[4] Interlocutors which are merely executorial cannot be reclaimed against.[5]

Where a prior interlocutor is expressly or by implication a final interlocutor, a reclaiming note against a subsequent interlocutor does not submit the prior interlocutor to review. Thus, an interlocutor restricting the mode of proof which has not been reclaimed against becomes final, and may not be opened up by a reclaiming note against a final judgment.[6] In the same way, an interlocutor sustaining the competency of an action of multiplepoinding, repelling objections to the fund *in medio*, and ordering consignation of the fund, which was done, not having been reclaimed against at the time, but having been acted upon by the parties, was held to have become final, and could not be brought under review by a reclaiming note against a subsequent interlocutor;[7] and where parties who had lodged a claim in a multiplepoinding, which they subsequently withdrew by minute, moved the Lord Ordinary to allow them to withdraw their minute and proceed to prove their averments after decrees of preference had been pronounced in the competition which had become final, and the Lord Ordinary refused their motion, a reclaiming note against the refusal was held not to bring the decrees of preference under review.[8]

A reclaiming note against an interlocutor refusing a reference to oath is not an interlocutor which has the effect of submitting to review the whole prior interlocutors.[9]

A reclaiming note brings under review findings in fact as well as in law.[10]

After a reclaiming note has been presented, the reclaimer is not

[1] Bannatine's Trs. *v.* Cunninghame, 1872, 10 M. 317; Baird *v.* Barton, 1882, 9 R. 970.

[2] Earl of Kintore *v.* Alex. Pirie & Sons, Ltd., 1904, 42 S. L. R. 5.

[3] Crellin's Tr. *v.* Muirhead's Judicial Factor, 1893, 21 R. 21; Taylor's Trs. *v.* M'Gairgan, 1896, 23 R. 738.

[4] Cowper *v.* Callender, 1872, 10 M. 353; M'Alley *v.* Marshall's Trs., 1913, S. C. 890.

[5] Tennents *v.* Romanes, 1881, 8 R. 824; Thompson & Co. *v.* King, 1883, 10 R. 469; Stirling-Maxwell's Trs. *v.* Kirkintilloch Police Commissioners, 1883, 11 R. 1.

[6] Copeland *v.* Lord Wimborne, 1912, S. C. 355; *cp.* Stewart *v.* Clark, 1871, 9 M. 616.

[7] North British Rly. Co. *v.* Gledden, 1872, 10 M. 870. See also Terrell *v.* Ker, 1900, 2 F. 1055.

[8] Duncan's Factor *v.* Duncan, 1874, 1 R. 964.

[9] Sawers *v.* Clark, 1892, 19 R. 1090. [10] Kinnell *v.* Peebles, 1890, 17 R. 416.

at liberty to withdraw it without the consent of the other parties; and if he does not insist therein, any other party in the cause may do so, in the same way as if it had been presented at his own instance.[1]

In cross-actions of divorce where judgment in both actions was given on the same day, and decree was granted against the wife, divorcing her, and decree of absolvitor was granted in favour of the husband, the wife reclaimed against the decree of absolvitor in favour of her husband, but allowed the decree of divorce against herself to become final. The Court held that as the marriage was dissolved by the latter decree becoming final, she could not prosecute her reclaiming note against the judgment in favour of her husband.[2]

A reclaiming note which has been presented *with leave* of the Lord Ordinary has not the effect of removing the cause or the process from the Outer House, or of staying procedure before the Lord Ordinary, or of excusing obedience to or implement of the interlocutor reclaimed against, unless the Lord Ordinary shall otherwise direct, upon motion made for that purpose, and the decision of the Lord Ordinary on such motion shall be final.[3]

(9) Reclaiming Days.—(a) *Generally.*—The different periods within which reclaiming notes may competently be lodged and boxed cannot be altered by consent of parties.[4] The statutory limit is imperative, and failure to lodge and box within such time will make the reclaiming note incompetent. (See *Boxing, supra,* p. 944 ; *Lodging, supra,* p. 944.) Where, however, the last reclaiming day is a Sunday or another day on which the clerk's office is not open, the reclaiming note may be lodged on the next day on which the clerk's office is open.[5]

(b) *Twenty-one Days from the Date of the Interlocutor taken to Review, without Leave.*—Reclaiming notes against interlocutors disposing of the whole cause are competent within twenty-one days from the date of the interlocutor taken to review, without leave.[6] The whole cause is held to be decided when an interlocutor has been pronounced which, either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of

[1] Court of Session Act, 1868, sec. 52. [2] Bridges *v.* Bridges, 1911, S. C. 250.

[3] Court of Session Act, 1868, sec. 54.

[4] Ibid., sec. 26. See also Hopkirk *v.* Shotts Iron Co., 1830, 9 S. 152 (note); Burns *v.* Waddell & Son, 1897, 24 R. 325.

[5] Hume *v.* Maclellan, 1855, 17 D. 477 ; M'Call & Co. *v.* Laing and Wilson, 1868, 40 Jur. 569 ; Craig *v.* Jex Blake, 1871, 9 M. 715 ; Russell *v.* Russell, 1874, 2 R. 82; Henderson *v.* Henderson, 1888, 16 R. 5 ; Blackburn *v.* Lang's Trs., 1905, 8 F. 290. See also C. A. S., A, iii. 19.

[6] 6 Geo. IV. cap. 120, sec. 18 ; 13 & 14 Vict. cap. 36, sec. 11; Court of Session Act, 1868, sec. 54.

the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified, or deserned for.[1]

Reclaiming notes against decrees by default may be lodged within twenty-one days without leave,[2] except in the case of an interlocutor expiring through mistake or inadvertence. (See *Reponing Notes, infra*, p. 953 *et seq.*)

The whole cause is not decided unless the question of expenses is also decided.[3] Expenses must be expressly awarded, and if the interlocutor exhausting the merits is silent on the subject, the Court has no power thereafter to award. Accordingly, where an interlocutor disposing of the merits is silent on the subject of expenses, it has been held that this is an interlocutor exhausting the cause.[4]

The following interlocutors have been held to be reclaimable within twenty-one days without leave:—

Ordaining a defender to erect according to certain plans, finding pursuer entitled to expenses, allowing *interim* extract, and continuing the cause.[5]

Approving a fund *in medio*.[6]

Refusing to sustain a minute of reference to oath after the merits have been disposed of by a previous interlocutor.[7]

Finding expenses due which were previously reserved.[8]

Awarding expenses subject to modification.[9]

Modifying expenses.[10]

[1] Court of Session Act, 1868, sec. 53.

[2] Arnold *v.* Winton & Co., 1852, 14 D. 769; Anderson *v.* Brown, 1854, 16 D. 367; Young *v.* Mackenzie, 1859, 21 D. 1358.

[3] Lamond's Trs. *v.* Croom, 1872, 10 M. 690; Baird *v.* Barton, 1882, 9 R. 970; Burns *v.* Waddell & Son, 1897, 24 R. 325; Caledonian Rly. Co. *v.* Glasgow Corporation, 1900, 2 F. 871.

[4] Wilson's Trs. *v.* Wilson's Factor, 1869, 7 M. 457; Dobbie *v.* Duncanson, 1872, 10 M. 810, at p. 816; Macdonald *v.* M'Eachan, 1880, 7 R. 574; Fraser *v.* Fraser, 1903, 11 S. L. T. 70.

[5] Kirkwood *v.* Park, 1874, 1 R. 1190; *cp.* Caledonian Rly. Co. *v.* Glasgow Corporation, 1900, 2 F. 871, per Lords Adam and Kinnear; Jardine *v.* Mags. of Moffat, 1907, S. C. 1065.

[6] Walker's Tr. *v.* Walker, 1878, 5 R. 678; School Board of Harris *v.* Davidson, 1881, 9 R. 371.

[7] M'Larens *v.* Shore, 1883, 10 R. 1067; *cp.* Sawers *v.* Clark, 1892, 19 R. 1090.

[8] Baird *v.* Barton, 1882, 9 R. 970.

[9] Earl of Kintore *v.* Alex. Pirie & Sons, Ltd., 1904, 42 S. L. R. 5.

[10] Crellin's Tr. *v.* Muirhead's Judicial Factor, 1893, 21 R. 21; Taylor's Trs. *v.* M'Gairgan, 1896, 23 R. 738.

Approving Auditor's report and granting decree for expenses as taxed, where modification had been previously reserved.[1]

There may be two final interlocutors in the same cause, each of which is capable of being reclaimed against within twenty-one days without leave. Thus, where an interlocutor has been pronounced disposing of the merits of a case and awarding expenses, but reserving the question of modification, such an interlocutor may be reclaimed against within twenty-one days without leave,[2] and the interlocutor modifying the expenses may also be reclaimed against within twenty-one days without leave, even where the interlocutor does not really modify but gives decree for expenses as taxed.[3]

(c) *Fourteen Days from the Date of the Interlocutor taken to Review, without Leave.*— Reclaiming notes against interlocutors pronounced under the Companies (Consolidation) Act, 1908, must be lodged within fourteen days from the date of the interlocutor taken to review, without leave.[4] (See *supra*, pp. 846, 863.)

Reclaiming notes against interlocutors pronounced in purely Bill Chamber proceedings are in the same position. (See Maclaren's Bill Chamber Practice.)

Reclaiming notes against interlocutors pronounced under the Bankruptcy (Scotland) Act, 1913, are in the same position. (See *supra*, p. 844 *et seq.*)

(d) *Ten Days from the Date of the Interlocutor taken to Review, without Leave.*— Interlocutors pronounced in petitions for the recall or restriction of arrestments and inhibitions, on caution or without caution, may be reclaimed against within ten days from their date, without leave. (See *supra*, p. 844.)

Where expenses have been found due, and objections have been taken to the Auditor's report and repelled and decree given for expenses as taxed, and for the expenses of the discussion, this latter interlocutor may be reclaimed against, but only within ten days.[5]

(e) *Ten Days from the Date of the Interlocutor Granting Leave and within Twenty-one Days of the Date of the Interlocutor taken to Review.*— An interlocutor which disposes of only a part of the case is subject to two limitations as regards the time for reclaiming. In the first place,

[1] Inglis *v.* National Bank of Scotland, Ltd., 1911, S. C. 6.

[2] Earl of Kintore *v.* Alex. Pirie & Sons, Ltd., 1904, 42 S. L. R. 5.

[3] Inglis *v.* National Bank of Scotland, Ltd., 1911, S. C. 6. See also Lamond's Trs. *v.* Croom, 1872, 10 M. 690, per Lord President Inglis, p. 692.

[4] MacArthur *v.* Mackay, 1914, S. C. 547.

[5] M'Alley *v.* Marshall's Trs., 1913, S. C. 890. See also Cowper *v.* Callender, 1872, 10 M. 353.

the interlocutor being an interlocutor dealing with the merits can be reclaimed against within twenty-one days. In the second place, being an interlocutor which does not dispose of the whole subject-matter of the cause, it is incompetent to present a reclaiming note against such an interlocutor without the leave of the Lord Ordinary being first had and obtained, and where such leave has been obtained, the reclaiming note must be lodged within ten days from the date of the interlocutor granting leave.[1] Accordingly, where in an action concluding for declarator and for interdict the Lord Ordinary pronounced an interlocutor granting decree in terms of the declaratory conclusion with expenses and superseded further consideration of the conclusion for interdict, it was held that a reclaiming note to be timeous ought to be lodged within ten days after the interlocutor granting leave to reclaim.[2] In the same way, where in an action of mutiplepoinding the Lord Ordinary pronounced an interlocutor exhausting all the questions of law between the different claimants, settling the shares of the fund *in medio* to which they were respectively entitled, appointing the cause to be enrolled for further procedure, and finding no expenses due to or by any of the competing claimants, and this interlocutor was reclaimed against, it was held that the leave of the Lord Ordinary required to be obtained, as the amount of the fund *in medio* had not been ascertained.[3]

An interlocutor which does not fall under sec. 28 of the Court of Session Act, 1868, and which disposes of the merits of a cause but reserves the question of expenses, has been held not to dispose of the whole subject-matter of the cause.[4]

It is a question whether an interlocutor disposing of the merits of an action and disposing of expenses in so far as already incurred and continuing the cause is an interlocutor disposing of the whole cause.[5]

(f) *Ten Days from the Date of the Interlocutor taken to Review, and also from the Date of the Interlocutor Granting Leave.*—Under this head fall all interlocutors which do not dispose, in whole or in part, of the merits of a cause,[6] the sole exception being interlocutors which settle

[1] 6 Geo. IV. cap. 120, sec. 18; 13 & 14 Vict. cap. 36, sec. 11; Court of Session Act, 1868, sec. 54; Fraser *v.* Fraser, 1872, 10 M. 420. See also Bannatine's Trs. *v.* Cunninghame, 1869, 7 M. 813.

[2] Jardine *v.* Mags. of Moffat, 1907, S. C. 1065; *cp.* Kirkwood *v.* Park, 1874, 1 R. 1190.

[3] Kennedy *v.* Taylor, 1873, 11 M. 603. See also Gowans *v.* Gowans, 1889, 27 S. L. R. 210.

[4] Lamond's Trs. *v.* Croom, 1872, 10 M. 690; Baird *v.* Barton, 1882, 9 R. 970; Burns *v.* Waddell & Son, 1897, 24 R. 325; Caledonian Rly. Co. *v.* Corporation of Glasgow, 1900, 2 F. 871.

[5] Caledonian Rly. Co. *v.* Corporation of Glasgow, 1900, 2 F. 871. See also Kennedy *v.* Taylor, 1873, 11 M. 603.

[6] Court of Session Act, 1850, sec. 11; Court of Session Act, 1868, sec. 54.

the method of proof.[1] Accordingly, interlocutors dealing with procedure, which do not fall under the aforesaid exception, such as granting diligence for the recovery of documents,[2] or remitting disputed accounts of new to the Auditor to tax and report,[3] or making an incidental remit where the method of procedure has already been decided,[4] can only be reclaimed against within ten days of the interlocutor taken to review, with leave. Interlocutors disposing of a strictly preliminary defence are in the same position.[5]

(g) *Eight Days from the Date of the Interlocutor taken to Review, without Leave.*—All judgments pronounced by the Lord Ordinary in petitions falling under the provisions of the Distribution of Business Act, 1857, such as entail petitions, petitions for the appointment of judicial factors, factors *loco tutoris* or *loco absentis*, or *curators bonis*, etc., etc., except where the same shall have been pronounced in terms of instructions by the Court on report, may be reclaimed against within eight days of their date, without leave. (See *supra*, p. 843.)

All judgments pronounced under the Trusts Acts are in a similar position. (See *supra*, p. 844.)

(h) *Six Days from the Date of the Interlocutor taken to Review, without Leave.*—Interlocutors which appoint a proof, or a refusal or postponement of the same, or approving of issues, must be reclaimed against within six days of their date, and may be reclaimed against without leave.[6]

An interlocutor renewing an order for proof is equal to an allowance of proof and is reclaimable within six days of its date, without leave;[7] and so is an interlocutor simply approving of issues.[8] Interlocutors ordering a remit by way of proof are in the same position;[9] but interlocutors making an incidental remit where the method of procedure has already been decided by a prior interlocutor,[10] or making a remit to a man of skill to report on certain objections to an account lodged in process by one of the parties,[11] are not in this position.

[1] Court of Session Act, 1868, sec. 28; A. S., 10th March, 1870, secs. 1, 2; C. A. S., C, ii. 4, 5.

[2] Stewart *v.* Kennedy, 1890, 17 R. 755; Duke of Hamilton's Trs. *v.* Woodside Coal Co., 1897, 24 R. 294.

[3] Turner *v.* Fraser's Trs., 1897, 24 R. 673.

[4] Anstruther *v.* Burns' Trs., 1893, 20 R. 723; Edinburgh Northern Tramways Co. *v.* Mann, 1894, 21 R. 930.

[5] Stewart *v.* Guthrie, 1889, 26 S. L. R. 656.

[6] Court of Session Act, 1868, sec. 28; A. S., 10th March 1870, secs. 1, 2; C. A. S., C, ii. 4, 5.

[7] Clark *v.* M'Allister, 1876, 3 R. 780.

[8] Mason *v.* Stewart, 1877, 4 R. 513.

[9] Quin *v.* Gardner & Sons, 1888, 15 R. 776.

[10] Anstruther *v.* Burns' Trs., 1893, 20 R. 723.

[11] Edinburgh Northern Tramways Co. *v.* Mann, 1894, 21 R. 930.

Where an interlocutor repels a plea to the relevancy and appoints parties to lodge issues, this imports an allowance of proof,[1] but not where the interlocutor merely closes the record and orders issues to be lodged without having disposed of the question of relevancy,[2] or, having repelled pleas to the competency and the pursuer's title to sue, appoints the pursuer to lodge an issue, leaving a plea to the relevancy not disposed of.[3]

An interlocutor allowing a proof before answer does not fall to be reclaimed within six days of its date without leave.[4]

An interlocutor in an action of accounting appointing the defenders before answer to lodge the account called for in the summons does not "import an appointment of proof, or a refusal or postponement of the same";[5] nor does an interlocutor finding that an agreement can only be proved by writ or oath.[6]

It is incompetent to reclaim against an interlocutor allowing a proof on objections to a report by the Accountant of Court in a petition for a judicial factor in bankruptcy proceedings.[7]

Where a party aggrieved by an interlocutor approving of an issue or issues does not desire to have such issue or issues, or one or more of such issues, disallowed *in toto*, but only desires a variation of the terms of such issue or issues, it is not necessary or competent to proceed by reclaiming note, but only by motion to the Inner House within six days from the date of such approval, specifying precisely in his notice of motion the particular variation or variations which he desires should be made on said issue or issues, and at the same time boxing copies of the record.[8] It is timeous if the notice of motion is lodged in process within six days from the date of the interlocutor approving of the issue or issues, although the motion is not made until a later date.[9]

(10) Reponing Notes.—These are reclaiming notes for the purpose of being reponed against (*a*) a decree in absence; or (*b*) a decree by default.

(a) *Decree in Absence.*—By sec. 23 of the Court of Session Act, 1868, it is no longer competent, by reclaiming note to the Inner House, to obtain the recall of a decree pronounced in absence of the defender.

[1] Little *v.* North British Rly. Co., 1877, 4 R. 980.
[2] Brown *v.* Virtue & Co., Ltd., 1889, 16 R. 987.
[3] Kennedy *v.* Wise, 1890, 17 R. 1036.
[4] Christie's Trs. *v.* Muirhead, 1869, 7 M. 1001.
[5] Lamont & Co. *v.* Dublin and Glasgow Steam Packet Co., 1908, S. C. 1017.
[6] Stewart *v.* Clark, 1871, 9 M. 616.
[7] M'Cardle *v.* M'Cardle's Factor, 1906, 8 F. 416.
[8] Court of Session Act, 1868, sec. 28; 14th October 1868, sec. 6; C. A. S., F, i. 2.
[9] Dingwall *v.* Fisher, 1909, S. C. 745.

The only methods by which such a defender can now be reponed are by a motion in the Lord Ordinary's Motion Roll and payment of £2, 2s. (see *Decree in Absence, supra*, p. 369 *et seq.*); or, if the period for such a motion has expired, by suspension. (See Maclaren's Bill Chamber Practice, p. 86.) It seems, however, to be competent to present a reclaiming note against a decree in absence where the person objecting to the decree in absence has not been called as a party and was entitled to have been so called.[1]

In an action of separation and aliment against a husband the summons was served personally on the defender, and notice of the diet of proof was sent to him by registered letter. He did not lodge defences or attend the proof, but decree being pronounced against him, he lodged a reclaiming note, and the Division remitted to the Lord Ordinary to repone the defender upon such terms as to his Lordship should seem fit.[2]

(b) *Decree by Default.*—(i.) *Generally.*—A party wishing to be reponed against a decree for failure to implement any order may apply to the Inner House by a short reclaiming note, before extract, accompanied by the paper required, merely setting forth the interlocutor or decree, when the Court may remit to the Lord Ordinary to repone the party on payment of such expenses as to his Lordship may seem reasonable, who shall thereafter prepare and proceed in the cause as accords.[3] The reclaiming note is in ordinary form, except that a copy of the closed record need not be appended thereto.[4] Where the default has been in failing to lodge a paper within a specified time, the reclaiming note must be accompanied with the paper ordered.[5] Reponing does not take place as a matter of course;[6] it is entirely a matter within the discretion of the Court,[7] and reponing is usually accompanied by an award of expenses to the other party.[8]

There is a general power in the Court at common law to repone against a decree by default, unless in a particular case it has been taken away by some statutory enactment.[9]

[1] Milne *v.* M'Callum, 1878, 5 R. 546; Lindsay *v.* Hendrie, 1879, 6 R. 1246.

[2] Whyte *v.* Whyte, 1891, 18 R. 469.

[3] A. S., 11th July 1828, sec. 72.

[4] C. A. S., D, i. 2; A. S., 11th July 1828, secs. 72 and 77; Wilson *v.* Stark, 1844, 6 D. 692; M'Connochie *v.* Binnie, 1848, 11 D. 89; Arnold *v.* Winton & Co., 1852, 14 D. 769, at p. 772, per Lord Ivory; Milne *v.* Scott, 1858, 20 D. 1224; National Exchange Co. *v.* Drew and Dick, 1860, 23 D. 27.

[5] C. A. S., A, iii. 17.

[6] M'Laren *v.* Robertson, 1857, 19 D. 769.

[7] Arthur *v.* Bell, 1866, 4 M. 841; Anderson *v.* Garson, 1875, 3 R. 254.

[8] Anderson *v.* Garson, 1875, 3 R. 254.

[9] Glen *v.* Thomson, 1901, 4 F. 154.

In the undernoted cases reponing was refused.[1] It was refused where a reclaiming note against a second default had been taken with modified expenses against the reclaimer,[2] though in another case a reclaiming note against a third default was allowed.[3] This latter case has, however, been rejected as a precedent, and the Court will not repone a second time without sufficient cause shown.[4] (See Maclaren on Expenses, pp. 78, 79.)

(ii.) *Against a Decree by Default in Respect of the Failure of a Pursuer to Deliver Proof Prints of the Record.*—By sec. 26 of the Court of Session Act, 1868, if a pursuer fails to deliver two printer's proofs of the open record within eight days from the lodging of defences to the agent of the other party, and also to the Clerk of the Process, the defender may enrol the cause and move for decree by default, which decree the Lord Ordinary will grant, unless the pursuer shows good cause to the contrary. This provision is directory and not imperative.[5] There is no statutory provision for being reponed against a decree of absolvitor granted in terms of the above section, but the Court has a common-law right to repone.[6] In one case the Court reponed a pursuer on payment of £3, 3s.[7]

(iii.) *Against a Decree of the Lord Ordinary Appointing a Cause to be Deleted from his Roll.*—If the pursuer, or the party appointed to print the record, fails within four days from the date of the interlocutor closing the record to lodge two printed copies of the closed record, the Lord Ordinary shall delete the cause from the Debate or Procedure Roll.[8]

In one case the pursuer was reponed without any finding for expenses.[9]

(iv.) *Against a Decree of Dismissal in Respect of the Failure of Both Parties to Lodge Printed Copies of the Closed Record.*[10]—In one case

[1] Arthur *v.* Bell, 1866, 4 M. 841; Trs. of Tron Free Church *v.* Morrison, 1876, 13 S. L. R. 384; M'Gibbon *v.* Thomson, 1877, 4 R. 1085; Robertson *v.* Barclay, 1877, 5 R. 257; Yeaman *v.* Caledonian Property Investment Building Society, 1883, 20 S. L. R. 777; Stevenson *v.* Hutcheson and Anderson, 1885, 12 R. 923; Bain *v.* Lawson & Son, 1899, 1 F. 576; Lanarkshire County Council *v.* Motherwell Commissioners, 1901, 4 F. 151.

[2] Hamilton *v.* Christie, 1857, 19 D. 712.

[3] Mather *v.* Smith, 1858, 21 D. 24.

[4] Pearson *v.* M'Gavin, 1866, 4 M. 754.

[5] Swan & Son *v.* Fairholme's Trs., 1894, 1 S. L. T. 464.

[6] Glen *v.* Thomson, 1901, 4 F. 154.

[7] Halligan *v.* Scottish Legal Life Assurance Society, 1883, 10 R. 972. See, however, Semple *v.* Semple, 1904, 12 S. L. T. 404; Ogilvie *v.* Wearwell Cycle Co., 1904, 12 S. L. T. 423.

[8] A. S., 2nd November 1872, sec. 5; C. A. S., C, ii. 6.

[9] Liquidator of the Gael Iron Co., Ltd. *v.* Orr, 1884, 12 R. 345.

[10] A. S., 2nd November 1872, secs. 1 and 5; C. A. S., C, ii. 6.

parties were reponed and no expenses were found due to or by either party.[1]

(v.) *Against a Decree of Dismissal in Respect of Failure of Counsel to Attend on the Procedure Roll.*[2]—There is no obligation on the Inner House to recall such an interlocutor, and it is not as a matter of course that such an interlocutor will be recalled.[3] The Court has accordingly been known to refuse to repone in such circumstances.[4]

In one case the Court allowed a defender to be reponed on payment of fourteen guineas of expenses.[5]

(vi.) *Against a Decree by Default taken by a Party in Respect of the Failure of the Counsel on the Other Side to Appear.*[6]—Such a decree cannot be recalled of consent of parties, but the decree can be recalled upon a reclaiming note only, and, unless where the Court shall otherwise direct, the Auditor shall, in taxing any account of expenses incurred to his agent by the party against whom such decree is taken, disallow the expenses of such decree being opened up.[7]

The Court has refused to recall such a decree.[8]

(vii.) *Against a Decree by Default in Respect of Failure to Lodge Issues.*[9]—It was formerly held that the appointment of lodging issues was peremptory, and that the party in default could only be reponed on lodging a reclaiming note,[10] but it is now held that the Lord Ordinary has a discretion to allow to be adjusted issues not timeously lodged.[11] In a case where there was no contumacy but merely a misunderstanding the Court reponed the pursuer upon payment of expenses.[12]

(viii.) *Against an Interlocutor of the Lord Ordinary Expiring through Mistake or Inadvertence.*[13]—Leave of the Lord Ordinary is required, and the reclaimer is subjected in the payment of the expenses previously incurred in the process by the other party.[14] The Court has no dis-

[1] Robertson *v.* Johnston, 1908, S. C. 383.

[2] A. S., 2nd November 1872, sec. 1; C. A. S., C, ii. 9 (*a*).

[3] Ferguson *v.* M'Duff, 1878, 5 R. 1016.

[4] Yeaman *v.* Caledonian Property Investment Building Society, 1883, 20 S. L. R. 777.

[5] Bedfordshire Loan Co. *v.* Russell, 1909, 47 S. L. R. 116.

[6] A. S., 2nd November 1872, sec. 2; C. A. S., C, ii. 9 (*b*).

[7] A. S., 15th July 1865, sec. 3; C. A. S., C, ii. 9 (*c*).

[8] M'Kean *v.* Lorimer and Moyes, 1877, 14 S. L. R. 274.

[9] A. S., 10th March 1870, sec. 1 (5); C. A. S., C, ii. 4 (*e*).

[10] Anderson *v.* Glasgow and South-Western Rly. Co., 1865, 4 M. 259.

[11] Wyllie *v.* Wyllie, 1911, S. C. 1.

[12] Glen *v.* Thomson, 1901, 4 F. 154.

[13] Court of Session Act, 1808 (48 Geo. III. cap. 151), sec. 16; Mills *v.* Hamilton, 1829, 7 S. 716; Smellie *v.* Adams, 1883, 20 S. L. R. 709; MacArthur *v.* Mackay, 1914, S. C. 547.

[14] 48 Geo. III. cap. 151, sec. 16. See also Bennet *v.* Pyper, 1833, 11 S. 414.

cretion in the matter of expenses, and must award the expenses incurred,[1] except in the case where a wife seeks to be reponed in an action between her and her husband.[2]

In the matter of granting leave the Lord Ordinary's discretion is not lightly interfered with.[3]

The Lord Ordinary granted leave in a case where owing to a printer's error the reclaiming note had been refused.[4]

The Court must have a good reason for reponing the reclaimer.[5] It held that it was no excuse that the reclaimer's agent's clerk had gone away leaving the print of the reclaiming note hidden in his desk;[6] or that the reclaimer had made a mistake about the reclaiming days.[7]

The Court will not repone where the interlocutor has been acquiesced in for some time.[8]

(11) Transfer of Causes.—Although the pursuer is entitled at the commencement of a cause to select the Division of the Inner House to which it shall belong, it does not follow that the cause must necessarily be heard before such Division. Thus the Lord President may from time to time, as it shall appear to him to be necessary or expedient, with a view to the due despatch of the business of the Court, transfer causes from one Division of the Court to the other to such extent as he shall judge to be necessary or expedient;[9] and a list or note of the causes so transferred shall be prepared specifying the Division from whom and the Division to whom the transference is made, bearing that the transference is made by the Lord President under the authority of 20 & 21 Vict. cap. 56, and signed by the Lord President, and every such list shall operate as a transference of the causes therein contained.[10] In addition, the parties to any cause enrolled in the rolls of either Division of the Court may, by a joint minute presented to the Court, move the Court of consent to transfer such cause from the rolls of the Division in which it is enrolled to those of the other Division; and such cause shall be transferred accordingly.[11]

Again, an additional Division of the Court may be formed from time

[1] M'Ra *v.* Birtwhistle's Trs., 1831, 9 S. 582; Bennet *v.* Pyper, 1833, 11 S. 414.
[2] Steedman *v.* Steedman, 1887, 14 R. 682.
[3] Mags. of Leith *v.* Lennon, 1875, 3 R. 152.
[4] Tough *v.* Macdonald, 1904, 7 F. 324.
[5] Mills *v.* Hamilton, 1829, 7 S. 716.
[6] Brodie *v.* Anderson & Co., 1897, 25 R. 10.
[7] Williams *v.* Macnee, 1841, 3 D. 1014.
[8] Ferrier *v.* Mudie, 1829, 7 S. 349.
[9] Court of Session Act, 1857 (20 & 21 Vict. cap. 56), sec. 1.
[10] Ibid., sec. 2.
[11] Ibid., sec. 7.

to time by Act of Sederunt of the Court, and to this Division the Lord President may transfer causes standing on the rolls of the First and Second Divisions.[1]

(12) PROCEDURE.—(a) *Single Bills.*—The reclaiming note, having been printed, signed, boxed, intimated, and lodged, appears in the Single Bills of the Division of the Inner House to which it belongs on the following day. If there is an objection to the competency of the reclaiming note it is usually taken and disposed of in the Single Bills, although such an objection may be reserved for discussion at the hearing of the case on the merits. If no objection is taken to the competency, or if an objection is taken and repelled, the note is sent to the Summar Roll or the Short Roll, as the case may be[2] (see *Summar Roll, supra*, p. 938; *Short Roll, supra*, p. 938), except in the case of a reclaiming note against a decree by default, which is disposed of in the Single Bills. At the moving of the note the respondent is entitled to crave leave from the Court to print any additional productions which he may think necessary to be laid before the Court for their consideration, reserving the question by what party the expense of such additional printing shall be defrayed.[2]

Where a reclaiming note is presented against an interlocutor not exhausting the whole merits of the cause, it is competent for the Court, either when such note is moved in the Single Bills, or where it is put out in the Short or Summar Roll, to supersede consideration thereof till other points in the cause are disposed of by the Lord Ordinary, or to remit to the Lord Ordinary to recall the interlocutor, and thereafter pronounce an interlocutor exhausting the whole cause.[3]

Where a reclaiming note has been taken against an interlocutor dismissing an action as irrelevant, the circumstances should be explained in the Single Bills, and the Division may send the case for an early hearing instead of sending it to the Short Roll.[4]

(b) *Hearing.*—The Division Roll is called in regular order,[5] and it is imperative that two counsel be instructed on each side.[6] Where only one counsel was instructed for the reclaimer and he failed to appear owing to being in a proof alone in the Outer House, the reclaiming note was refused.[7] The hearing of a cause will not be delayed merely on account of the absence of senior counsel, unless in very special circumstances, and the junior counsel must always be

[1] C. A. S., A, i. 2. [2] C. A. S., D, i. 2. [3] C. A. S., D, i. 3.
[4] Murray *v.* Fraser, 1915, 1 S. L. T. 72.
[5] Wilson *v.* Mann, 1876, 3 R. 527.
[6] Forbes *v.* Mags. of Banff, 1855, 18 D. 80; Kirk-Session of Wemyss *v.* Inspector of Poor of Wemyss, 1855, 18 D. 273.
[7] Cheyne *v.* Gray, 1870, 8 S. L. R. 142.

ready to go on.[1] In the case of unexpected and necessary absence of counsel the Court may delay the cause for a short time to instruct other counsel and agent.[2]

The junior counsel for the reclaimer usually opens the debate, and states the whole pleas maintained for his client, but in special circumstances the Court has allowed the senior counsel for the reclaimer to do so. If there is any objection to the interlocutor of the Lord Ordinary on the question of expenses, it is the duty of the reclaimer's counsel to open upon the point.[3] The junior counsel for the respondent usually follows, and in the same manner states the whole pleas for his client, and he is followed by senior counsel for the reclaimer and the respondent respectively. Sometimes, however, the Court does not call for a reply to the opening speech, and it is in its power to terminate the debate at any time when it considers that further argument is unnecessary.

The Court has power to order an argument by counsel as often as it sees fit, either on whole or part of the cause, and has still power to appoint parties to prepare and print cases and to allow counsel to be heard before giving judgment in the cause.[4] The latter right, however, is seldom exercised.

(c) *Amendment of Record.*—The Court has now very large powers of allowing amendment of the record, and may allow a new pursuer to be sisted or a new defender to be called; may allow the instance of the summons to be amended so as to alter the capacity in which the pursuer or the defender sues or is sued and also their respective designations; may allow the conclusions to be amended to the effect of increasing the sum sued for or subjecting additional funds or property to the adjudication of the Court; or may allow any amendment of the summons or other writ which may be necessary for the purpose of determining the real question in controversy between the parties, notwithstanding that, in consequence of such amendment, a larger or different remedy than that originally concluded for is thereby sought.[5]

With regard to the terms upon which such amendments have been allowed, see Maclaren on Expenses, pp. 69, 70.

(d) *Failure to Lodge a Paper.*—Where a party in any instance fails to lodge his paper within the time fixed, the cause may immediately,

[1] Clarke *v.* Newmarsh, 1836, 14 S. 488 (note); Ramsay *v.* Anderson, 1836, 14 S. 570.

[2] A. S., 11th July 1828, sec. 81.

[3] Clarke *v.* Sutherland, 1897, 24 R. 821; Bank of Scotland *v.* Morrison, 1911, S. C. 593.

[4] Judicature Act, 1825 (6 Geo. IV., cap. 120) sec. 18.

[5] C. A. S., B, i. 1-6.

on the expiry thereof, be enrolled in the Single Bills; and judgment shall be pronounced against the party so failing, in such manner, and to such extent, as may, in the form and circumstances of the process, be competently craved, unless in those cases where no prorogation has been previously granted the party failing can satisfy the Court that further time ought to be allowed to him; but such prorogation shall be granted only on payment of such previous expenses as the Court shall judge reasonable.[1]

(e) *Rehearing Before Increased Number of Judges.*—(i.) *Five Judges.*—Where the Judges of either of the Divisions of the Inner House are equally divided in opinion on a question of fact arising upon a proof, or upon a cause which in their opinion does not involve any legal principle of importance, the Judges of such Division may appoint the cause to be reheard before the Judges of said Division, or such as shall be able to give attendance in Court on the day appointed, with the assistance of such additional Judge or Judges to be afterwards named by the President or Judge presiding in the Division as shall make up the number of five Judges; and the judgment shall be in conformity with the opinion of the majority of the five Judges, and shall bear to be the judgment of the Division by which the hearing was appointed, after consulting with such additional Judge or Judges, and may be signed at any ordinary sitting of said Division, without the presence of such additional Judge or Judges, if he or they do not desire to attend for the purpose of delivering separate opinions.[2]

(ii.) *Seven Judges.*—Where the Judges of either Division are equally divided in opinion in any cause, it is competent for them to direct such cause to be reheard before the Judges of such Division with the addition of three Judges of the other Division of the Court; and the judgment pronounced shall be in accordance with the opinion of the Judges present at the hearing, and the interlocutor shall bear to be the judgment of the Division before whom the cause depends after consulting with the other Division of the Court; but the Lord Justice-General shall always be the presiding Judge whenever his Lordship sits as a member of the Court.[3]

In cases of equal division of opinion not falling under sec. 59 of the Court of Session Act, 1868 (*i.e.* which do not arise on a question of fact arising upon a proof, or upon a cause which does not involve any legal principle of importance), and in cases of difficulty or importance which

[1] C. A. S., D, i. 5.
[2] Court of Session Act, 1868, sec. 59.
[3] 13 & 14 Vict. cap. 36, sec. 35.

may be referred to the whole Court, it is competent for the Division before whom the cause depends to direct that the cause shall be argued before themselves with the assistance of three Judges (or four Judges when that is necessary to complete the number of seven at the time of the hearing) to be named in the interlocutor; and the judgment to be pronounced thereon shall be in conformity with the opinions of the majority of the seven Judges, and shall bear to be the judgment of the Division by whom the hearing was appointed, after consulting with such other Judges, and may be signed in the absence of such other Judges at any ordinary sitting of the Division.[1]

The opinion of a Judge who is present at the hearing but not at the advising may be taken in computing the majority of Judges.[2]

The judgment of a Court of seven Judges is of the same authority as a decision of the whole Court.[3]

(iii.) *Whole Inner House or Whole Court.*—In order to preserve uniformity in the decisions of the Court, and to settle doubtful questions of law which may arise, the Judges of either Division may, in all causes in which the Judges of the Inner House shall be equally divided in opinion, direct the cause to be judged either by the Inner House Judges of both Divisions, or by the whole Court, including the Lords Ordinary; and in such cases as it shall appear to them advisable to have any question occurring before them settled by the judgment of the whole Court, the Judges of either Division may order that such matter shall be heard before the whole Judges; and judgment shall in all causes be pronounced according to the opinion of the majority of the Judges present, and the interlocutor shall bear to be the judgment of the Division before which the cause depends after consulting with the other Judges.[4] In one case where the whole Court was consulted, the Court was equally divided in opinion, and the youngest Judge agreed to withhold his vote so as to allow judgment to be pronounced and an appeal taken to the House of Lords.[5]

Where, under a new Act of Parliament, a question had been decided by both Divisions in the same way, but there had been a dissent in each Division, and the result was the opinion of four Judges against two, the Court refused to send the case to the whole Court.[6]

[1] Court of Session Act, 1868, sec. 60.

[2] Mitchell *v.* Canal Basin Foundry Co., 1869, 7 M. 480, at p. 491; Haldane's Trs. *v.* Murphy, 1881, 9 R. 269, at p. 298.

[3] Yuill's Trs. *v.* Thomson, 1902, 4 F. 815.

[4] 6 Geo. IV. cap. 120, sec. 23.

[5] Lang *v.* Bruce, 1832, 10 S. 777, at p. 791.

[6] Baird & Co., Ltd. *v.* Stevenson, 1907, S. C. 1259.

(f) *Consultation with Other Judges.*—In cases of importance and difficulty the Judges of either Division, or the quorum thereof, may state questions of law in writing arising out of such cases and may require the opinions of the Judges of the other Division and of the Lords Ordinary to be given thereupon; and the judgment to be pronounced in the cause shall be according to the opinion of the majority of all the Judges, and shall bear that it is the judgment of the Division before which the cause depends after consulting with the other Judges.[1] The opinion of a consulted Judge cannot be taken into account unless he signs the record copy.[2]

In cases of equal division of opinion not falling under sec. 59 of the Court of Session Act, 1868 (*i.e.* not being a question of fact arising out of a proof, or upon a cause which does not involve any legal principle of importance), and in cases of difficulty or importance which may be referred by one of the Divisions of the Inner House to the whole Court, it is competent for such Division to direct that the printed papers in the cause shall be laid before three other Judges to be named in the interlocutor with a view to their opinions being communicated in writing; and the judgment to be pronounced thereon shall be in conformity with the opinions of the majority of the seven Judges, and shall bear to be the judgment of the Division by whom the hearing was appointed, after consulting with such other Judges, and may be signed in the absence of such other Judges at any ordinary sitting of the Division.[3] Lord Young has expressed an opinion that where the Judges of a Division are equally divided they should, before directing the papers to be laid before three other Judges, deliver their own opinions.[4] This course, however, has not been followed in practice. The procedure is for the Division desiring the additional opinions to pronounce an interlocutor ordering minutes of debate to be boxed to the other Judges.[5] The minutes are then prepared, printed, and lodged in process, and copies sent to the opposite agents. They are then mutually adjusted, and finally printed, boxed, and lodged, and the Judges give their opinions in writing.

(g) *Judgment.*—After the hearing the Court may at once pronounce judgment or may take the case to avizandum, in which latter case the reclaiming note will be put out for advising at a later date. At

[1] Court of Session Act, 1808 (48 Geo. III. cap. 151), sec. 10; Judicature Act, 1825 (6 Geo. IV. cap. 120), sec. 24; Stewart *v.* Scot, 1836, 14 S. 692.

[2] Thomson's Trs. *v.* Alexander, 1851, 14 D. 217, at p. 229 (note).

[3] Court of Session Act, 1868, sec. 60.

[4] Holmes Oil Co., Ltd. *v.* Pumpherston Oil Co., Ltd., 1890, 17 R. 624.

[5] Yuill's Trs. *v.* Thomson, 1902, 4 F. 815.

advising, the opinions of all the Judges, or the majority of the Judges, as the case may be, is the judgment of the Court, which is embodied in an interlocutor signed by the President of the Division in open Court.[1]

In deciding reclaiming notes against final judgments the Court must determine the matter of expenses.[2] Expenses must be moved for, otherwise they will not be awarded.[3]

In deciding reclaiming notes against interlocutors settling the method of proof the Division must dispose of the expenses of the reclaiming note, and of the discussion, and shall remit the cause to the Lord Ordinary to proceed as accords.[4]

There is no statutory enactment with regard to the award of expenses in deciding a reclaiming note presented with leave, but as there is a common law right inherent in every civil Court to award expenses in any cause that comes before it,[5] the Court will, at advising such reclaiming note, on the motion of the successful party, deal with expenses as to it may seem just.

(h) *Mistake or Omission in the Interlocutor.*—See Part xi. Chap. i. (15), *infra.*

(i) *Powers of Court.*—(i.) *Proof.*—Proof may be ordered by one of the Divisions of Court, in which case it is taken before any one of the Judges of the said Division, whose place may for the time be supplied by one of the Lords Ordinary called in for that occasion.[6]

(ii.) *Order for Repayment where Interlocutor Reclaimed Against has been Implemented.*—Where an *interim* decree or interlocutor pronounced in the Outer House has been implemented, it is within the power of the Court, in any interlocutor recalling or altering such *interim* decree or interlocutor, to order the repayment of any money which shall have been paid or recovered in implement thereof, or to pronounce such warrant *ad factum præstandum* or other order as may be necessary in order to give effect to such recall or alteration of the Lord Ordinary's interlocutor, notwithstanding that the interlocutor of the Lord Ordinary may have been extracted and put to execution.[7]

[1] Stair (More's ed.), ii. 790 (Appendix); Act 1686, cap. 4 (record edition), cap. 3 (12mo edition); Act 1693, cap. 31 (record edition), cap. 18 (12mo edition).

[2] Judicature Act, 1825, sec. 21.

[3] Grant *v.* Rose, 1835, 13 S. 1007; Wilson's Trs. *v.* Wilson's Factor, 1869, 7 M. 457; Turner *v.* Robertson, 1897, 34 S. L. R. 495.

[4] Court of Session Act, 1868, sec. 28.

[5] Brownlie *v.* Tennant, 1855, 17 D. 422, per Lord Justice-Clerk Hope, p. 425; Ledgerwood *v.* M'Kenna, 1868, 7 M. 261; Rooney *v.* Cormack, 1895, 23 R. 11, per Lord M'Laren, p. 13; Thomson *v.* Kerr, 1901, 3 F. 355.

[6] Evidence (Scotland) Act, 1866, sec. 3, as amended by the Court of Session Act, 1868, sec. 62.

[7] Court of Session Act, 1868, sec. 57.

(iii.) *Remit to the Lord Ordinary.*—The Court has power to remit the cause to the Outer House for further procedure.

Remit can only take place where the process is in the Inner House.

Reclaiming notes with leave have not the effect of removing the cause or the process from the Outer House, unless the Lord Ordinary otherwise directs.[1]

Reclaiming notes against interlocutors settling the method of proof have the effect of removing the cause and the process to the Inner House, and, when the reclaiming note is advised, the Division, after disposing of the question of the reclaiming note and of the discussion, remits to the Lord Ordinary to proceed as accords.[2]

Reclaiming notes against a final judgment remove the cause and the process to the Inner House, but there is no remit to the Lord Ordinary, except in special circumstances rendering a remit expedient.[3]

(j) *Withdrawal of Reclaiming Note.*—The reclaimer is not at liberty to withdraw a reclaiming note without the consent of the other parties to the cause.[4] The procedure is for the reclaimer to present a note to the President of the Division craving him to move the Court to refuse the reclaiming note, and it should be intimated to the other parties in the cause. When the note appears in the Single Bills, the Court, if there is no desire expressed by any other party to the cause to insist upon the reclaiming note, refuses the reclaiming note and finds the reclaimer liable in expenses, which are usually modified to £2, 2s. where the reclaiming note has not been put out for hearing.[5] If the cause is out for hearing and counsel have been instructed, full expenses are allowed. (See Maclaren on Expenses, pp. 61-63.)

(k) *In Vacation or Recess.*—By the 94th section of the Court of Session Act, 1868, it is provided that "it shall be lawful for the Lords Ordinary at any time in vacation or recess to sign interlocutors pronounced in causes heard in time of session, or at any extended sittings, or at the trial of causes by jury or by proof, before such Lord Ordinary; provided that where any such interlocutor is dated at or prior to the first box day in vacation, the same may be reclaimed against on the second box day; and where the interlocutor is dated after the first box day, then on the first sederunt day ensuing, or within such number of days from the date of such interlocutor as may be competent in the case of a reclaiming note against such interlocutor, dated and signed during session; and where such interlocutor is signed during the

[1] Court of Session Act, 1868, secs. 54 and 55.
[2] Ibid., sec. 28. [3] Ibid., sec. 56. [4] Ibid., sec. 52.
[5] H. R. Marsden, Ltd. *v.* Brunton & Sons, 1914, S. C. 868.

Christmas recess, the same may be reclaimed against on the first sederunt day ensuing, or within such time after the date thereof as may be competent as aforesaid: Provided that in the case of interlocutors which cannot be reclaimed against without the leave of the Lord Ordinary, such leave may be given by such Lord Ordinary, or, in his absence, by the Lord Ordinary sitting on the Bills, during vacation or recess."

Accordingly, where a Lord Ordinary during the Spring vacation signed an interlocutor disposing of part of a cause and granting leave to reclaim, a reclaiming note against the interlocutor was held to be timeously lodged on the second box day in the vacation, although the reclaiming days had expired prior to the first box day.[1]

The above-mentioned section applies to *all* causes, including entail petitions.[2]

Previous to the year 1894, where interlocutors of the Lord Ordinary in the Outer House which required to be reclaimed against within twenty-one days[3] and ten days[4] respectively were signed during session and the respective reclaiming days expired during vacation or during any recess, the reclaiming days continued open till the first box day in the vacation, or till the box day in the recess, or if they expired after the box day in the recess they continued open till the first sederunt day after the recess. No provision, however, was made for interlocutors which required to be reclaimed against within other periods, and in consequence of a decision regarding an interlocutor requiring to be reclaimed against within six days,[5] an Act of Sederunt, dated 14th March 1894, was passed, which provides that "in all cases where the days allowed for presenting a reclaiming note against an interlocutor pronounced by a Lord Ordinary in the Outer House expire during any vacation, recess, or adjournment of the Court, such reclaiming note may be presented on the first box day occurring in said vacation, recess, or adjournment after the reclaiming days have expired; and if there be no such box day, then on the first ensuing sederunt day."[6]

In certain cases it is only required to lodge and not to box a reclaiming note. In such cases it was formerly the practice to require the reclaiming note to be lodged within the reclaiming days, whether

[1] Countess Dowager of Seafield *v.* Kemp, 1898, 25 R. 873.
[2] Grant Suttie's Tutors *v.* Viscountess Dalrymple, 1883, 11 R. 3.
[3] A. S., 11th July 1828, sec. 79.
[4] A. S., 20th July 1853.
[5] Mackenzie *v.* Lucas and Aird 1894, 21 R. 544.
[6] C. A. S., D, i. 4.

in session or vacation,[1] but it is thought that it is not now necessary to do so, but that *every* reclaiming note where the reclaiming days expire in vacation may be lodged on the first box day after the expiry of the reclaiming days, except in the case of reclaiming notes against interlocutors pronounced by the Lord Ordinary on the Bills in purely Bill Chamber proceedings, which are not affected by vacation, recess, or adjournment of the Court of Session.

Where the Lord Ordinary on the Bills in vacation pronounces interlocutors in causes which are not purely Bill Chamber proceedings, the reclaiming days against such interlocutors are the same as they would be if pronounced by the Lord Ordinary in Session, whether the Junior Lord Ordinary or other Outer House Judge.[2]

[1] Lockhart *v.* Cumming, 1851, 13 D. 996; Joel *v.* Gill, 1860, 22 D. 357, per Lord Justice-Clerk Inglis, p. 358. See also Mackenzie *v.* Lucas and Aird, 1894, 21 R. 544.

[2] Staig *v.* Johnston, 1875, 2 R. 701.

CHAPTER III

REPORTS BY LORDS ORDINARY

(1) COURT OF SESSION CAUSES.—(a) *Ordinary Actions.*—When a cause appears to the Lord Ordinary of more than usual difficulty or importance, he may, without pronouncing any decision himself, report it to the Inner House to which the cause belongs.[1] He may do so either when the parties have respectively admitted all the facts requisite to the decision of the cause,[2] or after a proof has been led.[3] The procedure adopted in a recent case was by the Lord Ordinary pronouncing an interlocutor and appending a note thereto reporting the cause to the First Division. The cause was then sent to the roll of the Inner House, where an argument was heard upon the point reported. The Lord Ordinary sat along with the Judges of the Division and gave judgment with them.[3] The former procedure is to be found in Shand's Practice, pp. 340 and 963. The foregoing refers to reports on the *whole* cause.

The Lord Ordinary may also report an *incidental* matter. Provision for this is made by the Judicature Act, 1825, and the Court of Session Act, 1850. By sec. 19 of the Judicature Act[4] it is provided that "the Lord Ordinary may, after intimation to the parties, report verbally to the Inner House any incidental matter which may arise in the course of the cause, and such matter so reported by the Lord Ordinary shall be disposed of upon argument of counsel, unless the Court shall, when the matter comes before them, think fit to order cases; and if judgment shall be pronounced by the Court, or an order shall be made in respect to the matter so reported, that judgment or order shall be final, and the Court shall either settle the expense relative to the point so reported, or reserve consideration thereof to the end of the cause."

The intimation of the Lord Ordinary's intention to report verbally above referred to was by Act of Sederunt, 11th July 1828, sec. 66,[5] ordered to be made to the parties by interlocutor pointing out the incidental matter so to be reported.

[1] Shand's Practice, p. 963. [2] Judicature Act, 1825 (6 Geo. IV. cap. 120), sec. 13. A. B. *v.* C. B., 1914, 2 S. L. T. 107.
[4] 6 Geo. IV. cap. 120. [5] C. A. S., C., ii. 12.

A later section of the same Act of Sederunt[1] gives the Lord Ordinary a right to report any difficulty which may occur with regard to the new forms of process described in the said Act of Sederunt, and said report may be made by the Lord Ordinary "verbally to the Division to which the cause belongs, who may direct him how to proceed, or report to the other Division, if they see cause."

By sec. 51 of the Court of Session Act, 1850,[2] it is provided that "where by the provisions of this Act anything may be done upon the report of a Lord Ordinary to one or other of the Divisions of the Court, the same may be done summarily, by a simple verbal report, to be made by such Lord Ordinary to such Division."

The present practice in reporting an *incidental* matter is for the Lord Ordinary to report verbally to the Division whenever the difficulty occurs, or as soon thereafter as possible, after verbal intimation to the parties from the bench and without intimation by interlocutor.

(b) *Actions Appropriated to the Inner House.*—These processes are gradually becoming obsolete, or being converted into ordinary actions. The action of proving the tenor has recently been made an ordinary action,[3] and the only actions appropriated to the Inner House which remain are actions of ranking and sale, cognition and sale, and division of commonty or runrig lands. In these actions the Lord Ordinary prepares the cause up to a certain point when he makes great avizandum to the Inner House. (See *supra*, pp. 85, 95, 641, 642, 772.)

(c) *Junior Lord Ordinary Petitions.*—No interlocutor pronounced in such petitions can be reviewed by the Inner House unless it finally disposes of the petition upon the merits. Accordingly, the only method by which the opinion of the Inner House can be obtained upon incidental points or interlocutory judgments is by the report of the Lord Ordinary. This is provided for by sec. 5 of the Distribution of Business Act, 1857,[4] which enacts that the Lord Ordinary "may in special cases, if he see cause, report such petition or application to the Court, who may thereupon dispose of the same, or give such instructions thereanent to the Lord Ordinary as they may deem proper."

(2) Bill Chamber Causes.—In case of difficulty as to procedure the Lord Ordinary on the Bills may report the same verbally to the

[1] Sec. 119. [2] 13 & 14 Vict. cap. 36.
[3] A. S., 20th March 1907; C. A. S., C, iv. 5.
[4] 20 & 21 Vict. cap. 56.

Division to which the cause belongs, who may direct him how to proceed, or report to the other Division, if they see cause.[1]

When an application is made to the Lord Ordinary on the Bills, which arises out of an action depending before the Court of Session, it shall be competent for him, if he see cause, to report to the Division or the Lord Ordinary before whom the action is depending, and to order the note, answers, and productions, if any, to be printed for the use of such Division or Lord Ordinary.[2] (See also Maclaren on Bill Chamber Practice, pp. 38, 40, 41, 84.)

(3) Form of Interlocutor Disposing of the Matter Reported.—In cases where the *whole* cause has been reported to the Inner House the interlocutor would seem to proceed in the name of the Division, and so the interlocutor could be directly appealed to the House of Lords. In a recent case of this nature the interlocutor ran:—"The Lords, along with Lord Anderson, the Lord Ordinary in the cause, having considered the cause on the report by the Lord Ordinary and heard counsel for the pursuer, Find, Declare, and Decern against the defenders in terms of the conclusions of the summons."[3]

Where the matter reported is only *incidental* to the cause the rule is different. In causes other than causes which are purely Bill Chamber proceedings the practice seems to have been for the Lord Ordinary, after the parties were heard by the Division, to pronounce an interlocutor giving effect to the opinion of the Judges of the Division, thus:—"Having resumed consideration of , and having advised with the Lords of the Division, etc."[4] In purely Bill Chamber causes (*i.e.* suspensions, etc., as distinguished from bankruptcy proceedings, or petitions to the Junior Lord Ordinary), however, "where a case is taken to report to the Inner House by the Lord Ordinary on the Bills, the interlocutor pronounced thereon shall be considered as a judgment of the Inner House, and be signed by the Lord President of the Division accordingly."[5] In a recent case the last-mentioned Act of Sederunt was disregarded. This was a petition to the Lord Ordinary on the Bills for the arrestment of a ship, and it was reported to the First Division, who remitted to the Lord Ordinary to pronounce a certain interlocutor, which he did in his own name.[6]

[1] A. S., 11th July 1828, sec. 119. [2] C. A. S., E, ii. 24.

[3] A. B. *v.* C. B., 1914, 2 S. L. T. 107.

[4] Tod *v.* North British Rly. Co., 1846, 8 D. 726, per Lord Medwyn, p. 743; Nicol *v.* Edmond, 1851, 13 D. 614, at pp. 619 and 622; Wryghte *v.* Lindsay, 1856, 19 D. 55, at pp. 60 and 65.

[5] A. S., 11th July 1828, sec. 76; C. A. S., D, i. 6; Tod *v.* North British Rly. Co., 1846, 8 D. 726, at pp. 743, 744.

[6] M'Connachie, Petr., 1914, S. C. 853.

CHAPTER IV

ORDINARY APPEALS FROM INFERIOR COURTS

(1) GENERALLY.—It is a general rule that a judgment of an inferior Court may be appealed to the Court of Session unless appeal is excluded expressly or by necessary implication.[1] Appeal is competent notwithstanding that there is not a closed record,[2] except where appeal is expressly excluded.[3] Appeal is only competent against judgments, and accordingly where the Legislature commits to an inferior Judge discretionary powers which he is to exercise summarily and without written pleadings there is no appeal against the exercise of that discretion.[4] Where a special method of appeal is directed by a statute, an ordinary appeal is incompetent.[5]

The actings of parties have sometimes been considered such as to prevent an appeal. Thus, where parties have constituted the inferior Judge an arbiter;[6] where they have agreed to accept his decision as final;[7] where his judgment has been pronounced in respect of the express withdrawal of opposition;[8] where a party having first appealed from the Sheriff-Substitute to the Sheriff did not insist upon his appeal before the latter and thereafter appealed to the Court of Session;[9] where a party appeals against a judgment pronounced on his own motion;[10] and where a party appeals against a decision on a part of his

[1] Strain *v.* Strain, 1886, 13 R. 1029, per Lord President Inglis, p. 1032; Harper *v.* Inspector of Rutherglen, 1903, 6 F. 23, per Lord Trayner, p. 25; Jeffray *v.* Angus, 1909, S. C. 400, per Lord Justice-Clerk Macdonald.

[2] Harper *v.* Inspector of Rutherglen, 1903, 6 F. 23. See also Allan *v.* Whyte, 1890, 18 R. 332.

[3] Walker *v.* Lang, 1891, 18 R. 928.

[4] Strain *v.* Strain, 1886, 13 R. 1029. See also Tevendale *v.* Duncan, 1883, 10 R. 852, per Lord Young.

[5] County Council of Lanark *v.* Mags. of Airdrie, 1906, 8 F. 802; *cp.* Guthrie Craig, Peter & Co. *v.* Mags. of Brechin, 1885, 12 R. 469.

[6] Dykes *v.* Merry and Cuninghame, 1869, 7 M. 603; Steel *v.* Steel, 1898, 25 R. 715; *cp.* Gordon *v.* Bruce & Co., 1897, 24 R. 844; Stark's Trs. *v.* Duncan, 1906, 8 F. 429.

[7] Shiels *v.* Shiels' Trs., 1874, 1 R. 502; *cp.* Lindsay *v.* Walker's Trs., 1877, 4 R. 870.

[8] Whyte *v.* Whyte, 1895, 23 R. 320.

[9] Manchester and County Bank, Ltd. *v.* Moore, 1909, S. C. 246.

[10] Watson *v.* Russell, 1894, 21 R. 433.

case, which he must be held to have abandoned in the inferior Court,[1] an appeal is incompetent.

It has not yet been decided whether it is competent to appeal to the Court of Session after trial and verdict in a brieve of service and cognition to terce.[2]

Appeal is incompetent after extract,[3] but an extract of a decree for expenses following upon a decree of absolvitor not extracted has been held not to bar review of the latter decree.[4] Appeal is incompetent where the decree has been implemented.[3]

The fact that a party has obtained a diligence for the recovery of documents after an order allowing proof has been pronounced is no bar to his insisting upon an appeal against such an order.[5] (See *Jurisdiction, supra*, p. 111 *et seq.*)

(2) Appeals from Ordinary Sheriff Court.—(a) *Generally.*—It is competent to appeal to the Court of Session against a judgment either of a Sheriff or of a Sheriff-Substitute if the interlocutor appealed against is a final judgment, or is an interlocutor—

(*a*) Granting *interim* decree for payment of money other than a decree for expenses; or

(*b*) Sisting an action; or

(*c*) Refusing a reponing note; or

(*d*) Against which the Sheriff or Sheriff-Substitute, either *ex proprio motu* or on the motion of any party, grants leave to appeal: Provided that no appeal shall be competent where the cause does not exceed £50 in value, exclusive of interest and expenses, or is being tried as a summary cause, unless the Sheriff, after final judgment by him, on an appeal on the motion of either party made within seven days of the date of the final interlocutor, certifies the cause as suitable for appeal to the Court of Session.

The right of appeal or exclusion of such right provided by any Act of Parliament in force for the time being is not affected.[6]

There is always a right of appeal to the Court of Session to be reponed against a *decree by default*.[7] An appeal can be made to the

[1] Sutherland *v.* Thomson, 1905, 8 F. (H. L.) 1.

[2] Craik *v.* Penny, 1891, 19 R. 339.

[3] Sheriff Courts (Scotland) Act, 1907, rules 86 and 92.

[4] Macfarlane *v.* Thompson, 1884, 12 R. 232.

[5] John Watson, Ltd. *v.* Caledonian Rly Co., 1910, S. C. 1066.

[6] Sheriff Courts (Scotland) Act, 1907, sec. 28, as amended by the Sheriff Courts (Scotland) Act, 1913, sec. 2.

[7] Traill *v.* Andrew, 1877, 14 S. L. R. 234; Vickers & Sons *v.* Nibloe, 1877, 4 R. 729; Bainbridge *v.* Bainbridge, 1879, 6 R. 541; Duff *v.* Stewart, 1882, 9 R. 423.

Court of Session to be reponed against a decree by default of the Sheriff-Substitute even before the period within which it is competent to appeal to the Sheriff;[1] and an appeal to the Court of Session has been sustained even where there was an appeal to the Sheriff to be reponed and the appellant failed to appear before the latter.[2]

Where a decree by default is appealed to the Sheriff in order to be reponed, the Sheriff's discretion is rarely interfered with.[3]

In the undernoted cases the appellant was reponed.[4]

In the undernoted cases the appellant was refused to be reponed.[5]

It is competent to appeal against a judgment of a Sheriff imposing a sentence in a petition and complaint for breach of interdict granted in the Sheriff Court.[6]

(b) *Value of Cause.*—No appeal is competent where the cause does not exceed £50 in value, exclusive of interest and expenses, or is being tried as a summary cause, unless the Sheriff, after final judgment by him, on an appeal on the motion of either party made within seven days of the date of the final interlocutor, certifies the cause as suitable for appeal to the Court of Session.[7]

In an ordinary case of damages, interest does not run until the date of the decree or verdict. Notwithstanding this, however, if a summons concludes for the sum of £50 of damages with interest thereon from the date of citation, this will bring the sum concluded for above £50 and make an appeal competent.[8] (See *Interest, supra,* p. 298 *et seq.*)

Where a small debt action was remitted by a Sheriff to his ordinary Court roll, it was held not to be subject to review by the Court of Session in respect that being of less value than £50 it could not be appealed under sec. 28 of the Act of 1907, and that not being

[1] Robb *v.* Elgin, 1877, 14 S. L. R. 473.

[2] Brown's Trs. *v.* Milne, 1897, 24 R. 1139.

[3] M'Gibbon *v.* Thomson, 1877, 4 R. 1085.

[4] Morrison *v.* Smith, 1876, 4 R. 9; Vickers & Sons *v.* Nibloe, 1877, 4 R. 729; Robb *v.* Elgin, 1877, 14 S. L. R. 473; Bainbridge *v.* Bainbridge, 1879, 6 R. 541; King *v.* Gavan, 1880, 17 S. L. R. 583; M'Carthy *v.* Emery, 1897, 24 R. 610; Brown's Trs. *v.* Milne, 1897, 24 R. 1139.

[5] M'Gibbon *v.* Thomson, 1877, 4 R. 1085; Stevenson *v.* Hutcheson and Anderson, 1885, 12 R. 923; Bain *v.* Lawson, 1899, 1 F. 576; Lanark County Council *v.* Motherwell Commissioners, 1901, 4 F. 151; Lord Brooke *v.* Marchioness of Huntly, 1911, 49 S. L. R. 71.

[6] Maclachlan *v.* Bruce, 1912, S. C. 440. See also Stark's Trs. *v.* Duncan, 1906, 2 F. 429.

[7] Sheriff Courts (Scotland) Act, 1907, sec. 28, as amended by the Sheriff Courts (Scotland) Act, 1913, sec. 2. See also secs. 7 and 8 of the first-mentioned Act.

[8] Martin & Sons *v.* Robertson, Ferguson & Co., 1872, 10 M. 949. See also Mitchell *v.* Murray, 1855, 17 D. 682; Lenaghan *v.* Monkland Iron and Steel Co., 1858, 20 D. 848; Brydon *v.* Macfarlane, 1864, 3 M. 7; Denholm *v.* London and Edinburgh Shipping Co., 1865, 3 M. 815.

a summary cause it could not be appealed under sec. 8 of the same Act.[1]

The value of a cause is the amount of the claim made in the conclusions of the summons, and not the value determined as the result of the judgment brought under review.[2] Where two actions are conjoined they become one process.[3] Accordingly, where neither of the sums concluded for in the conjoined actions exceeds £50, but combined exceed that amount, an appeal is competent.[4] In the same way, where one pursuer sues several defenders who have a community of interest for separate sums, none of which sums exceeds £50, but all combined exceed that sum, an appeal is competent.[5] In a case where an underwriter sued in his own right, and as assignee of two other underwriters in the same policy, for repetition of certain sums paid under the policy, and none of the sums reached the limit of privative jurisdiction, but all combined exceeded the limit, the action was held to have been competently raised in the Court of Session.[6]

Where the sum sued for exceeds £50 at the time when the parties join issue, an appeal is competent, notwithstanding that the sum sued for is subsequently reduced below £50.[7] Where, however, the reduction below £50 takes place before issue is joined, appeal is incompetent.[8] Where a sum sued for is above £50, and from this sum the pursuer admits that there should be deducted the amount of a counter account, making the sum to which the pursuer will be entitled less than £50, the value of the cause for the purpose of appeal is the amount sued for without reduction of the counter account.[9] Where, however, the items credited by the pursuer are not proper counter claims but a sum due to the defender on the transactions which are the ground of action, and this latter sum reduces the amount sued for below £50, appeal is incompetent.[10]

Where the sum sued for is under £50, but the real question at

[1] Price *v.* Canadian Pacific Rly. Co., 1911, S. C. 631.

[2] Henderson *v.* Grant, 1896, 23 R. 659. See also Dobbie *v.* Thomson, 1880, 7 R. 983.

[3] Ivory's Form of Process, vol. ii. p. 52.

[4] Campbell and Cowan & Co. *v.* Train, 1910, S. C. 147.

[5] Dykes *v.* Merry and Cuninghame, 1869, 7 M. 603; Nelson, Donkin & Co. *v.* Browne, 1876, 3 R. 810.

[6] Birrell *v.* Taylor, 1884, 12 R. 151; *cp.* Brotherston *v.* Livingston, 1892, 20 R. 1.

[7] Tait *v.* Lees, 1903, 5 F. 304. See also Buie *v.* Stiven, 1863, 2 M. 208; M'Kimmie's Trs. *v.* Armour, 1899, 36 S. L. R. 675.

[8] Cairns *v.* Murray, 1884, 12 R. 167.

[9] Inglis *v.* Smith, 1859, 21 D. 822.

[10] Stevens, Son & Co. *v.* Grant, 1877, 5 R. 19.

issue is not as to this sum but as to a continuing liability or contract involving a much larger sum than £50,[1] or if there is another question at issue in addition to a pecuniary liability,[2] an appeal is competent. It has been held that a conclusion for aliment of 2s. 6d. per week to a man of sixty-six years of age is a claim for more than £40.[3]

Where, notwithstanding that there is a conclusion for more than payment of a sum under £50, it is obvious that the defender can get rid of the action by payment of the sum sued for, an appeal will not be competent.[4] Again, where it is not clear that there can be a continuing,[5] or other,[6] liability which will raise the sum sued for above £50, an appeal is incompetent.

Where the action is solely for delivery of an article of property, and there is no pecuniary conclusion, appeal is competent.[7]

If the action is for delivery of an article, or, alternatively, for payment of a sum less than £50, there is no appeal.[8] Where, failing implement, there is an alternative conclusion for a definite sum of money less than £50, or such other sum as shall be ascertained to be the price or value of the thing sought to be delivered, an appeal is competent.[9] In an action for interdict and £50 damages where the question of interdict was exhausted prior to appeal, appeal was held to be incompetent.[10]

(c) *Final Judgment.*—"Final judgment means an interlocutor which, by itself, or taken along with previous interlocutors, disposes of the subject-matter of the cause, notwithstanding that judgment may not have been pronounced in every question raised, and that expenses

[1] Abrahams, Ltd. *v.* Campbell, 1911, S. C. 353. See also Drummond *v.* Hunter, 1869, 7 M. 347; Cunningham *v.* Black, 1883, 10 R. 441; Paisley Parish Council *v.* Glasgow and Row Parish Councils, 1907, S. C. 674; Stevenson *v.* Sharp, 1910, S. C. 580.

[2] Thomson *v.* Barclay, 1883, 10 R. 694; Duke of Argyll *v.* Muir, 1910, S. C. 96; Aitchison *v.* M'Donald, 1911, S. C. 174, per Lord President Dunedin, p. 176.

[3] Hamilton *v.* Hamilton, 1877, 4 R. 688.

[4] North British Rly. Co. *v.* M'Arthur, 1889, 17 R. 30. See also Singer Manufacturing Co. *v.* Jessiman, 1881, 8 R. 695; Dickson *v.* Bryan, 1889, 16 R. 673.

[5] Macfarlane *v.* Friendly Society of Stornoway, 1870, 8 M. 438; Heddle *v.* Gow, 1880, 18 S. L. R. 96; Parish Council of Stirling *v.* Parish Council of Perth, 1898, 25 R. 964; Melrose Parish Council *v.* Hawick Parish Council, 1912, S. C. 1029.

[6] Standard Shipowners' Mutual Association *v.* Taylor, 1896, 23 R. 870.

[7] Purves *v.* Brock, 1867, 5 M. 1003; Henry *v.* Morrison, 1881, 8 R. 692. See also Broatch *v.* Pattison, 1898, 1 F. 303, per Lord President Robertson.

[8] Singer Manufacturing Co. *v.* Jessiman, 1881, 8 R. 695; Dickson *v.* Bryan, 1889, 16 R. 673.

[9] Shotts Iron Co. *v.* Kerr, 1871, 10 M. 195; Aberdeen *v.* Wilson, 1872, 10 M. 971.

[10] David Allen & Sons' Billposting, Ltd. *v.* Dundee and District Billposting Co., Ltd., 1912, S. C. 970.

found due may not have been modified, taxed, or decerned for."[1] This definition is in terms almost similar to the definition of a final judgment in the Court of Session,[2] and the words in the latter definition "or of the competition between the parties in a process of competition" must be read into the former.[3]

A judgment is not a final judgment which does not deal with expenses.[4] Accordingly an interlocutor in which expenses are reserved is not a final interlocutor.[5] An interlocutor awarding expenses which have been previously reserved is a final interlocutor;[6] so is an interlocutor awarding expenses subject to some modification;[7] as is also an interlocutor which modifies expenses after the account has been taxed.[8] Where expenses have been granted, but reserving as to the modification thereof, the interlocutor is final, and so is the subsequent interlocutor dealing with the modification.[9] An interlocutor merely granting decree for expenses in terms of the Auditor's report, to which no objections have been stated, is not a final interlocutor which can be appealed.[10] Where, however, there are objections,[11] or where the objections appear on the face of the report,[12] an appeal is competent. In a case where the pursuers before taxation of their account of expenses obtained *interim* extract of the decree, and thereafter the Auditor's report was approved of and the taxed amount of the pursuers' expenses was decerned for, a reclaiming note was held competent on the ground that the interlocutor was *ultra vires*.[13] In another case where the Second Division assoilzied the defender and found the defender entitled to expenses in the Court of Session alone, the Sheriff subsequently gave decree in favour of the defender for expenses in the

[1] Sheriff Courts (Scotland) Act, 1907, sec. 3 (*h*).

[2] Court of Session Act, 1868, sec. 53.

[3] Glasgow Corporation *v.* General Accident Fire and Life Assurance Corporation, Ltd., 1914, S. C. 835.

[4] Baird *v.* Barton, 1882, 9 R. 970; Burns *v.* Waddell & Son, 1897, 24 R. 325; Caledonian Rly. Co. *v.* Corporation of Glasgow, 1900, 2 F. 871.

[5] Parochial Board of Greenock *v.* Miller and Brown, 1877, 4 R. 737; Russell *v.* Allan, 1877, 5 R. 22.

[6] Baird *v.* Barton, 1882, 9 R. 970.

[7] Earl of Kintore *v.* Alex. Pirie & Sons, Ltd., 1904, 42 S. L. R. 5.

[8] Crellin's Tr. *v.* Muirhead's Judicial Factor, 1893, 21 R. 21; Taylor's Trs. *v.* M'Gairgan, 1896, 23 R. 738.

[9] Inglis *v.* National Bank of Scotland, Ltd. 1911, S. C. 6.

[10] Tennents *v.* Romanes, 1881, 8 R. 824; Thompson & Co. *v.* King, 1883, 10 R. 469; Stirling-Maxwell's Trs. *v.* Kirkintilloch Police Commissioners, 1883, 11 R. 1.

[11] Stirling-Maxwell's Trs. *v.* Kirkintilloch Police Commissioners, 1883, 11 R. 1; Craig *v.* Craig, 1906, 44 S. L. R. 100; M'Alley *v.* Marshall's Trs., 1913, S. C. 890.

[12] Innes *v.* Macdonald, 1899, 1 F. 380.

[13] Crichton Bros. *v.* Crichton, 1901, 4 F. 271.

Sheriff Court, and an appeal against the latter judgment was held competent.[1] Where a Sheriff having pronounced an order *ad factum præstandum* refused to deal with expenses until the operation ordered was completed, a suspension was held competent.[2]

Appeals on expenses alone, though competent, are severely discouraged.[3]

A judgment by default may be appealed to the Court of Session even before the expiry of the period within which it is competent to appeal to the Sheriff.[4] An interlocutor repelling the whole of the defender's pleas, or finding in terms of the conclusions of the summons, and *quoad ultra* continuing the cause for executorial purposes, may be appealed,[5] but not where consideration of part of the case has been superseded.[6] Where an interlocutor is final as regards one of the parties to a cause, it may be appealed against, notwithstanding that it is not disposed of *quoad* the rest.[7] A refusal to repone against a decree in absence may be appealed against.[8] An interlocutor dismissing an action as incompetent is a final interlocutor.[9]

An interlocutor sustaining the competency of a multiplepoinding is not a final interlocutor,[10] nor is an interlocutor in which a Sheriff merely lays down the principles on which he is to give judgment.[11] An interlocutor of a Sheriff allowing proof,[12] or limiting proof by writ or oath,[13] is not a final interlocutor.

[1] Macgillivray *v.* Mackintosh, 1891, 19 R. 103.

[2] Caledonian Rly. Co. *v.* Cochran's Trs., 1897, 24 R. 855.

[3] Fleming *v.* North of Scotland Banking Co., 1881, 9 R. 11; Bowman's Trs. *v.* Scott's Trs., 1901, 3 F. 450; Barrie *v.* Caledonian Rly. Co., 1902, 5 F. 30; Caldwell *v.* Dykes, 1906, 8 F. 839; Aird *v.* School Board of Tarbert, 1907, S. C. 22; Wyllie *v.* Fisher, 1907, S. C. 686.

[4] Hamilton *v.* Hamilton, 1824, 3 S. 283 (N. E. 199); Leslie *v.* Edie, 1828, 6 S. 674; Robb *v.* Elgin, 1877, 14 S. L. R. 473.

[5] M'Ewan *v.* Sharp, 1899, 1 F. 393; Turner's Trs. *v.* Steel, 1900, 2 F. 363. See also Malcolm *v.* M'Intyre, 1877, 5 R. 22.

[6] Jardine *v.* Mags. of Moffat, 1907, S. C. 1065.

[7] Gammell's Trs. *v.* Miller, 1829, 7 S. 461; Duke of Roxburghe, 1875, 2 R. 715; Corporation of Glasgow *v.* General Accident, etc., Assurance Corporation, Ltd., 1914, S. C. 835.

[8] Smith *v.* Inglis, 1881, 18 S. L. R. 563. See also M'Gibbon *v.* Thomson, 1877, 4 R. 1085.

[9] Whyte *v.* Gerrard, 1861, 24 D. 102.

[10] Gordon *v.* Graham, 1874, 1 R. 1081.

[11] Governors of Strichen Endowments *v.* Diverall, 1891, 19 R. 79. See also Stewart *v.* Cochrane, 28th January 1814, F. C.; Thomson, etc., Petrs., 5th March 1814, F. C.; Brodie *v.* Brodie, 1821, 1 S. 53 (N. E. 55); Cameron *v.* Clephane, 1837, 15 S. 1220.

[12] Johnston *v.* Brodie, 1862, 24 D. 973.

[13] Shirra *v.* Robertson, 1873, 11 M. 660; Wilson *v.* Brakenridge, 1888, 15 R. 587.

A Sheriff's order on the subject of caption is not an interlocutor in a *lis* between parties.[1]

(d) *Interlocutory Judgments.*—The following interlocutory judgments of the Sheriff or Sheriff-Substitute are expressly declared to be appealable to the Court of Session:—

(i.) *Granting Interim Decree for Payment of Money Other than a Decree for Expenses.*[2]—An *interim* warrant to an officer of Court to pay over money falls under the head of an *interim* decree.[3] In the same way, where a Sheriff granted warrant to the pursuer to uplift money consigned in bank by the defender, the interlocutor granting warrant was held to be appealable.[4] An order upon a party to consign money is not an *interim* decree for payment, and consequently cannot be appealed.[5] An *interim* decree for expenses cannot be appealed.[6]

(ii.) *Sisting an Action.*[7]—An interlocutor of a Sheriff ordaining a limited company who were pursuers in an action to find caution in terms of the Companies Acts and sisting procedure until such caution was found is an interlocutor sisting process.[8] An interlocutor by a Sheriff recalling *in hoc statu* a final judgment of his Substitute and practically sisting process can be appealed.[9]

(iii.) *Refusing a Reponing Note.*[10]—An appeal against an interlocutor refusing to repone against a decree in absence or by default was held competent prior to the Sheriff Courts (Scotland) Act, 1913, but the Court was very reluctant to interfere with the discretion of the Sheriff.[11] Perhaps now that such an appeal has been made competent by statute, the Court may be inclined to deal more strictly with the exercise of the Sheriff's discretion.

(iv.) *Against which the Sheriff or Sheriff-Substitute, either ex Proprio Motu or on the Motion of any Party, Grants Leave to Appeal.*[12]—Where

[1] Broatch *v.* Pattison, 1898, 1 F. 303.

[2] Sheriff Courts (Scotland) Act, 1907, sec. 28 (1) (*a*), as amended by sec. 2 of the Sheriff Courts (Scotland) Act, 1913.

[3] Baird *v.* Glendinning, 1874, 2 R. 25.

[4] Sinclair *v.* Baikie, 1884, 11 R. 413.

[5] Maxton *v.* Bone, 1886, 13 R. 912.

[6] Notman *v.* Kidd, 1872, 9 S. L. R. 292.

[7] Sheriff Courts (Scotland) Act, 1907, sec. 28 (1) (*b*), as amended by sec. 2 of the Sheriff Courts (Scotland) Act, 1913.

[8] Horn & Co., Ltd. *v.* Tangyes, Ltd., 1906, 8 F. 475.

[9] Watson *v.* Stewart, 1872, 10 M. 494.

[10] Sheriff Courts (Scotland) Act, 1907, sec. 28 (1) (*c*), as amended by the Sheriff Courts (Scotland) Act, 1913, sec. 2.

[11] M'Gibbon *v.* Thomson, 1877, 4 R. 1085; Smith *v.* Inglis, 1881, 18 S. L. R. 563.

[12] Sheriff Courts (Scotland) Act, 1907, sec. 28 (1) (*d*), as amended by the Sheriff Courts (Scotland) Act, 1913, sec. 2.

the interlocutory judgment goes to the root of the case, the Sheriff or Sheriff-Substitute will be well advised to grant leave.[1] Where a Sheriff granted leave to defenders to appeal against an interlocutor allowing proof, and the appeal was dismissed, and the pursuers subsequently moved that the cause be remitted to the Court of Session for jury trial, it was held that the motion was incompetent in respect that it was not made within six days of the final allowance of proof in the Sheriff Court.[2]

(e) *Summary Causes.*—A summary cause includes actions (other than actions brought and conducted in the Small Debt Court, and claims under the Workmen's Compensation Act) for payment of money not exceeding £50 in amount, exclusive of interest and expenses, and all actions in which either the parties admit that the value of the action, exclusive of interest and expenses, does not exceed £50, or which they consent at any stage shall be tried summarily.[3]

Where a cause is a summary cause or has been tried as a summary cause, and has been appealed from the Sheriff-Substitute to the Sheriff, and the latter has pronounced a final judgment, a motion may be made to the Sheriff by either party within seven days of the date of the said final interlocutor to certify the cause as suitable for appeal to the Court of Session, and the Sheriff has a discretion to grant a certificate or not according to circumstances.[4] If the evidence taken before the Sheriff-Substitute has not been recorded the findings in law only are subject to review.[5]

The difficulty pointed out by Lord President Dunedin in *Duke of Argyll* v. *Muir*[6] has been made clear in the Sheriff Courts (Scotland) Act, 1913,[7] and there is now no appeal to the Court of Session from a final judgment of the Sheriff-Substitute which has been turned into an interlocutory judgment by the Sheriff.

(f) *Procedure.*—(i.) *Time during which Appeal Competent.*—Where a final judgment of a Sheriff or Sheriff-Substitute in an *ordinary* cause has not been extracted or implemented, it may be appealed against

[1] Duke of Argyll *v.* Muir, 1910, S. C. 96, per Lord Dunedin, p. 103.

[2] Ellerman Lines, Ltd. *v.* Clyde Navigation Trs., 1909, S. C. 694.

[3] Sheriff Courts (Scotland) Act, 1907, sec. 3 (*i*), as amended by the Sheriff Courts (Scotland) Act, 1913, First Schedule.

[4] Sheriff Courts (Scotland) Act, 1907, sec. 28, as amended by the Sheriff Courts (Scotland) Act, 1913, sec. 2.

[5] Sheriff Courts (Scotland) Act, 1907, sec. 8, as amended by the Sheriff Courts (Scotland) Act, 1913, First Schedule.

[6] 1910, S. C. 96, at p. 102.

[7] Sec. 2.

within three months of its date, but not later.[1] Extract may be issued after fourteen days from its date, or at such earlier date as the Sheriff shall allow extract.[2]

Where an appealable interlocutory judgment of a Sheriff or Sheriff-Substitute in an *ordinary* cause has not been extracted or implemented, it may be appealed against within fourteen days of its date, but not later.[1] Extract may be issued after the lapse of fourteen days from its date, or at such earlier date as the Sheriff shall allow extract.[2]

Where a final judgment of a Sheriff in a *summary* cause has not been extracted or implemented, it may be appealed against within three months from its date, but not later.[3] Extract may be issued after the lapse of seven days.[2]

(ii.) *Form of Appeal.*—An appeal is taken by the appellant or his agent dating and signing a note on the interlocutor sheet in the following terms:—

"The pursuer [*or* defender *or other party*] appeals to the First [*or* Second] Division of the Court of Session."[4] If the interlocutor sheet is not in the hands of the Sheriff-Clerk he will certify the fact, and the note of appeal may be written on a separate paper and lodged along with the Sheriff-Clerk's said certificate.[5]

(iii.) *Transmission of Process and Intimation of Appeal.*—On receipt of the note of appeal the Sheriff-Clerk shall within two days transmit the process to the Principal Clerk of Session at Edinburgh, and shall also send written notice to the effect to the other parties or their agents, but failure to give such notice shall not invalidate the appeal.[6]

Intimation of the appeal to the other parties should be marked by the Sheriff-Clerk on the principal record.[7]

(iv.) *Printing and Boxing Appeal.*—The appellant shall, *during session*, within fourteen days after the process has been received by the Clerk of Court, print and box the note of appeal, record, interlocutors, and proof, if any, unless within eight days after the process has been received by the clerk he shall have obtained an interlocutor of the Court dispensing with printing in whole or in part; in which case the appellant shall only print and box, as aforesaid, those papers the printing whereof has not been dispensed with; and if printing has been in whole dispensed with, shall lodge with the Clerk of Court a manuscript copy of the note of appeal, furnishing another copy to the Clerk of the Lord

[1] Sheriff Courts (Scotland) Act, 1907, rules 86 and 92.
[2] Ibid., rule 85.
[3] Ibid., rule 92.
[4] Ibid., rule 93.
[5] Ibid., rules 87 and 93.
[6] Ibid., rules 88 and 94.
[7] Chisholm *v.* Marshall, 1874, 1 R. 388.

President of the Division; and if the appellant shall fail, within the said period of fourteen days, to print and box, or lodge and furnish, the papers required as aforesaid, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein, except upon being reponed.[1]

During vacation the appellant shall, within fourteen days after the process has been received by the Clerk of Court, deposit with the said clerk a print of the note of appeal, record, interlocutors, and proof, if any, unless within eight days after the process has been received by the clerk he shall have obtained from the Lord Ordinary officiating on the Bills an interlocutor dispensing with printing in whole or in part, for which purpose the assistant-clerk shall, if required, lay the process before the Lord Ordinary on the Bills; and in such case the appellant shall deposit with the clerk, as aforesaid, a print of those papers, the printing whereof has not been dispensed with; and if printing has been in whole dispensed with, shall lodge with the said clerk a manuscript copy of the note of appeal; and the appellant shall, upon the box day or sederunt day next following the deposit of such print with the clerk, box copies of the same to the Court; or, if printing has been in whole dispensed with, shall furnish to the Clerk of the Lord President of the Division a manuscript copy of the note of appeal; and if the appellant shall fail, within the said period of fourteen days, to deposit with the Clerk of Court, as aforesaid, a print of the papers required, or to lodge with him a manuscript copy of the note of appeal, as the case may be, or to box or furnish the same as aforesaid on the box day or sederunt day next thereafter, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein, except upon being reponed.[2]

Documentary evidence need not be printed and boxed with the note of appeal. It is sufficient if the appellant prints such documents as are requisite to make his case intelligible when it comes on for hearing.[3] Prints of documents which are not already in process cannot be received, and it is the duty of the clerk to refuse to receive prints of such documents. If there has been an error in failing to lodge some document on which parties intend to found, a motion must be made to the Court for leave to lodge it in process.[4]

The fact that an appellant has made application to be admitted to the poor's roll immediately after the process in an appeal has been transmitted does not free him from making application to the Court to

[1] A. S., 10th March, 1870, sec. 3 (1); C. A. S., D, iii. 1.
[2] A. S., 10th March, 1870, sec. 3 (2); C. A. S., D, iii. 2.
[3] Muir *v.* Mackenzie, 1881, 9 R. 10.
[4] Grierson *v.* Mitchell, 1912, S. C. 173.

dispense *hoc statu* with printing within eight days after the process has been received.[1] Where the Court has dispensed with printing, it is only necessary to lodge two copies of the note of appeal and not of the proof.[2] Where the Court has dispensed with printing *hoc statu* and has subsequently refused to dispense with printing, it should appoint a day for prints to be lodged.[3]

Where a second appeal is taken in a case originating in an inferior Court, it is not necessary to reprint papers already printed and boxed in the former appeal, but it is sufficient to refer to such papers, as in the case of reclaiming notes, by their description and date of boxing.[4]

(v.) *Printing, and Distinctive Letters.*—All papers should be printed in type not smaller than that known as "English," and should have alphabetical reference letters printed on the outer margin.[5] In a recent case objection was taken that the papers were printed in the wrong type. The objection was repelled on the conditions that they were reprinted in proper type and that the expense should not fall upon the client.[6] A distinctive letter of the alphabet (A, B, C, etc.) must be printed in large heavy type on the front page, and on the backing, of every print boxed to the Court, so that in each process the letters thus printed shall follow consecutively. Any print without such lettering shall not be received by the boxing clerks.[7]

(vi.) *Prints not Lodged Timeously.*—Where an appeal was taken on 8th March 1877, *i.e.* during session, and prints were due on 26th March, *i.e.* in vacation, but by mistake they were not lodged until 5th April, being the first box day in vacation, the Court overruled an objection taken by the respondent to the competency.[8] Where an appeal was taken during vacation and the appellant omitted to lodge prints within fourteen days after the Clerk of Court had received the process, and to box them on the first box day thereafter, the Second Division, after consultation with the First Division, held that the Court had a discretion, and that as the omission was unintentional the objection taken by the respondent ought to be overruled.[9] In two later cases, however, the strict observance of the Act of Sederunt has been enforced, and objec-

[1] Allan *v.* Sandeman, 1881, 8 R. 563.
[2] Dolan *v.* Anderson and Lyall, 1885, 12 R. 1190.
[3] Ross *v.* Gray, 1887, 14 R. 768.
[4] Dougall's Trs. *v.* Lornie, 1900, 2 F. 1123. See also Lee *v.* Maxton, 1904, 6 F. 346.
[5] C. A. S., A, iii. 3.
[6] Burrell *v.* Van t'Hoff, 1915, S. C. 832.
[7] C. A. S., A, iii. 5.
[8] Walker *v.* Reid, 1877, 4 R. 714; C. A. S., D, iii. 1.
[9] Boyd, Gilmour & Co. *v.* Glasgow and South-Western Rly. Co., 1888, 16 R. 104; C. A. S., D, iii. 2.

tions to the competency were sustained (1) where the appeal was taken in vacation and the appellant failed to lodge prints within fourteen days and to box the same on the first box day;[1] and (2) where the print of the note of appeal was lodged on the fourteenth day after the process had been received by the Clerk of Court, but the prints were not boxed until the following day, the whole procedure taking place during session.[2]

Prints must be lodged within office hours.[3] (See *Reponing, infra*, paragraph (viii.).)

(vii.) *Prints Lodged, but Inaccurate or Incomplete.*—Where prints have been lodged and boxed but are inaccurate they may be corrected.[4] Thus, where on appeal an objection was taken that the record which was printed did not contain the adjustments, the Court remitted the cause to the Sheriff to allow parties to adjust and to initial the adjustments;[5] and where the note of appeal itself,[6] and the oral proof,[7] had been inadvertently omitted to be printed along with the other prints the Court allowed the mistake to be rectified. In one case where the titles of the pleadings in the Sheriff Court were defective, the appellants were ordered to amend the print and to pay the expenses—£2, 2s.—of the hearing upon the objection.[8]

Where, however, the mistake is more serious, the appeal may be dismissed. Thus, where an appellant boxed a note of appeal which did not have the record in the action appended, but referred to the print boxed in an appeal which had been taken in the earlier stage of the action, which print, although it contained a copy of the record as originally laid and the pursuer's minute of amendments did not contain the defender's answers thereto, the Court dismissed the appeal.[9] In the same way, where the appellant failed to lodge and box a print of the proof along with the other papers and admitted that his failure to do so was not due to inadvertence, the Court dismissed the appeal.[10] (See next paragraph.)

(viii.) *Reponing.*—It is competent for the appellant, within eight

[1] Taylor *v.* Macilwain, 1900, 3 F. 1.
[2] Bennie *v.* Cross & Co., 1904, 6 F. 538.
[3] Burrell *v.* Van t'Hoff, 1915, S. C. 832.
[4] Newton *v.* Methven, 1914, S. C. 753.
[5] Kilcoyne *v.* Wilson, 1907, S. C. 86.
[6] Young *v.* Brown, 1875, 2 R. 456.
[7] Lattimer *v.* Anderson, 1881, 9 R. 370.
[8] Roxburgh & Co. *v.* Barlas, 1876, 3 R. 288.
[9] Lee *v.* Maxton, 1904, 6 F. 346.
[10] Bell *v.* Bell, 1897, 24 R. 847.

days after an appeal has been held to be abandoned in respect of the failure to lodge prints, to move the Court during session, or the Lord Ordinary on the Bills during vacation, to repone him to the effect of entitling him to insist in the appeal; which motion shall not be granted by the Court or the Lord Ordinary except upon cause shown, and upon such conditions as to printing, and payment of expenses to the respondent, or otherwise, as to the Court or Lord Ordinary shall seem just.[1]

An appellant has been allowed to be reponed—

(i.) Where he inadvertently printed the wrong summons.[2]

(ii.) Where he had been ill.[3]

(iii.) Where he had been from home on business.[4]

(iv.) Where he lived on the island of North Uist and his agent resided in Skye.[5]

(v.) Where his law agent's clerk used a diary which omitted Sundays and consequently reckoned sixteen days as fourteen.[6]

(vi.) Where the process was with counsel, who was absent from town.[7]

(vii.) Where there was a change of agency.[8]

Reponing has been refused—

(i.) Where the only cause shown was that there were conversations and verbal negotiations regarding a settlement;[9] and

(ii.) Where the local agent had sent instructions too late for printing and boxing.[10]

See *Prints not Lodged Timeously, supra*, p. 981; *Prints Lodged but Inaccurate or Incomplete, supra*, p. 982; Maclaren on Expenses, pp. 76, 77.

(ix.) *Right of Respondent to Print and Box Appeal.*—It shall be lawful for the respondent within eight days after an appeal has been held to be abandoned, if during session, to print and box the note of appeal, record, interlocutors, and proof, if any; and if during vacation, to deposit a print thereof with the Clerk of Court, and thereafter to

[1] C. A. S., D, iii. 3.
[2] Harvey *v.* Lindsay, 1875, 2 R. 980.
[3] Nisbet *v.* Corrance, 1905, 13 S. L. T. 287.
[4] Dougan *v.* M'Credies, 1885, 23 S. L. R. 133.
[5] Macquian *v.* Macdonald, 1871, 9 M. 743.
[6] Donald *v.* Irvine, 1904, 6 F. 612.
[7] Greig *v.* Sutherland, 1880, 8 R. 41.
[8] White *v.* Rothesay Tramways Co., Ltd., 1909, S. C. 760.
[9] Robertson *v.* Barclay, 1877, 5 R. 257.
[10] Bennie *v.* Cross & Co., 1904, 6 F. 538. See also Taylor *v.* Macilwain, 1900, 3 F. 1; *cp.* Walker *v.* Reid, 1877, 4 R. 714; Boyd, Gilmour & Co. *v.* Glasgow and South-Western Rly. Co., 1888, 16 R. 104.

insist in the appeal, as if it had been taken by himself; in which case the appellant shall also be entitled to insist in the appeal.[1]

(x.) *Retransmission of the Abandoned Appeal.*—On the expiry of the period of eight days after the appeal has been held to be abandoned in respect of failure to lodge prints, if the appellant has not been reponed, and if the respondent does not insist in the appeal, the judgment or judgments complained of become final, and are treated in all respects as if no appeal has been taken against the same; and the Clerk of Court forthwith retransmits the process to the Clerk of the inferior Court: Provided always, that before retransmitting the process, the Clerk of Court or his assistant shall engross upon the interlocutor sheet and sign a certificate in these or similar terms:—

"[*Date*].—Retransmitted in respect of the abandonment of the appeal"; and, in respect of said certificate, the Sheriff, or other Judge of the inferior Court, shall, upon a motion being made before him to that effect, grant decree for payment to the respondent in the appeal of the sum of £3, 3s. of expenses.[2]

Where the Sheriff Court judgment has become final in terms of the above, it is incompetent to bring it under review by note of suspension or other form of appeal.[3]

(xi.) *Abandonment.*—After an appeal has been noted, an appellant cannot abandon his appeal without the consent of all parties or by leave of the Appellate Court.[4] Accordingly the expenses of such an abandonment are in the hands of the Court.[5] The person who abandons an appeal has not the same rights as the person who abandons an action in the Outer House, for whereas in the latter case the party abandoning has a right upon payment of full expenses to raise a new action, the abandonment of an appeal makes the Sheriff's judgment final, and there can be no question of raising another action on the same grounds. It is therefore usual to allow appeals to be abandoned where the respondent does not wish to take up the appeal, the question of expenses depending upon the stage at which the appeal has arrived. Thus, where an appeal was abandoned or withdrawn before the days for printing and boxing had expired, the Court did not award expenses to the respondent.[6] Where the appeal has been sent to the roll but is not out for discussion, the practice is now to award a sum of £3, 3s. to the respondent,[7] unless where the latter has properly printed documents,

[1] C. A. S., D, iii. 4. [2] C. A. S., D, iii. 5.

[3] Watt Bros. & Co. *v.* Foyn, 1879, 7 R. 126; Mackenzie *v.* North British Rly. Co., 1879, 7 R. 128 (note). [4] Sheriff Courts (Scotland) Act, 1907, rule 96.

[5] M'Guire *v.* Union Cold Storage Co., Ltd., 1909, S. C. 384.

[6] Muir *v.* Lamb, 1872, 9 S. L. R. 568.

[7] H. R. Marsden, Ltd. *v.* Brunton & Sons, 1914, S. C. 868.

when the expense of such printing may also be awarded.[1] Where the case is out for discussion and counsel have been instructed, it is the practice to award *full* expenses. Full expenses have also been awarded where the appeal was not out for hearing, but the respondent had been put to considerable expense in printing documents in preparation for the discussion.[2] (See also Maclaren on Expenses, p. 61 *et seq.*)

(xii.) *Effect of Appeal.*—An appeal shall be effectual to submit to review the whole of the interlocutors pronounced in the cause, and shall be available to and may be insisted in by all other parties in the cause notwithstanding they may not have noted separate appeals.[3] An appeal shall not prevent immediate execution of a warrant of sequestration for rent, or of warrants to take inventories, or place effects in custody *ad interim*, or warrants for *interim* preservation, and an *interim* interdict, although appealed against, shall be binding until recalled.[3]

Sec. 69 of the Court of Session Act, 1868, although repealed, is virtually re-enacted by sec. 29 of the Sheriff Courts (Scotland) Act, 1907, and under the former section it was held that (i.) an appeal against an interlocutor granting *interim* decree for payment of money brought up for review a previous interlocutor disposing in part of the merits of which it was a logical sequence;[4] and (ii.) an appeal brings up for review all prior interlocutors whether they have been extracted or not.[5]

(xiii.) *Objection to the Competency.*—This is usually taken by the respondent when the case is called in the Single Bills, and is usually discussed at the end of the Single Bills. The objection may, however, be taken when the appeal is put out for hearing;[6] in which case, if the appeal is dismissed as incompetent, the respondent may not be awarded expenses.[7] Where the objection to competency was taken by the Court while the appeal was being heard, no expenses were awarded to either party.[8]

(xiv.) *Interim Possession, etc., Pending Appeal.*—Notwithstanding an appeal, the Sheriff shall have power to regulate all matters relating to *interim* possession, to make any order for the preservation of any property to which the action relates or for its sale if perishable, or for

[1] Craig *v.* Marshall & Co., Ltd., 1898, 1 F. 67. See also Henderson *v.* Menzies, 1901, 3 F. 858.

[2] Smith Sligo *v.* Knox, 1880, 8 R. 41; Little Ormes Head Limestone Co., Ltd. *v.* Hendry & Co., 1897, 25 R. 124.

[3] Sheriff Courts (Scotland) Act, 1907, sec. 29. See Bell *v.* Andrews, 1885, 12 R. 961.

[4] Cross & Sons *v.* Bordes, 1879, 6 R. 934.

[5] Weir *v.* Tudhope, 1892, 19 R. 858.

[6] Hillhouse *v.* Walker, 1891, 19 R. 47.

[7] Ross *v.* Brims, 1878, 15 S. L. R. 438.

[8] Shirra *v.* Robertson, 1873, 11 M. 660.

the preservation of evidence, or to make in his discretion any *interim* order which a due regard to the interests of the parties may require.[1] Such orders shall not be subject to review except by the Appellate Court at the hearing of the appeal.[1]

(xv.) *Amendment.*—The record in an appeal pending before the Inner House may, with leave of the Court, be amended at any time on such conditions as to the Court may seem proper.[2]

For the conditions upon which amendments are allowed, see Maclaren on Expenses, p. 69 *et seq.*

(xvi.) *Hearing, Proof, and Judgment.*—Notwithstanding that there is no appearance for the respondent at the hearing, the Court will not *de plano* sustain the appeal, but will require the appellant to show cause why the Sheriff's judgment should be altered.[3] The Court may, if necessary, order proof or additional proof to be taken in an appeal, such proof to be taken in the same manner as proof may be competently taken in any cause depending before the Inner House, and shall thereafter, or without any such order (if no such proof or additional proof is necessary), give judgment on the merits of the cause according to the law truly applicable in the circumstances, although such law is not pleaded on the record.[2] The Court may also order issues for the trial of the cause where on appeal the Court overturns the judgment of the Sheriff dismissing the case.[4] The Inner House must, in its judgment, distinctly specify the several facts material to the case which it finds to be established by the proof, and express how far its judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which it means to decide, and the judgment thus pronounced is subject to appeal to the House of Lords in so far as the same depends on or is affected by matter of law.[5] (See *Rehearing Before Increased Number of Judges, supra,* p. 960; *Consultation with Other Judges, supra,* p. 962; *Mistake or Omission in the Interlocutor, infra,* Part xi. Chap. i. (15).)

(3) Other Inferior Courts.—Where appeals are competent from judgments pronounced in other inferior Courts, such as the Dean of Guild Court[6] and the Commissary Court,[7] the procedure is still

[1] Sheriff Courts (Scotland) Act, 1907, rule 91; Trainer *v.* Renfrewshire Upper District Committee, 1907, S. C. 1117.

[2] Court of Session Act, 1868, sec. 72.

[3] Alder *v.* Clark, 1880, 7 R. 1093; Aitken *v.* Robertson, 1880, 8 R. 12; Dunbar *v.* Macadam, 1884, 11 R. 652. See also Nicolson *v.* Munro, 1877, 4 R. 434.

[4] M'Donagh *v.* P. & W. MacLellan, 1886, 13 R. 1000.

[5] 6 Geo. IV. cap. 120, sec. 40.

[6] Jeffray *v.* Angus, 1909, S. C. 400.

[7] Hamilton *v.* Hardie, 1888, 16 R. 192; Campbell *v.* Barber, 1895, 23 R. 90;

regulated by the Court of Session Act, 1868, secs. 65-80, and in addition by the Codifying Act of Sederunt, D, iii.

Besides appeals against final judgments, appeals may be taken against interlocutory judgments on the following grounds:—

First, of incompetency, including defect of jurisdiction, personal objection to the Judge and privilege of party; *secondly*, of contingency; *thirdly*, of legal objection with respect to the mode of proof, or with respect to some change of possession, or to an *interim* decree for a partial payment, provided that in the cases specified under this third head leave is given by the inferior Judge.[1] Leave to appeal on grounds other than those enumerated under the third head is not necessary.[2]

Instead of an appeal on the ground of contingency, a motion for that purpose is now competent.[3]

Where there is a question of jurisdiction in the inferior Court and the inferior Judge has allowed a proof on the question, there can be no appeal until the result of the proof is known.[4]

Personal objection to a Judge is now confined to interest, which includes enmity and bribery, and relationship. With regard to relationship, see *Defences, supra*, p. 394.

Jerdon *v.* Forrest, 1897, 24 R. 395; MacHardy *v.* Steele, 1902, 4 F. 765; Simpson's Exr. *v.* Simpson's Trs., 1912, S. C. 418.

[1] Court of Session Act, 1810 (50 Geo. III. cap. 112), sec. 36.

[2] Miller *v.* Crawfurd, 1881, 8 R. 385.

[3] Court of Session Act, 1868, sec. 74.

[4] Moffat *v.* Denham, 1829 7 S. 781.

CHAPTER V

REMOVALS FROM INFERIOR COURTS

(1) For Jury Trial.—(a) *Ordinary Sheriff Court.*—(i.) *Where Competent.*—Sec. 30 of the Sheriff Courts (Scotland) Act, 1907, provides that in cases originating in the Sheriff Court where the claim is in amount or value above £50, and an order for proof (other than an order for proof to lie *in retentis* or for recovery of documents) has been pronounced, it is competent, within six days thereafter, for either party to require the cause to be remitted to the Court of Session for jury trial.[1] The aforementioned section is the successor of the 40th section of the Judicature Act, which was afterwards re-enacted in another form in the 73rd section of the Court of Session Act, 1868.

If the Sheriff-Substitute allows proof and on appeal to the Sheriff the latter affirms the judgment of the Sheriff-Substitute, it is quite competent to make application for remission within six days of the Sheriff's interlocutor.[2] The rule requiring application to be made within six days is strictly interpreted,[3] and does not apply to the case of an interlocutor merely fixing a diet of proof.[4]

It is no objection to an application for remission that the interlocutor of the Sheriff allows a proof restricted to one part of the record,[5] or that a preliminary proof has already been taken,[6] so long as the interlocutor upon which the application is based is an interlocutor allowing proof on the merits. Accordingly, where the interlocutor is only an interlocutor allowing a preliminary proof, an application for remission following thereon will be incompetent.[7]

Where the interlocutor restricts the proof to writ, or writ or oath,

[1] Sheriff Courts (Scotland) Act, 1907, sec. 30.

[2] Ellerman Lines, Ltd. *v.* Clyde Navigation Trs., 1909, S. C. 694, per Lord President Dunedin, p. 697.

[3] Kinnes *v.* Fleming, 1881, 8 R. 386; Duff *v.* Steuart, 1881, 9 R. 17; Crawford *v.* Simpson, 1901, 38 S. L. R. 272.

[4] Williams *v.* Watt and Wilson, 1889, 16 R. 687; Davidson *v.* Davidson's Exr., 1891, 18 R. 1069.

[5] Conroy *v.* A. & I. Inglis, 1895, 22 R. 620; M'Cafferty *v.* M'Cabe, 1898, 25 R. 872. See also Robertson *v.* Earl of Dudley, 1875, 2 R. 935.

[6] M'Coll *v.* Gardner & Co., 1898, 25 R. 395.

[7] Curran *v.* M'Alpine & Son, 1898, 1 F. 326.

the application for remission is incompetent,[1] but not where the interlocutor only makes the restriction apply to a portion of the case, the remainder being sent to proof *prout de jure*,[2] or allows a proof before answer.[3]

It is incompetent for one of the parties to make application for a remission where the interlocutor of the Sheriff allowing proof in the Sheriff Court is pronounced "of consent."[4] In one case where the words "of consent" referred to the closing of the record and not to the allowance of proof, the application for remission was held competent.[5]

Where an interlocutor allowing proof is under appeal to the Sheriff, it is incompetent to make application for remission.[6]

The code of procedure for removal of a cause from the Sheriff Court for jury trial in the Court of Session stands by itself and is exclusive of the code of appeal proper contained in sec. 28 of the Sheriff Courts (Scotland) Acts, 1907 and 1913. Accordingly, the parties must, within six days from the allowance of proof, elect either to make application for a remission for jury trial or to ask leave to appeal, but they cannot do both.[7]

(ii.) *Exceptions.*—The following classes of cases are exceptions to the foregoing rule:—

Claims by employees against employers in respect of injury caused by accident arising out of and in the course of their employment and concluding for damages (i.) under the Employers' Liability Act, 1880; (ii.) at common law; and (iii.) alternatively at common law or under the Employers' Liability Act, 1880.[8]

In the Sheriff Courts Act of 1907 there was no definition of the term "employee," and several decisions were given in which the Court put its own interpretation upon the term.[9] All difficulty on this subject has now been removed by the Amending Act of 1913 thus defining the term:—"Employee" includes the legal personal repre-

[1] Shirra *v.* Robertson, 1873, 11 M. 660; Wilson *v.* Brakenridge, 1888, 15 R. 587; Glasgow Central Stores, Ltd. *v.* Goodson, 1901, 3 F. 1075; *cp.* Hamilton *v.* Henderson, 1837, 15 S. 1105.

[2] Robertson *v.* Earl of Dudley, 1875, 2 R. 935.

[3] Stewart *v.* Rutherfurd, 1862, 24 D. 1442.

[4] Paterson *v.* Kidd's Trs., 1896, 23 R. 737.

[5] Fleming *v.* Eadie & Son, 1897, 25 R. 3.

[6] M'Arthur *v.* Boucher, 1887, 15 R. 117.

[7] Ellerman Lines, Ltd. *v.* Clyde Navigation Trs., 1909, S. C. 694.

[8] Sheriff Courts (Scotland) Act, 1907, sec. 30, as amended by the Sheriff Courts (Scotland) Act, 1913, First Schedule.

[9] Cook *v.* Bonnybridge Silica and Fireclay Co., Ltd., 1911, S. C. 177; Brown *v.* Glenboig Union Fireclay Co., Ltd., 1911, S. C. 179; Lawrie *v.* Banknock Coal Co., Ltd., 1911, S. C. 817; 1912, S. C. (H. L.) 20.

sentative of an employee, and any person who, by the law of Scotland, may be entitled to *solatium* by the death of an employee.[1]

(iii.) *Powers of Court of Session.*—The Court of Session, if it thinks the case unsuitable for jury trial, may remit the case back to the Sheriff, or remit it to a Lord Ordinary, or send it for proof before a Judge of the Division before whom the cause depends.[2]

In deciding which course to follow the Court of Session deals with an application for remission as if the case originated in the Court of Session.[3] The question whether a cause is more suitable for a proof than a jury trial has already been discussed (*supra*, p. 545 *et seq.*). In the cases which have been decided since the passing of the Sheriff Courts Act of 1907 the question was whether the case should be sent back for proof before the Sheriff, or whether it should be sent to a jury in the Court of Session, and the decision usually turned upon the substantiality of the case as disclosed by the averments on record. In cases where the injuries averred were trifling, the Court remitted the case back to the Sheriff for proof.[4] Where the injuries were of a serious nature and the pursuer's claim was substantial, the Court sent the case to a jury.[5] The question whether a case should be sent to proof before a Judge of the Division, or remitted to the Sheriff for proof, has not yet been discussed.

The undernoted cases prior to the Sheriff Courts Act, 1907, are specially referred to.[6]

(b) *Sheriff Court of Chancery.*—Where competing petitions are presented to the Sheriff of Chancery, or where anyone competently appears to oppose a service, any of the parties, at any time before proof is begun to be taken by the Sheriff, may remove the proceedings to the Court of Session by a note of appeal in the form of a note of appeal under the Court of Session Act, 1868, and such note of appeal shall be proceeded with in like manner with notes of appeal presented

[1] Sheriff Courts (Scotland) Act, 1907, sec. 3, as amended by the Sheriff Courts (Scotland) Act, 1913, First Schedule.

[2] Sheriff Courts (Scotland) Act, 1907, sec. 30.

[3] Cochrane *v.* Ewing, 1883, 10 R. 1279; M'Intosh *v.* Lochgelly Commissioners, 1897, 25 R. 32, per Lord M'Laren.

[4] Barclay *v.* Smith & Co., 1913, S. C. 473; Ogg *v.* Scott, 1915, S. C. 168; Greer *v.* Glasgow Corporation, 1915, S. C. 171. See, however, Grant *v.* John Fleming & Co., Ltd., 1914, S. C. 228.

[5] Mackie *v.* Davidson, 1913, S. C. 675. See, however, Grant *v.* John Fleming & Co., Ltd., 1914, S. C. 228.

[6] Sharples *v.* Yuill & Co., 1905, 7 F. 657, where there is an exhaustive examination of prior authorities by Lord President Dunedin; Dawson *v.* Stewart and Shaw, 1905, 7 F. 769; M'Laughlan *v.* Clyde Valley, etc., Co., 1905, 8 F. 131; Smellies *v.* Whitelaw, 1907, 44 S. L. R. 586; Kennedy *v.* Bruce, 1907, S. C. 845.

with a view to jury trial against judgments of the Sheriff Courts of Scotland.[1]

The appellant has a right to jury trial unless cause is shown to the contrary. It is not a sufficient reason for refusing jury trial that the evidence in the case mainly consists of a large mass of correspondence and other documentary evidence as to pedigree.[2]

(2) For Further Procedure.—(a) *Under the Second Proviso of Sec.* 5 *of the Sheriff Courts Act*, 1907.—It is competent for either party at the closing of the record in the Sheriff Court, or within six days thereafter, to require the cause to be remitted to the Court of Session in the case of actions:—

(i.) Relating to questions of heritable right and title where the value of the subject in dispute exceeds £50 by the year or £1000 in value.

(ii.) Relating to the right of succession to moveables where the value of the subject in dispute exceeds £1000.

(iii.) Relating to division of commonty or division or division and sale of common property where the value of the subject in dispute exceeds £50 by the year or £1000 value.[3]

Actions "relating to questions of heritable right and title" mean actions which raise any competition of heritable right or title;[4] *i.e.* both parties must lay claim to the same piece of property.[5] Where, therefore, an action related to a joint adventure for acquiring land and erecting buildings thereon, it was held that, as the action related to a personal contract and did not raise any question of heritable right or title, the case should be retransmitted to the Sheriff Court.[6] Where the true matter in dispute in an action raising a question of heritable right or title was as to the sum of £10, transmission of the cause was held to be incompetent.[7]

(b) *Under Subsec.* (2) *and the Third Proviso of Sec.* 5 *of the Sheriff Courts (Scotland) Act*, 1907, *as Amended.*—On cause shown or *ex proprio motu* the Sheriff may at any stage remit to the Court of Session any of the following actions:—Actions of aliment, provided that as between husband and wife they are actions of separation and aliment, adherence

[1] 31 & 32 Vict. cap. 101, sec. 41.

[2] Mackintosh *v.* Ross, 1875, 3 R. 232.

[3] Sheriff Courts (Scotland) Act, 1907, sec. 5 (second proviso).

[4] Anderson *v.* M'Gown, 1911, S. C. 441, per Lord Kinnear, p. 444. See also Pitman *v.* Burnett's Trs., 1882, 9 R. 444, per Lord President Inglis, p. 448.

[5] Nicholson *v.* Glasgow Blind Asylum, 1911, S. C. 391, per Lord President Dunedin, p. 397.

[6] Anderson *v.* M'Gown, 1911, S. C. 441.

[7] Muirhead *v.* Gilmour, 1909, 46 S. L. R. 425.

and aliment or *interim* aliment, and actions for regulating the custody of children.[1]

The remission by the Sheriff does not exclude the power of the Court of Session to deal with the matter as it thinks fit, and, in particular, to send the case back to the Sheriff, and accordingly in the only reported case on the matter the First Division held that, as the record did not disclose any special difficulty in the case, the Sheriff was not justified in declining to exercise his jurisdiction, and remitted the cause back to him for consideration and judgment.[2]

(c) *Under the Rivers Pollution Prevention Act*, 1876.—A petition presented in a Sheriff Court under this Act may be removed into the Court of Session in either Division of the Inner House by leave of any Judge of the Inner House if it appears to such Judge desirable in the interests of justice that such petition should be tried in the first instance in either Division of the Court of Session.[3]

In petitions by two county councils presented in the Sheriff Courts of the respective counties against various manufacturers on the banks of a river praying the respondents to be restrained from polluting the river which flowed through the two counties in question, answers were lodged by both respondents. Thereafter the respondents presented notes to the Lord President for the purpose of having the proceedings removed into the Court of Session. The Lord President alone considered the notes and issued interlocutors in which he granted leave to the respondents to remove the petitions into the Court of Session and to have them tried in the first instance in either Division of the Court of Session. By subsequent interlocutors the Court ordered transmission of the processes and sent the petitions to the Summar Roll.[4]

(d) *Dean of Guild Court.*—It sometimes happens in the course of proceedings in the Dean of Guild Court that what appear to be questions of heritable right and title require to be decided before further progress can be made in that Court. Accordingly, whenever such questions arise it is the practice of the Dean of Guild Court to sist procedure until such questions are determined in the Court of Session.[5] The

[1] Sheriff Courts (Scotland) Act, 1907, sec. 5 (2), and third proviso, as amended by the Sheriff Courts (Scotland) Act, 1913, First Schedule.

[2] Dunbar *v.* Dunbar, 1912, S. C. 19.

[3] 39 & 40 Vict. cap. 75, secs. 11 and 21.

[4] Midlothian County Council *v.* Pumpherston Oil Co., Ltd., 1902, 4 F. 996. See also Lanark County Council *v.* Airdrie and Coatbridge Mags., 1906, 8 F. 802.

[5] Pitman *v.* Burnett's Trs., 1881, 8 R. 914; Walker and Dick *v.* Park, 1888, 15 R. 477; Macandrew *v.* Dods, 1908, S. C. 51.

questions, however, must really be questions of competition of heritable right or title in which each party claims the same piece of property. In a case where the Dean of Guild sisted process *hoc statu* for the period of a month in order that the petitioner, if so advised, might raise an action of declarator or other action to establish his right in a competent Court, the petitioner lodged a minute in which he stated that he did not propose to raise any such action, and the Dean of Guild dismissed the petition. On appeal, the First Division was of opinion that there was no competition of title and that the Dean of Guild ought to have determined the question between the parties, and accordingly remitted the case to the Dean of Guild.[1]

(3) On the Ground of Contingency.—Where a party desires to remove an action or proceeding in an inferior Court *ob contingentiam* of a process in the Court of Session, he may now proceed by motion to the Lord Ordinary or the Division of the Court before which such Court of Session process shall actually be at the time for transmission of the inferior Court process.[2]

Transmission of an inferior Court process *ob contingentiam* of a Court of Session process has not the effect of conjoining the two processes; they still remain separate processes.[3] (See *Motion for Transmission ob Contingentiam, supra*, p. 495 *et seq.*)

(4) Procedure in Remitted Causes under the Sheriff Courts (Scotland) Act, 1907.—(a) *Form of Note.*—The party desiring the cause to be remitted shall cause to be written upon the interlocutor sheet in the Sheriff Court a note in the following terms:—"The pursuer [*or* defender *or other party*] requires the cause to be remitted to the Division of the Court of Session"; and the said note shall specify the Division and shall be signed by the party making the application, or his agent, and shall bear the date on which it is signed.[4]

(b) *Notice of Application.*—The Clerk of the inferior Court shall, within two days after the date of such application being made, send written notice of such application to the opposite party, or his agent, provided that the failure to give such notice shall not invalidate the remission, but the Court of Session may give such remedy for any disadvantage or inconvenience thereby occasioned as may in the circumstances be thought proper.[5]

(c) *Transmission where Remit ex Proprio Motu.*—Where such applica-

[1] Nicholson *v.* Glasgow Blind Asylum, 1911, S. C. 391.
[2] Court of Session Act, 1868, sec. 74.
[3] Ivory's Form of Process, vol. ii. p. 52.
[4] C. A. S., D, iv. 1. [5] Ibid., 2.

tion shall have been made, or in cases where the Sheriff has *ex proprio motu* under the provisions of sec. 5 of the Sheriff Courts (Scotland) Act, 1907, pronounced an interlocutor remitting the cause to one of the Divisions of the Court of Session, the Clerk of the inferior Court shall, within two days thereafter, transmit the process to the Clerk of the Division of the Court to which the cause is remitted, who shall write on the interlocutor sheet a note of the day on which it is received.[1]

In a recent case the appellant omitted to deposit a print of appeal within fourteen days after the process was received by the Clerk of Court, through an oversight on the part of the appellant's agent. The print was lodged afterwards and a motion made to be reponed, but the motion was not made within eight days as before mentioned. The Court refused the motion.[2]

(d) *Printing, Boxing, etc.*—Upon the process being so remitted, the regulations as to printing and boxing in session and during vacation, reponing, respondent printing and boxing abandoned appeal, and retransmission of abandoned appeal, applicable to appeals from inferior Courts,[3] shall apply with this qualification, that in the event of an application for a remission of the cause being abandoned, or held to be abandoned, the docquet written by the Clerk of Court or his assistant shall be in the following terms:—"Retransmitted in respect of the abandonment of the remission." In cases remitted *ex proprio motu* by the Sheriff, the pursuer, or party leading in the cause, shall act as if he were appellant and the other party to the cause, shall be considered the respondent. But should the pursuer or party leading fail to print and proceed in manner above provided within fourteen days after the process has been received by the Clerk of Court, it shall be competent for any other party to the cause to print and proceed as above provided within the eight days succeeding; or otherwise it shall be competent for the pursuer, or party leading, to move the Court or Lord Ordinary on the Bills during the said eight days to be reponed on cause shown in the same manner, and subject to the same conditions as is provided in the case of appeals. And on the expiry of the said eight days without printing or reponing being done, the Clerk of Court shall retransmit the process to the Clerk of the inferior Court, as a cause in which the remission has been abandoned, with a docquet on the interlocutor sheet in the terms above provided. In respect of such docquet the Sheriff shall, on motion made, pronounce such order as may be just,

[1] C. A. S., D, iv. 3.
[2] Creighton *v.* Wylie & Lochhead, Ltd., 1915, S. C. 305.
[3] C. A. S., D, iii. 1 to 6. See *supra*, p. 979 *et seq.*

and shall have power to deal with the expenses of the remission as expenses in the cause.[1]

(e) *Procedure in Single Bills.*—Upon the appearance of the cause in the Single Bills of the Division to which it has been remitted, parties will be heard upon any motion made to retransmit the cause to the Sheriff Court, or directed against the competency of the remission, and if the motion to retransmit be refused and the remission held competent, the mode and course of further procedure in the cause (including all questions as to its competency or relevancy) will thereafter be determined by the said Division in the Single Bills or in the Summar Roll as they may think fit.[2]

(f) *Regulations to Supersede Sec.* 95, *Schedule I., of the Sheriff Courts Act,* 1907.—The regulations above set forth shall be observed and come in place of the provisions in paragraph 95 of the First Schedule of the said Sheriff Courts Act.[3] (See *supra,* p. 978 *et seq.*)

[1] C. A. S., D, iv. 4. [2] Ibid., 5. [3] Ibid., 6.

CHAPTER VI

APPEALS FROM JURY TRIALS IN THE ORDINARY SHERIFF COURT

(1) Where Competent.—The interlocutor applying a verdict in a cause tried before a jury in the Sheriff Court may be appealed against to either Division of the Court of Session provided shorthand notes of the proceedings at the trial have been taken.[1] Where no shorthand notes have been taken, the interlocutor applying the verdict is not subject to review.[2]

(2) Time for Appeal.—A note of appeal must be lodged with the Sheriff-Clerk within fourteen days after the date of the final interlocutor.[3]

(3) Form of Note of Appeal.—The note of appeal must be in the Form M annexed to the Sheriff Courts (Scotland) Act, 1907.[3]

(4) Intimation of Appeal and Transmission of Process.—The Sheriff-Clerk shall, within three days of his receiving the note of appeal, notify the other parties in the cause, and transmit the process to the Principal Clerk of Session at Edinburgh.[4]

(5) Printing and Boxing.—The regulations applicable to other appeals from the Sheriff Court apply,[5] except that it shall not be necessary to print any notes of the evidence unless an order appointing the same to be printed shall be made by the Court of Session.[6]

(6) Reponing.—The appellant may be reponed in the same way as in ordinary appeals.[7] In one case where the note of appeal was not in the Form M the appellant was reponed by the Lord Ordinary on the Bills on payment of the sum of £3, 3s.[8]

(7) Production of the Notes of Evidence.—Where the production is ordered by the Court of Session, it is the duty of the appellant to procure the extended notes, certified by the shorthand writer, and to lodge the same with the Principal Clerk of Court.[9]

[1] Sheriff Courts (Scotland) Act, 1907, sec. 31, and rule 148.
[2] Ibid., rule 147. [3] Ibid., rule 148. [4] Ibid., rule 149.
[5] C. A. S., D, iii. 1, 2, and 6. See also *supra*, p. 979 *et seq.* [6] Ibid., 6.
[7] Ibid., 3 and 6. See also *supra*, pp. 982, 983.
[8] Reid *v.* James Nimmo & Co., Ltd., 1913, 1 S. L. T. 460.
[9] Sheriff Courts (Scotland) Act, 1907, rule 137.

(8) Grounds of Appeal.—An appeal may be taken upon one or more of the following grounds:—[1]

(*a*) That the verdict has been erroneously applied by the Sheriff.[2]

(*b*) That the verdict is contrary to evidence.[3]

(*c*) That the Sheriff had in the course of the trial unduly refused or admitted evidence, or misdirected the jury.[4] It would appear that this ground of appeal can only be founded upon if the exception has been taken at the trial and is recorded upon the official shorthand notes.[5]

(*d*) That an award of damages is inadequate or is excessive. There is no reported case of an appeal being taken from the verdict of a jury in the Sheriff Court on either of these last grounds, but reference is made on these points, as well as on the other grounds of appeal, to the decisions applicable to jury trials in the Court of Session. In a recent case, however, Lord Anderson was of opinion that it was incompetent to consider other grounds than those specified in sec. 31 of the Sheriff Courts (Scotland) Act, 1907, and the Lord Justice-Clerk concurred in that opinion.[6] A special verdict or a general verdict is legitimate, but not both.[6]

(9) Powers of Court.—Upon an appeal the Court may refuse the appeal or may find that the verdict was erroneously applied and give judgment accordingly, or may set aside the verdict and order a new trial, provided that if the Judges are equally divided in opinion the verdict shall stand.[1]

(10) New Trial.—If the Court shall order a new trial, the Principal Clerk of Session shall retransmit the process to the Sheriff-Clerk;[7] and the party wishing to proceed with the new trial shall furnish the Sheriff-Clerk with a certified copy of the interlocutor making such order.[8]

(11) Expenses.—See Maclaren on Expenses, p. 406, and the undernoted case.[9]

[1] Sheriff Courts (Scotland) Act, 1907, sec. 31.

[2] M'Vicar *v.* Robertson & Son, 1910, S. C. 396; Taylor *v.* Sutherland, 1910, S. C. 644; Reid *v.* Jas. Nimmo & Co., Ltd., 1913, S. C. 1002. See also Adamson *v.* Fife Coal Co., 1909, S. C. 580.

[3] Bond *v.* Dalmeny Oil Co., Ltd., 1909, 46 S. L. R. 920; Reid *v.* Jas. Nimmo & Co., Ltd., 1913, S. C. 1002.

[4] M'Coll *v.* Alloa Coal Co., 1909, 46 S. L. R. 465.

[5] Sheriff Courts (Scotland) Act, 1907, rule 139; M'Coll *v.* Alloa Coal Co., 1909, 46 S. L. R. 465.

[6] Ferguson *v.* North British Rly. Co., 1915, S. C. 566.

[7] Sheriff Courts (Scotland) Act, 1907, rule 150.

[8] C. A. S., D, iii. 7.

[9] Reid *v.* James Nimmo & Co., Ltd., 1913, S. C. 1002.

CHAPTER VII

APPEALS UNDER SPECIAL STATUTES[1]

(1) Appeals under the Railway and Canal Traffic Act, 1888.[2]—Procedure in these appeals, including Form of Note;[3] Time for Appealing; Lodging and Intimating; Transmission of Process; Respondent may Insist in Appeal; Printing and Boxing, is set forth in the Codifying Act of Sederunt, Book D, Chap. v. 2.

(2) Appeals under the Agricultural Holdings Act, 1908.[4]—(a) *Time for Appealing.*—It shall be competent to appeal under the Agricultural Holdings Act, 1908, sec. 11 (3), against the opinion of the Sheriff within twenty-one days from the date of such opinion, but not later.[5]

(b) *Sheriff Courts (Scotland) Act, 1907, to Apply.*—Such appeal shall be taken in the form and manner prescribed for appeals to the Court of Session in the Sheriff Courts (Scotland) Act, 1907, and be subject to the regulations thereanent, so far as applicable and not inconsistent with the foregoing provision.[6]

(3) Appeals under the Titles to Land Consolidation (Scotland) Act, 1868.[7]—Where competing petitions are presented to the Sheriff of Chancery, or where anyone competently appears to oppose a service, any of the parties, at any time before proof is begun to be taken by the Sheriff, may remove the proceedings to the Court of Session by a note of appeal in the form of a note of appeal under the Court of Session Act, 1868, and such note of appeal shall be proceeded with in like manner with notes of appeal presented with a view to jury trial against judgments of the Sheriff Courts of Scotland.[8] (See *Removals from Inferior Courts, supra*, p. 988 *et seq.*)

Where the Sheriff of Chancery pronounces a decree refusing to

[1] Reference is also made to *Appeals from Inferior Courts by Stated Case, infra*, p. 1006 *et seq.*

[2] 51 & 52 Vict. cap. 25, sec. 17 (3).

[3] See Caledonian Rly. Co. *v.* Greenock and Wemyss Bay Rly. Co., 1878, 5 R. 995; North-Eastern Rly. Co. *v.* North British Rly. Co., 1897, 25 R. 333; John Watson, Ltd. *v.* Caledonian Rly. Co., 1910, S. C. 1066.

[4] 8 Edw. VII. cap. 64, sec. 11 (3).

[5] C. A. S., D, v. 1 (*a*).

[6] Ibid., 1 (*b*).

[7] 31 & 32 Vict. cap. 101.

[8] Ibid., sec. 41.

serve a petitioner, or dismissing a petition for service, or repelling the objection of an opposing party, it is competent to bring the said decree under review of the Court of Session by a note of appeal in the form of a note of appeal under the Court of Session Act, 1868. Such note must be presented within fifteen, or, where the proceedings have been taken in the Courts of Orkney or Shetland, twenty days from the date of the judgment; and where the decree has been pronounced after opposition duly entered or in competition, such note must be intimated to the opposite party, and shall be proceeded with in like manner with notes of appeal against final judgments of the Sheriff Courts. Further or additional evidence may be taken, and wherever the Court determines that the party whom the Sheriff has refused to serve ought to be served, a remit shall be made to the Sheriff to pronounce a decree serving said party.[1] The whole provisions of the Court of Session Act, 1868, so far as possible, apply to notes of appeal under the Titles to Land Consolidation (Scotland) Act, 1868.[2]

(4) Appeals under the Entail Amendment (Scotland) Act, 1868.[3] A decree of the Sheriff pronounced upon an application by an heir in possession of an entailed estate to ascertain whether land which he proposes to feu, lease, or dispone may be feued, leased, or disponed in terms of sec. 3 of the Entail Amendment (Scotland) Act, 1868, may be reviewed by a short note of appeal to be presented to either of the Divisions of the Court of Session, which appeal shall be disposed of by such Division as a summary cause. Such note of appeal must be lodged with the Clerk of the Division, and notice thereof given in writing to the opposite party, or his known agent, or lodged with the Sheriff-Clerk, within six months of the date of the decree of the Sheriff, otherwise such decree shall be final and conclusive. In the event of an appeal being taken, the judgment of the Court of Session thereon is final and conclusive.[4]

(5) Appeals under the Finance (1909-10) Act, 1910[5]—Licence Values.—(a) *Generally.*—By sec. 44 of the Finance (1909-10) Act, 1910, under reference to sec. 2 (2) of the Licensing Act, 1904, and to sec. 10 of the Finance Act, 1894, the certificate of the Commissioners of Inland Revenue, fixing and certifying the "Annual Licence Value" of any licensed premises, in terms of said sec. 44 of the Finance (1909-10) Act, 1910, and sec. 8 of the Revenue Act, 1911, is subject to appeal, and the Lords of Council and Session have by Act of

[1] 31 & 32 Vict. cap. 101, sec. 42.
[2] Ibid., sec. 45.
[3] 31 & 32 Vict. cap. 84.
[4] Ibid., sec. 4.
[5] 10 Edw. VII. cap. 8.

Sederunt framed rules for the constitution of a Court of Appeal and for the procedure to be adopted in taking and hearing such appeals.

(b) *The Constitution of the Court of Appeal.*—The Court is the Valuation Appeal Court, consisting of the Judges named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Acts; the Lord Ordinary is the Junior Judge of the Court; and the Clerk is the Depute or Assistant Clerk of Session attached to the Junior Judge of the Court.[1]

(c) *Representation against Certificate.*—If the licence-holder or any person to whom a copy of the certificate has been issued deems himself aggrieved by the terms of a certificate issued under and in terms of the Finance (1909-10) Act, 1910, sec. 44, subsec. (2), he shall within one month of the issue of such certificate lodge with the Commissioners a representation in writing against such certificate in the following form or as nearly as may be thereto:—

A. B. [*designing him, and adding*], holding a licence for the sale of in the licensed premises at , represents to the Commissioners of Inland Revenue against their certificate of the annual licence value of the said premises, a copy of which is appended hereto, in respect that , and craves that the said certificate may be corrected by inserting £ as the annual licence value of the said premises, and by stating £ and £ respectively as the two annual values by reference to which the said annual licence value has been arrived at in terms of the Finance (1909-10) Act, 1910, sec. 44 [*or specifying such other relief as is sought to be obtained*].

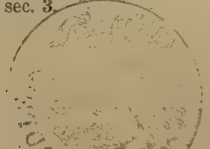
[*Signed by the party, or by his agent, adding the name and address of his principal.*]

The representation should state specifically the grounds of the representation.[2]

(d) *Disposal by Commissioners of Representation.*—The Commissioners shall within one month from the delivery to them of a representation against such certificate notify by registered post letter to the person making such representation whether they have determined to adhere to their certificate or to give effect in whole or in part to such representation.[3]

(e) *Date of Issue of Certificate and of Certificate.*—The date of posting of the certificate shall be deemed to be the date of such certificate for the purposes of the Act of Sederunt; provided that where prior to the date of the Act of Sederunt any certificate under the Finance (1909-10) Act, 1910, sec. 44, subsec. (2), has been issued, the date of the Act of Sederunt shall be deemed to be the date of such certificate.[4]

[1] A. S., 22nd May 1914, sec. 1.
[2] Ibid., sec. 2.
[3] Ibid., sec. 3.
[4] Ibid., sec. 4.



(f) *Appeal.*—Any person aggrieved by the determination of the Commissioners with respect to such certificate may, within fourteen days from the date of the notification by the Commissioners of their determination, appeal against such certificate by printing, boxing to the Court, and lodging with the clerk a petition of appeal in the following form:—

A. B. [*designing him, and adding*], holding a licence for the sale of in the licensed premises at , [*or otherwise indicating his interest in said licence or licensed premises*], appeals to the Valuation Appeal Court against the certificate by the Commissioners of Inland Revenue of the annual licence value of the said licensed premises, a copy of which is appended hereto, in respect that , and craves that the said certificate may be corrected by inserting £ as the annual licence value of the said premises, and by stating £ and £ respectively as the two annual values by reference to which the said annual licence value has been arrived at in terms of the Finance (1909-10) Act, 1910, sec. 44 [*or specifying such other relief as is sought to be obtained*].

[*Signed by the party, or by his agent, adding the name and address of his principal.*][1]

(g) *Grounds of Appeal.*—The appellant shall briefly set forth in his petition of appeal his objections to the certificate and the grounds thereof in articulate form, and shall specify the correction or other relief which he seeks to obtain; and if he complains of the annual licence value contained in such certificate, shall state the two annual values by reference to which he maintains that such annual licence value should have been arrived at.[2]

(h) *Enrolment for First Order.*—As soon as conveniently may be after the petition is lodged the clerk shall enrol it in the ordinary Motion Roll of the Lord Ordinary during session, or, during vacation, shall lay it before the Lord Ordinary on the Bills, who shall order service on the Commissioners, and such other intimation, service, or advertisement as he may deem proper, and answers within eight days.[3]

(i) *Answers.*—The Commissioners shall in their answers specifically admit or deny any statements in the appeal so far as necessary for the decision of the matter of the appeal, and shall also state articulately the grounds upon which they maintain such certificate.[4]

(j) *Second Enrolment.*—As soon as conveniently may be after the *inducice* have expired the clerk shall enrol the cause in the Motion Roll of the Lord Ordinary, who shall hear parties, if necessary, and

[1] A. S., 22nd May 1914, sec. 5.
[2] Ibid., sec. 6.
[3] Ibid., sec. 7.
[4] Ibid., sec. 8.

decide any question as to the title of any party not being the Commissioners or the licence-holder to appeal, and of competency, relevancy, or other preliminary plea, and shall determine as to the procedure, if any, necessary to prepare the cause for hearing and decision by the Court.[1]

(k) *Proof.*—At such enrolment, or at any adjournment thereof, the Lord Ordinary may require the parties respectively to admit or deny any facts which he considers necessary for the decision by the Court of the matter of the appeal; and he may allow parties a proof of any such particular fact or facts, or generally as he thinks proper; such proof to be taken before the Lord Ordinary or other Judge of the Court, on such day as may be fixed.[2]

(l) *Recovery of Documents.*—It shall be in the power of any party to require production by another party to the appeal of documents bearing on the matter of the appeal, but he shall first call for such production by registered post letter with specification of the documents annexed; and only on non-compliance within six days with such call shall he be entitled to apply to the Lord Ordinary for diligence to recover in common form. The Lord Ordinary, if he is of opinion that any documents have been unduly withheld, shall report the same to the Court when the question of expenses is disposed of.[3]

(m) *Ordering Cause to be put to the Roll.*—On the proof, if any, having been led, and when he is satisfied that the process in the appeal is ready for the consideration and decision of the Court, the Lord Ordinary shall pronounce an interlocutor ordering the cause to be put to the roll of the Court, and the clerk shall thereupon enter it therein.[4]

(n) *Appeal from Lord Ordinary to the Court.*—Any party may within eight days appeal to the Court against any interlocutor, determination, or order of the Lord Ordinary, by dating and signing a note, by himself or his agent, on the interlocutor sheet in these terms:—"The appellant *A. B.* [*or* the respondent *C. D.*] appeals to the Court"; and at the same time intimating this appeal in writing to the other party to the cause. Such appeal shall be dealt with by the Court at its earliest convenient sitting, when such order shall be pronounced as may seem proper.[5]

(o) *Amendment of Record and Additional Proof.*—It shall be in the power of the Court at any time before final judgment, and on such conditions as they may deem proper, to allow the record to be amended.

[1] A. S., 22nd May 1914, sec. 9.
[2] Ibid., sec. 10.
[3] Ibid., sec. 11.
[4] Ibid., sec. 12.
[5] Ibid., sec. 13.

And at the hearing before them the Court may order the production of further documents or further proof to be led, if in their opinion this is necessary for the due determination of the matter of the appeal.[1]

(p) *Judgment of the Court.*—The judgment of the Court on the appeal shall be in the form of an interlocutor specifically fixing and declaring the annual licence value of the premises in question, and stating the two annual values by reference to which the annual licence value has been arrived at, and when necessary shall direct the certificate to be corrected accordingly, and the Court shall dispose of the question of expenses so far as not already dealt with.[2]

(q) *Fees and Expenses.*—Expenses in the appeal shall be regulated and in terms of the Codifying Act of Sederunt, Book K, Chap. iv., with the substitution of the Court for the Inner House and of the Lord Ordinary for the Outer House therein.[3]

(r) *Extracts of Interlocutors.*—The Extractor of the Court of Session shall grant extract of interlocutors in such appeal in common form.[4]

(6) Appeals under the Finance (1909-10) Act, 1910—Land Values.—Any person aggrieved by the decision of a referee appointed under this Act where the total or site value as alleged by the Commissioners of the property in respect of which the dispute arises exceeds £500 may appeal directly to the Judges of the Court of Session named for hearing appeals under the Valuation of Lands (Scotland) Acts, and there is an appeal from such Judges to the House of Lords.[5] Where the total or site value as alleged by the Commissioners does not exceed £500, an appeal may be taken to the Sheriff Court, with a further right of appeal to the said Judges.[6]

The Constitution of the Court, Time for Appeal, Procedure in Appeal, Clerks of Courts, Rolls of Court, Extracts, Fees and Expenses, Minute-Book, Payment of Duty, Leave for Appeal without Payment, and Abandonment of Appeal are all set forth in the Codifying Act, Book J, Chap. ii.

(7) Appeals under the Bankruptcy Act, 1913.[7]—It is competent to bring under review of the Inner House of the Court of Session during session any deliverance of the Sheriff after sequestration has been awarded, except where the same is declared not to be subject to review. The note of appeal must be lodged with and marked by

[1] A. S., 22nd May 1914, sec. 14.
[2] Ibid., sec. 15. [3] Ibid., sec. 16. [4] Ibid., sec. 17.
[5] 10 Edw. VII. cap. 8, secs. 33 (4) and 42; Herbert's Trs. *v.* Inland Revenue, 1912, S. C. 948; 1913, S. C. (H. L.) 34.
[6] 10 Edw. VII. cap. 8, secs. 33 (4) and 42.
[7] 3 & 4 Geo. V cap. 20.

the Sheriff-Clerk within eight days from the date of such deliverance, failing which the same shall be final, and such note, together with the process, shall forthwith be transmitted by the Sheriff-Clerk to the Clerk of the Bill Chamber.[1]

There is no form of note of appeal given in the statute. The correct name and designation of the appellant must be given, however, although in one case the note of appeal was held not to be incompetent in respect of its omission to be addressed to the Lords of Council and Session, nor recited the interlocutor appealed against nor contained a prayer.[2]

Such appeals are not subject to the conditions as to boxing and printing imposed by the Court of Session Act, 1868, Part VII., and relative Act of Sederunt in the case of appeals from the Sheriff Court in lieu of advocations;[3] nor do such appeals have the effect of subjecting to review substantive deliverances prior to the deliverance appealed against.[4] (See also Maclaren's Bill Chamber Practice, p. 217 *et seq.*)

(5) Appeals under the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868.[5]—An appeal to the Lord Ordinary in teind causes under this Act is competent by a note of appeal written at the end or on the margin of the order, finding, judgment, interlocutor, or decree appealed from, or by a separate note of appeal lodged with the Sheriff-Clerk in the following or similar terms:—

"The petitioner [*or* respondent] appeals to the Lord Ordinary in teind causes." It must be signed by the appellant or his agent, and bear the date on which it is signed.[6] It must be signed within twenty days of the date of the order or interlocutor, during which time extract is incompetent.[7] The note of appeal brings up the whole orders, interlocutors, etc., pronounced by the Sheriff, so far as not final, to review at the instance of all parties, and an appellant cannot withdraw or abandon his appeal without leave of the Lord Ordinary.[8] Within two days after the date of the appeal the Sheriff-Clerk must send written notice of such appeal to the respondent or his agent, but failure to do so will not invalidate the appeal.[9] Within the same period the

[1] 3 & 4 Geo. V. cap. 20, sec. 166.
[2] Ewing v. Watson, 1860, 22 D. 354.
[3] Lamont v. Lamont's Tr., 1904, 6 F. 336.
[4] Scottish Provincial Assurance Co. v. Christie, 1859, 21 D. 333; Alison v. Robertson's Trustees, 1890, 18 R. 212; *cp.* Pilling v. Drake, 1857, 19 D. 938.
[5] 31 & 32 Vict. cap. 96.
[6] Ibid., sec. 16.
[7] Ibid., sec. 17.
Ibid., sec. 18.
[9] Ibid., sec. 19.

Sheriff-Clerk must transmit the process to the Depute-Clerk of Session attached to the bar of the Lord Ordinary, who shall subjoin to the appeal a note of the day on which it is received; and it shall be lawful for either the appellant or the respondent at any time after the expiry of eight days from the date of such note to enrol the appeal; and when the appeal is called in the roll, it shall be competent for the Lord Ordinary to order the note of appeal and any other papers or productions to be printed, or the Lord Ordinary may dispense with the printing of the same; and in case the papers ordered to be printed shall not be printed by the appellant, or in case he shall not move in the appeal, it shall be lawful for the Lord Ordinary, on a motion by any party in the cause, to grant an order authorising the party moving to print the papers aforesaid, and to insist in the appeal as if it had been taken by himself: Provided always, that when any appeal is taken to the Lord Ordinary, he shall have the whole powers which are conferred on the Sheriff; provided also that all orders, findings, interlocutors, judgments, or decrees pronounced by the Lord Ordinary shall be final, and not subject to review.[1]

(9) Appeals under the Burial Grounds (Scotland) Act, 1855.[2] —Appeals under sec. 10 of this Act are to any of the Lords Ordinary, whose decision is final.[3]

(10) Appeals under the Finance Act, 1894.—See *supra*, p. 912.

(11) Appeals under the Patents and Designs Act, 1907.—See *supra*, p. 913.

(12) Appeals under the Employers' Liability Act, 1880.—There is now no appeal to the Court of Session in an action by a workman, or by his legal personal representatives, or by any person who is entitled to *solatium* in respect of the death of a workman against the workman's employers either under this Act or at common law, or alternatively at common law or under this Act, except on a point of law by stated case.[4] (See *infra*, p. 1017.)

[1] 31 & 32 Vict. cap. 96, sec. 20; Heritors of Pitsligo *v.* Gregor, 1879, 6 R. 1062.

[2] 18 & 19 Vict. cap. 68.

[3] Ibid., sec. 10; Strichen Parish Council *v.* Goodwillie, 1908, S. C. 835.

[4] Cook *v.* Bonnybridge Silica and Fireclay Co., Ltd., 1914 S. C. 740. See also Lawrie *v.* Banknock Coal Co., Ltd., 1912, S. C. (H. L.) 20.

CHAPTER VIII

APPEALS FROM INFERIOR COURTS BY STATED CASE

(1) Case Stated to the Registration Appeal Court.—(a) *Where Competent.*—Any person whose name has been struck out of any register or list of voters by the Sheriff, or who shall claim or object before the Sheriff at any Registration Court, may appeal in open Court against the decision of the Sheriff on a point of law, and require the Sheriff to state the facts of the case and such question of law, and his decision thereon in a special case; and the Sheriff shall prepare and sign and date such special case, and deliver the same in open Court to the Sheriff-Clerk or town clerk, as the case may be; and such person, or his agent, may thereupon in open Court declare his intention to appeal against the said decision, and may, within ten days of the date of such special case, lay a certified copy thereof before the Registration Appeal Court for its decision thereon.[1]

Parliamentary voters alone used to have a right of appeal to the Registration Appeal Court,[2] but now both parish council and municipal voters have that privilege.[3]

(b) *The Court.*—The Court for hearing appeals consists of three Judges of the Court of Session to be named from time to time by Act of Sederunt of the said Court, one Judge to be named from each Division of the Inner House, and one from the Lords Ordinary in the Outer House.[4]

The Court shall sit on Mondays during session to hear appeals, but it has power to continue the hearing of an appeal on other days.[5]

The decision of the Court is final, and not subject to review by any Court, or in any manner whatsoever.[6]

(c) *Preparation of the Case.*—The case ought to be prepared by the Sheriff with reference to each appeal taken, and it is incorrect, in point

[1] Representation of the People (Scotland) Act, 1868 (31 & 32 Vict. cap. 48), sec. 22.

[2] Wood *v.* Laing, 1897, 24 R. 382.

[3] MacLellan *v.* Nish, 1911, S. C. 510; 57 & 58 Vict. cap. 58, sec. 12 (6); 63 & 64 Vict. cap. 49, sec. 29.

[4] 31 & 32 Vict. cap. 48, sec. 23.

[5] Court of Session Act, 1868, sec. 10.

[6] 31 & 32 Vict. cap. 48, sec. 22.

of form, for the Sheriff to state several appeals arising out of different circumstances in one case. Each case should state the name of the objector as well as the claimant, and contain an enumeration of the facts found to be proved and the points of law decided, and not merely notes of the evidence adduced and judgment given.[1] Even where the evidence is documentary the facts proved from the writs should be set forth and not the documents themselves.[2] The precise question of law and not the general question should be set forth.[3] It is the duty of the appellant to see that the case is properly stated,[4] and if the case is not in proper order it may be dismissed.[5]

Where the Sheriff is of opinion that his judgments respecting the qualifications of any two or more persons depend on the same question of law, he shall append to the stated case the names of all such persons who have appealed against his judgment on their respective claims.[6] This applies to new claimants only; all other appellants must each take a separate special case.[7] Appeals both by the objector and the claimant may, however, be embodied in one stated case.[8]

(d) *Hearing.*—The Court will not sustain an appeal in respect of no appearance for the respondent, but will require the appellant to show cause why the Sheriff's judgment should be altered.[9] The respondent may, however, agree by joint minute to the judgment of the Sheriff being recalled, and this will be given effect to.[10]

The Court will not interfere with the findings in fact of the Sheriff.[11]

No objection can be raised before the Appeal Court which was not raised before the Sheriff, although the facts and the question of law set forth in the stated case are sufficient to cover it.[12]

Even though documents are not embodied in the stated case, they may still be looked at.[13]

[1] Millar *v.* Wilson, 1863, 1 M. 307; Jardine *v.* M'Culloch, 1865, 4 M. 138; Anderson *v.* Ireland, 1876, 4 R. 1.

[2] Anderson *v.* Ireland, 1876, 4 R. 1.

[3] Jardine *v.* M'Culloch, 1865, 4 M. 138.

[4] Pringle *v.* Hilson, 1865, 3 M. 420; Maitland *v.* M'Credie, 1868, 7 M. 288.

[5] Pringle *v.* Hilson, 1865, 3 M. 420; Cameron *v.* Hilton, 1866, 5 M. 73.

[6] 31 & 32 Vict. cap. 48, sec. 22.

[7] M'Gowan *v.* Mather, 1879, 7 R. 46; Neilson *v.* Robertson, 1891, 19 R. 301.

[8] Haldane *v.* Nichol, 1863, 2 M. 174.

[9] Aitken *v.* Robertson, 1880, 8 R. 12.

[10] M'Chlery *v.* Cowan, 1866, 5 M. 73.

[11] Kellie *v.* Little, 1897, 24 R. 379; Hamilton *v.* Ferguson, 1897, 25 R. 94.

[12] Maitland *v.* M'Credie, 1868, 7 M. 288; Adamson *v.* Smith, 1879, 17 S. L. R. 158; M'Kergow *v.* White, 1910, S. C. 215.

[13] Bell *v.* Donaldson, 1879, 7 R. 34.

Where the name of a voter has been inserted in or expunged from the roll by the Registration Appeal Court, there must be a change of circumstances before a new appeal will be entertained.[1] A different objector would seem to be entitled to state an objection previously repelled.[2]

If the Court is of opinion that the case is not properly stated, it may be dismissed,[3] or it may be remitted back to the Sheriff to be amended.[4]

(e) *Expenses.*—See Maclaren on Expenses, p. 391.

(2) Case Stated to the Court of Exchequer.—(a) *Under the Taxes Management Act*, 1880.[5]—(i.) *Where Competent.*—Where a taxpayer or the surveyor of taxes is dissatisfied on a point of law with the determination of any appeal decided by the General or Special Commissioners under the Income Tax Acts or the Acts relating to inhabited house duties, and has immediately upon such determination declared his dissatisfaction to the Commissioners who heard the appeal, he may, within twenty-one days after such determination, require the Commissioners to state a case for the opinion of the Court of Exchequer.[6] The fee payable to the clerk of the Commissioners for the preparation of the case is twenty shillings.[7]

(ii.) *Transmission of Case.*—The party who has obtained a case must, within seven days after the receipt thereof, transmit the same (marked for one of the Divisions of the Court) to the process clerk of the Lord Ordinary in Exchequer causes, and at the same time transmit a copy thereof to the opposite party or his agent.[8]

(iii.) *The Tribunal.*—The said process clerk shall lay the case before the Lord Ordinary in Exchequer causes (or, in case of his absence or inability, the Lord Ordinary on the Bills for the time), who may either dispose of the case himself, or appoint the same to be heard before the Division of the Court for which it may have been marked as aforesaid.[9]

(iv.) *Where Disposed of by Lord Ordinary.*—Where the Lord Ordinary in Exchequer causes, or the Lord Ordinary on the Bills, proceeds to dispose of the case himself, he shall, on the application of either party, fix a diet for hearing parties, of which diet four days' notice shall be given to the other party or his agent by the party on whose

[1] Renton *v.* Robson, 1863, 2 M. 189; Murray *v.* M'Gowan, 1869, 8 M. 4, per Lord Ormidale, p. 5.

[2] Miller *v.* Fisher, 1863, 2 M. 192.

[3] Pringle *v.* Hilson, 1865, 3 M. 420; Cameron *v.* Hilton, 1866, 5 M. 73.

[4] 31 & 32 Vict. cap. 48, sec. 22.

[5] 43 & 44 Vict. cap. 19.

[6] Ibid., sec. 59 (1).

[7] Ibid., sec. 59 (2) (*a*).

[8] C. A. S., C, vii. 1.

[9] Ibid., 2.

application it has been fixed. At the diet so fixed, or any adjournment thereof, the said Lord Ordinary may dispose of the case in absence, if the parties, or either of them, do not then attend, or he may hear parties or their counsel or agent, and thereafter dispose of the case.[1]

(v.) *Where Case Transmitted to Inner House.*—Where the case is appointed to be heard before one of the Divisions of the Court, the process clerk of the Lord Ordinary in Exchequer causes shall transmit the case to the office of that Division, and the case shall then be heard and be disposed of by the Division.[2]

(vi.) *Powers of Court.*—The Lord Ordinary or the Inner House, as the case may be, shall hear and determine the question or questions of law arising in the transmitted case, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the Commissioners with the opinion of the Lord Ordinary or the Inner House thereon, or may make such other order in relation to the matter, and may make such order as to costs as either of them may think fit.[3]

The said Court has power to cause the case to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it has been amended.[4] The case may also be amended of consent.[5] The Court may also remit the case for amendments which will show the *data* of the Commissioners' calculation.[6]

(vii.) *Expenses.*—See Maclaren on Expenses, pp. 300, 301.

(b) *Relative to Excise Duties.*—Where an appeal has been taken from the Justices to the General Quarter Sessions under sec. 82 of the Excise Management Act, 1827,[7] it is competent for the Justices of the Peace at General Quarter Sessions before whom any such appeal shall be brought, at their discretion, to state the facts of any case on which such appeal shall be made specially for the opinion and direction of the Court of Exchequer.[8] This stated case is a matter unprovided for by the Exchequer Court (Scotland) Act, 1856,[9] and may not be brought before the Lord Ordinary in Exchequer causes in the first instance, but must be sent to either of the Divisions of the Court of Session sitting as Exchequer Judges.[10]

[1] C. A. S., C, vii. 4. [2] Ibid., 3.
[3] 43 & 44 Vict. cap. 19, sec. 59 (2) (*b*).
[4] Ibid., sec. 59 (2) (*c*); Paisley Cemetery Co. *v.* Inland Revenue, 1898, 25 R. 1080.
[5] Lloyd *v.* Solicitor of Inland Revenue, 1884, 11 R. 687.
[6] Leith, Hull, and Hamburg Steam Packet Co. *v.* Inland Revenue, 1899, 1 F. 1117.
[7] 7 & 8 Geo. IV. cap. 53. [8] Ibid., sec. 84. [9] 19 & 20 Vict. cap. 56.
[10] Perth Quarter Sessions, 1861, 24 D. 221.

It is not competent for the Justices in General Quarter Sessions to state a case after they have pronounced judgment in the cause,[1] although it may be competent for Quarter Sessions to pronounce judgment subject to the opinion of the Inner House of the Court of Session.[2]

For *Expenses*, see Maclaren on Expenses, pp. 139, 299, and 389.

(3) Case Stated to the Lands Valuation Appeal Court.—The Valuation Committees in counties and burghs must hold their Courts between 10th and 19th September in each year with continuation of days, and complete their work and dispose of all appeals before 30th September. Parties appealing must hand to the Clerk of Committee their reasons for appeal and answers within ten days of the determination appealed against—in no case later than 10th October—and the Clerk of the Valuation Committee must transmit the complete case to the Inland Revenue as soon thereafter as possible, and at any rate in time for the sittings of the Lands Valuation Appeal Court.[3]

(a) *The Court.*—The Court is known as the Lands Valuation Appeal Court, and consists of *three* Judges of the Court of Session named for that purpose from time to time by Act of Sederunt of the said Court.[4] Any valuation which is confirmed or altered in conformity with the opinion of the said Judges is final and not subject to review in any manner of way,[5] and the Court of Session cannot set aside its decisions even on the ground of *ultra vires* or incompetency.[6]

(b) *Ground of Appeal.*—The ground of appeal is confined to the question of annual value.[7] An appeal as to whether the appellant has been properly entered in the Valuation Roll is incompetent.[8]

If the magistrates have proceeded upon "local knowledge," not being public matters or matters of common knowledge, this is a good ground of appeal.[9]

[1] Sumner *v.* Middleton, 1878, 5 R. 863.

[2] Steele *v.* M'Intosh Bros., 1879, 7 R. 192, per Lord President Inglis, p. 196.

[3] Stein *v.* Falkirk Assessor, 1912, S. C. 853.

[4] 20 & 21 Vict. cap. 58, sec. 2; 30 & 31 Vict. cap. 80, sec. 8; 42 & 43 Vict. cap. 42, sec. 7; 8 Edw. VII. cap. 62, sec. 7 (2).

[5] 30 & 31 Vict. cap. 80, sec. 8; Magistrates of Glasgow *v.* Hall, 1887, 14 R. 319; Pumpherston Oil Co., Ltd. *v.* Wilson, 1901, 3 F. 1099.

[6] Stirling & Sons *v.* Holm, 1873, 11 M. 480.

[7] British Linen Co. *v.* Aberdeen Assessor, 1906, 8 F. 508; Glasgow Parish Council *v.* Glasgow Assessor; Glasgow Parish Council *v.* Glasgow Corporation, 1912, S. C. 818. See also Glass, 1872, 11 M. 988; Ritchie, 1881, 9 R. 1244; Bryden's Trs., 1881, 9 R. 1244; Cuninghame *v.* Assessor for Ayrshire, 1895, 22 R. 596.

[8] British Linen Co. *v.* Aberdeen Assessor, 1906, 8 F. 508.

[9] Craiks, Ltd. *v.* Forfar Assessor, 1909, S. C. 658; Moyes *v.* Perth Assessor; Reed *v.* Perth Assessor; Robertson *v.* Perth Assessor, 1912, S. C. 761.

(c) *Who may Demand Case.*—A case may be demanded either by persons whose names have been entered as proprietors or tenants or occupiers in the Valuation Roll, or by any person interested, or by the assessor.[1]

(d) *Preparation of the Stated Case.*—It is the duty of the Committee themselves to state the facts and their determination upon them, and to add the reasons of appeal and answers furnished by the parties; but it is also proper and convenient that the Committee should submit a draft to the parties for their observations, provided that no undue delay is thereby caused.[2] The Committee must set forth findings in fact which it has found have been proved, so that the Court may draw an inference as to value.[3] The principles contended for by the assessor and the other parties respectively must also be stated.[4]

At one time the Appeal Court held the appellant responsible for the contents of the stated case,[5] but it would appear that now the appellant is only held responsible for that part of the case over which he himself has control.[6]

If the case does not properly state the facts, the case will be dismissed.[7] (See *Amendment, infra,* p. 1012.)

(e) *Hearing.*—At the hearing the appellant will always be heard notwithstanding that the point at issue has already been decided previously between the same parties.[8] New evidence may be brought forward by an appellant who was unsuccessful at a previous sitting of the Court, and the Court in respect of such evidence may alter its previous decision.[9] Even although no new evidence is brought forward, a new argument

[1] Ferrier *v.* Edinburgh Assessor, 1892, 19 R. 882; British Linen Co. *v.* Aberdeen Assessor, 1906, 8 F. 508. See also M'Gregor *v.* Menzies, 1874, 4 R. 1144; Burgh of Linlithgow, 1878, 9 R. 1236; Blantyre Parochial Board *v.* Assessor for Lanarkshire, 1883, 10 R. 773.

[2] 20 & 21 Vict. cap. 58, sec. 2; 42 & 43 Vict. cap. 42, sec. 9; Stein *v.* Falkirk Assessor, 1912, S. C. 853.

[3] Rule *v.* Lord Abinger, 1883, 10 R. 502, per Lord Fraser, p. 506; Lord Middleton *v.* Assessor for Ross-shire, 1882, 10 R. 28, per Lord Lee, p. 30.

[4] Steel Company of Scotland, Ltd. *v.* Assessor for Lanarkshire, 1892, 19 R. 847; Glasgow and South-Western Rly. Co. *v.* Assessor for Greenock, 1898, 25 R. 1229.

[5] Bank of Scotland, 1873, 11 M. 991; Glasgow and South-Western Rly. Co. *v.* Assessor for Greenock, 1898, 25 R. 1229; Stirling Gas Light Co. *v.* Assessor for Stirling, 1899, 1 F. 583.

[6] Aberdeen District Lunacy Board *v.* Assessor for Aberdeenshire, 1907, S. C. 737; Stein *v.* Falkirk Assessor, 1912, S. C. 853.

[7] Union Tube Co. *v.* Coatbridge Assessor, 1895, 22 R. 583.

[8] Smith *v.* Assessor for Argyllshire, 1885, 12 R. 905; Lamont *v.* Assessor for Dumfriesshire, 1900, 2 F. 610; Glasgow Parish Council *v.* Glasgow Assessor; Glasgow Parish Council *v.* Glasgow Corporation, 1912, S. C. 818.

[9] Webster & Sons *v.* Assessor of Arbroath, 1908, S. C. 613.

submitted by an appellant may cause the Court to alter its previous decision.[1]

Where the valuation appealed against has been the valuation for several years previously, the *onus* is upon the appellant to show that it should be altered,[2] but the *onus* may be shifted by the appellant establishing a *primâ facie* case for alteration.[3] Where the assessor increases a valuation the *onus* is upon him to justify the increase.[4]

(f) *Amendment of Case.*—The Judges of the Lands Valuation Appeal Court may, if they think fit to do so, remit the case to the county council or the magistrates by whom it was stated, with such instructions as the said Judges may consider necessary for having the case more fully stated.[5] A remit will only be granted where the Committee has refused to hear an appeal on the ground that it had already heard and disposed of the same question between the same parties,[6] where the appellant is not to blame for omissions or mis-statements in the case,[7] or where it is necessary to correct the admission or rejection of evidence, or matters of a similar nature.[8]

Where no proof has been led by either side and facts are disputed the Court will not remit the case for proof on the disputed facts.[9]

(4) Case Stated to the Court of Session.—(a) *Under the Workmen's Compensation Act*, 1906.—(i.) *Generally.*—Either party to an arbitration within the time and in accordance with the after-mentioned conditions may require the Sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session, who may hear and determine the same, and remit to the Sheriff with instruction as

[1] North British and Mercantile Insurance Co. *v.* Assessor for Edinburgh, 1910, S. C. 814.

[2] Livingston *v.* Assessor for Paisley, 1909, 46 S. L. R. 433.

[3] Deards *v.* Assessor for Edinburgh; Clark *v.* Assessor for Edinburgh, 1911, S. C. 918.

[4] Jenner & Co. *v.* Assessor for Edinburgh, 1908, S. C. 601; North of Scotland Electric Light, etc., Co., Ltd. *v.* Assessor for Brechin, 1909, S. C. 655.

[5] 42 & 43 Vict. cap. 42, sec. 9.

[6] Smith *v.* Assessor for Argyllshire, 1885, 12 R. 905; Lamont *v.* Assessor for Dumfriesshire, 1900, 2 F. 610.

[7] Aberdeen District Lunacy Board *v.* Assessor for Aberdeenshire, 1907, S. C. 737; *cp.* Marr Typefounding Co., Ltd. *v.* Assessor for Edinburgh, 1884, 11 R. 563.

[8] Assessor for County of Argyll *v.* Marquis of Breadalbane, 1889, 16 R. 793; Bell *v.* Assessor for Edinburgh, 1904, 6 F. 501; *cp.* Ramsden *v.* Assessor for Inverness-shire, 1894, 21 R. 797.

[9] Assessor for Argyllshire *v.* Islay Distillery Co., Ltd., 1884, 11 R. 841.

to the judgment to be pronounced, and an appeal shall lie from either of such Divisions to the House of Lords.[1]

(ii.) *Application for a Case.*—An application to a Sheriff to state a case on a question of law determined by him shall be made by minute lodged in the process within seven days after the Sheriff has issued his award, and such minute shall set forth the question (or questions) of law proposed as the subject-matter of the case, and shall be accompanied by a deposit of £1, which shall be paid to the Sheriff-Clerk as his fee for preparing the case.[2] This will be rigidly enforced.[3]

(iii.) *Preparation of Case.*—The Sheriff-Clerk shall, within seven days from the lodging of such minute, accompanied as aforesaid, prepare the case and submit the same in draft to the parties or their agents. Should the parties or their agents fail to agree as to the terms of the case, these shall be settled by the Sheriff.[4]

(iv.) *Refusal to State a Case.*—If the Sheriff on a draft case being submitted to him is of opinion that any question of law stated in it was not raised by the admissions made or the facts proved before him, or that the application for a case is frivolous, he may refuse to state or sign the case, but in that event he shall grant to the applicant a certificate specifying the cause, and bearing the date, of the refusal.[5]

A certificate of refusal to state a case must be written on a separate paper and not on the interlocutor sheet of the arbitration process.[6] (See *Note for Order to State a Case, infra*, p. 1015.)

(v.) *Form of Case.*—The case shall be as nearly as possible in the following terms:—

In the Sheriff Court of at , on appeal to the Division of the Court of Session, in an arbitration under the Workmen's Compensation Act, 1906, between *A. B.* [*name and design him*], *Appellant*, and *C. D. & Co.* [*name and design them*], *Respondents.*

This is an arbitration [*state concisely and without argument the nature of the application, and the facts admitted or proved which raise the question* (*or questions*) *of law to be submitted on appeal*].

The question [*or* questions] of law for the opinion of the Court is [*or* are] [*state it or them*].

This case is stated [*or*, as adjusted by the parties, is stated] by me.

[*Signature of Sheriff.*]

Dated this day of 19 .[7]

[1] 6 Edw. VII. cap. 58, Schedule II. 17 (*b*).
[2] C. A. S., L, xiii. 17 (*a*).
[3] Murphy *v.* Blair and White, 1905, 7 F. 863.
[4] C. A. S., L, xiii. 17 (*b*) and (*c*).
[5] Ibid., 17 (*c*).
[6] Paterson *v.* Wm. Beardmore & Co., Ltd., 1910, S. C. 507.
[7] C. A. S., L, xiii. 17 (*d*); Form II.

The note of the Sheriff, if any, explanatory of the grounds of his award shall be appended to the case.[1]

(vi.) *Intimation and Transmission of Case.*—The appellant shall within seven days, or where such seven days expire during a vacation or recess of the Court of Session, then on or before the first ensuing sederunt day thereof, after the case as settled has been delivered to him, give written notice of his intention to proceed with it, and of the Division to which he proposes to submit it, to the other party or parties interested, and shall at the same time send to each of such parties a copy of the case. He shall also within the said seven days (or as above provided) transmit the case by post to, or cause the same to be lodged with, the Principal Clerk of the Division mentioned in the foresaid notice, together with a certificate under the hand of himself or his law agent of the notice having been given to the other parties.[2]

(vii.) *Printing.*—The regulations as to the printing of appeals from the Sheriff Courts (see *supra*, p. 978 *et seq.*) apply to cases stated under the Act, provided always that it shall not be necessary to print any document, except the case, without a special order from the Court.[3]

(viii.) *Transmission of Process.*—Either party may move for an order on the Sheriff-Clerk to transmit the process.[3] In a couple of cases the motion was granted where the case had been remitted to the Sheriff for further information and his report was unsatisfactory.[4] In another case the motion was granted, upon payment by the appellant of the expense of transmission, in order to save a remit to the Sheriff.[5] The motion was refused where the ground for transmission was that the Court might see a note appended by the Sheriff-Substitute to his interlocutor.[6]

(ix.) *Powers of Court.*—The Court has power when determining a case to make such order arising out of the answer or answers given by them to the question or questions put as they shall think necessary, and also to make such order as to the costs of the case as to them may seem right. They may also, before giving their determination, send back the case to the Sheriff for amendment.[7] The principles

[1] A. S., 6th July 1915. [2] C. A. S., L, xiii. 17 (*e*). [3] Ibid., 17 (*f*).

[4] Dundee Steam Trawling Co. *v.* Robb, 1910, 48 S. L. R. 11; Millar *v.* Refuge Assurance Co., Ltd., 1912, S. C. 37. See also M'Kenna *v.* Niddrie and Benhar Coal Co., 1916, S. C. 1.

[5] M'Ghie *v.* United Collieries, Ltd., 1910, S. C. 927.

[6] Singer Manufacturing Co., Ltd. *v.* Clelland, 1905, 7 F. 654. See, however, A. S., 6th July 1915.

[7] C. A. S., L, xiii. 17 (*g*).

which should guide the Court in so doing have been set forth by the House of Lords.[1]

Cases have been sent back to the Sheriff—to state the facts proved by him on which he founded his judgment;[2] to decide whether death "resulted" from the alleged accident;[3] to allow an amendment of the instance;[4] to allow the appellant to lodge a condescendence of the facts on which he relies;[5] and to reconsider his own findings in the light of opinions expressed by the House of Lords in a case decided after the date of the award.[6]

The Court will not remit to the Sheriff to amend a case so as to include a question which had not been submitted to him for his decision;[7] nor to take further evidence;[8] but in one case where it was remitted to the Sheriff for further information, and the Sheriff took additional evidence, it was held that the Sheriff was entitled to do so under the remit.[9]

An arbitration should not be decided on the relevancy except in very exceptional circumstances, and will therefore likely be sent back for a decision on the facts.[10]

(x.) *Note for Order to State a Case.*—When a Sheriff has refused to state and sign a case, the applicant for the case may within seven days from the date of such refusal apply by a written note to one of the Divisions of the Court of Session for an order upon the other party or parties to show cause why a case should not be stated. Such note may be in the following terms:—

In the Sheriff Court of at on appeal, at the instance of *A. B.* [*name and design him*], *Appellant*, to the Division of the Court of Session, in an arbitration under the Workmen's Compensation Act, 1906, between [*state the parties*].

In this arbitration, which was decided by Sheriff on , the said Sheriff has refused, conform to certificate herewith produced, to state and sign a case for which the appellant duly applied in writing.

[1] Lendrum *v.* Ayr Steam Shipping Co., Ltd., 1914, S. C. (H. L.) 91.

[2] Dundee Steam Trawling Co. *v.* Robb, 1910, 48 S. L. R. 11; Millar *v.* Refuge Assurance Co., Ltd., 1912, S. C. 37; M'Kenna *v.* Niddrie and Benhar Coal Co., Ltd., 1916, 2 S. C. 1.

[3] Dunnigan *v.* Cavan and Lind, 1911, S. C. 579.

[4] O'Donnell *v.* Wilson, 1910, S. C. 799.

[5] M'Laughlin *v.* Wemyss Coal Co., Ltd., 1912, S. C. 250.

[6] Weir *v.* North British Rly. Co., 1912, S. C. 1073.

[7] Rae *v.* Fraser, 1899, 1 F. 1017; M'Donald *v.* Hobbs and Samuel, 1899, 2 F. 3; Hobbs and Samuels *v.* Bradley, 1900, 2 F. 744.

[8] Miller *v.* North British Locomotive Co., Ltd., 1909, S. C. 698.

[9] Park *v.* Coltness Iron Co., Ltd., 1913, S. C. 1163.

[10] Dyer *v.* Wilsons and Clyde Coal Co., Ltd., 1915, 2 S. C. 199.

[*Here state concisely and without argument the nature of the application, and the facts alleged to be admitted or proved which raised the question (or questions) of law proposed to be submitted on appeal.*]

The question [*or* questions] of law proposed to be submitted for the opinion of the Court is [*or* are] [*state it or them*].

The appellant prays for an order on the respondents, the said , to show cause why a case should not be stated by the Sheriff for the following reasons :—[*here state seriatim the reasons*].

[*To be signed by the appellant or his counsel or law agent.*]

Dated this day of 19 .

It must be accompanied by the above-mentioned certificate of refusal, and state shortly the nature of the cause, the facts, and the question or questions of law which the applicant desires to raise, and any Judge of the Division, or in vacation the Lord Ordinary officiating on the Bills, may, after intimation to the other party or parties, dispose of it summarily, and his judgment upon it, as well as upon the question of costs, shall be final. If an order is pronounced requiring the Sheriff to state and sign a case, the case shall be stated as hereinbefore provided, and the foregoing regulations shall apply to the subsequent procedure.[1]

Such a note must specify findings to which the appellant says he is entitled, and unless these findings are such as will found a *primâ facie* argument that the Sheriff's decision in the arbitration is wrong, the order craved will not be made.[2] The note must also disclose that there is a question of law raised by the facts or admissions found proved. What is a question of law has received a wide interpretation. In one case it was laid down that "when the Sheriff finds certain facts proved, and then decides that these facts fall under the statute, a consideration of the law is necessarily involved";[3] and in a later case it was decided that it is a question of law whether the findings of the Sheriff can be supported on the evidence submitted, the question of law being "Whether there was evidence upon which it could competently be found that the death of the workman was the result of an accident arising out of and in the course of his employment."[4] Where, however, it is clear from such note that the Sheriff had evidence before him from which he might competently find either for or against the applicant, the question is one of fact, and the Court will refuse to order either a case to be stated, or to add a question raising such a

[1] C. A. S., L, xiii. 17 (*h*), and Form III.

[2] Walker *v.* Murrays, 1911, S. C. 825, per Lord President Dunedin, p. 828.

[3] Jackson *v.* General Steam Fishing Co., Ltd., 1909, S. C. 63, per Lord Justice-Clerk Macdonald, p. 65.

[4] Euman *v.* Dalziel & Co., 1912, S. C. 966.

point to a case already stated.[1] "The criterion is, if not exactly the same, at least strictly analogous to the criterion we are in use to apply where we are asked to direct a new trial on the ground that the verdict of a jury is contrary to evidence."[2]

It has been held that the following questions are questions of law:—Whether, under sec. 1 (3) of the Act, a question had arisen as to the liability to pay compensation, or as to the amount or duration thereof, so as to give the Sheriff jurisdiction to entertain the petition, and whether the petition was competent in the circumstances;[3] also whether a memorandum, the genuineness of which was disputed, should be recorded,[4] and whether the respondents have been prejudiced from want of notice, and whether the want of notice was caused by mistake or other reasonable cause.[5]

An application for an order to state a case has been allowed to be amended.[6]

(b) *Under the Employers' Liability Act*, 1880.[7]—Where a workman raises an action against his employer in the Sheriff Court concluding for damages under the Employers' Liability Act, 1880, or alternatively at common law or under the Employers' Liability Act, 1880, the action shall, notwithstanding anything contained in that Act, not be removed under that Act or otherwise to the Court of Session, nor shall it be appealed to that Court otherwise than by appeal on a question of law; and for the purposes of such appeal the provisions of the Second Schedule of the Workmen's Compensation Act, 1906, in regard to an appeal from the decision of the Sheriff on any question of law determined by him as arbitrator under the last-mentioned Act shall apply.[8] (See *Under the Workmen's Compensation Act*, 1906, *supra*, p. 1012 *et seq.*)

(c) *Under the National Insurance Act*, 1911.[9]—If any person feels aggrieved by the decision of the Insurance Commissioners on any question as to whether any employment or any class of employment

[1] Nelson *v.* Allan Bros. & Co. (United Kingdom), Ltd., 1913, S. C. 1003. See also Henderson *v.* Corporation of Glasgow, 1900, 2 F. 1127.

[2] Euman *v.* Dalziel & Co., 1912, S. C. 966, per Lord President Dunedin, p. 968.

[3] Caledon Shipbuilding, etc., Co., Ltd. *v.* Kennedy, 1906, 8 F. 597. See also Freeland *v.* Summerlee Iron Co., Ltd., 1912, S. C. 1145.

[4] Coakley *v.* Addie & Sons, Ltd., 1909, S. C. 545; John Brown & Co., Ltd. *v.* Orr, 1910, S. C. 526; *cp.* Binning *v.* Easton & Sons, 1906, 8 F. 407; Lochgelly Iron and Coal Co., Ltd. *v.* Sinclair, 1907, S. C. 3.

[5] Rankine *v.* Alloa Coal Co., Ltd., 1903, 5 F. 1164.

[6] Walker *v.* Murrays, 1911, S. C. 825.

[7] 43 & 44 Vict. cap. 42.

[8] Workmen's Compensation Act, 1906, sec. 14.

[9] 1 & 2 Geo. V. cap. 55.

is or will be employment within the meaning of Part I. of the Act, or as to whether a person is entitled to become a voluntary contributor, he may appeal therefrom to the Sheriff Court, with a further right of appeal upon any question of law to either Division of the Court of Session in terms of subsec. (17) (*b*) of the Second Schedule to the Workmen's Compensation Act, 1906, and the decision of either Division of the Court of Session on such appeal shall be final.[1] (See *Under the Workmen's Compensation Act*, 1906, *supra*, p. 1012 *et seq.*)

(d) *Under the Rivers Pollution Prevention Act*, 1876.[2]—Either party in any proceeding before the Sheriff Court under this Act who feels aggrieved by the decision of the Court on a point of law or on the merits, or in respect of the admission or rejection of any evidence, may appeal to the Court of Session in either Division of the Inner House. The appeal is in the form of a special case to be agreed upon by both parties or their agents, and if they cannot agree, to be settled by the Sheriff upon the application of the parties or their agents. The Court of Session may draw any inferences from the facts stated in the case that a jury might draw from facts stated by witnesses. All enactments relating to appeals from decisions of Sheriffs, and to the conditions of such appeals, shall apply to an appeal in proceedings under the Act in the same manner as if such appeal related to a matter within the ordinary jurisdiction of the Court.[3]

The provision of an appeal by special case excludes the common law right of appeal.[4] Where an appeal by special case is taken against an interlocutory judgment of the Sheriff, leave to appeal must be granted by the Sheriff.[5]

(e) *Under the Friendly Societies Acts*, 1896 *and* 1908.[6]—Where a dispute has arisen between either of the parties mentioned in sec. 68 of the Act of 1896, as amended by sec. 6 of the Act of 1908, and has been referred to the Sheriff Court or to the chief or other Registrar of Friendly Societies for Scotland, or any umpire or arbitrator, for settlement, the Court or chief or other registrar may, at the request of either party, state a case for the opinion of either Division of the Inner House of the Court of Session on any question of law.[7]

[1] 1 & 2 Geo. V. cap. 55, sec. 66 (1) (i.), sec. 80 (16).

[2] 39 & 40 Vict. cap. 75.

[3] Ibid., secs. 11 and 21.

[4] County Council of Lanark *v.* Mags. of Airdrie, 1906, 8 F. 802; [1910] A. C. 286.

[5] Dumfries County Council *v.* Langholm Mags., 1913, S. C. 307.

[6] 59 & 60 Vict. cap. 25; and 8 Edw. VII. cap. 32.

[7] 59 & 60 Vict. cap. 25, sec. 68 (7).

The case must be stated during the progress of the reference, and cannot be stated after the Court or arbitrator has given judgment.[1]

(f) *Under the Industrial and Provident Societies Act*, 1893.[2]—Where a dispute has arisen between a registered society or an officer thereof and any member or person aggrieved who has not for more than six months ceased to be a member of a registered society, or any person claiming through such member or person aggrieved, the dispute may be referred to the chief registrar, or to the assistant registrar, for Scotland for settlement, or to the Sheriff Court, and the Court or chief or other registrar may, at the request of either party to the dispute, state a case for the opinion of either Division of the Inner House of the Court of Session, and may also grant diligence for the recovery of documents.[3] The stated case must be presented during the progress of the reference and not after the Court or arbitrator has given judgment.[1]

(g) *Under the Housing, Town Planning, etc., Act*, 1909.[4]—Where an appeal has been taken to the Sheriff under Part I. of the Act, the Sheriff may, at any stage of the proceedings on appeal, and shall, if so directed by the Court of Session, state in the form of a special case for the opinion of the Court of Session any question of law arising in the course of the appeal.[5]

The case must be stated during the progress of the reference, and not after the decision therein.[6]

Where the Sheriff refuses to state a case a note for an order upon the Sheriff to state a case is competent. Thus, in an appeal to the Sheriff against a closing order, the Sheriff, who had allowed a proof, refused to state a case for the opinion of the Court of Session. The appellant thereupon presented a note to the Court for an order on the Sheriff to state a case, and appended a list of the questions of law which he desired to have stated. The Court sustained the competency of the note; but, of consent of parties, without ordering the Sheriff to state a case, answered the questions of law in the note, and remitted to the Sheriff to give effect to these answers.[7]

[1] Smith *v.* Scottish Legal Life Assurance Society, 1912, S. C. 611. See also Steele *v.* M'Intosh Bros., 1879, 7 R. 192; Johnston's Trs. *v.* Glasgow Corporation, 1912, S. C. 300; Lanark County Council *v.* Mags. of Motherwell, 1912, S. C. 1251.

[2] 56 & 57 Vict. cap. 39.

[3] Ibid., sec. 49.

[4] 9 Edw. VII. cap. 44.

[5] Ibid., secs. 39 (1) (*a*) and 53 (14).

[6] Johnston's Trs. *v.* Glasgow Corporation, 1912, S. C. 300. See also Steele *v.* M'Intosh Bros., 1879, 7 R. 192.

[7] Kirkpatrick *v.* Town Council of Maxwelltown, 1912, S. C. 288.

(h) *Under the Elections (Scotland) (Corrupt and Illegal Practices) Act*, 1890.[1]—This Act deals with elections in Scotland other than Parliamentary elections, and contains provisions for the hearing of an election petition as a special case, and for the reservation of any question of law for the decision of the Court of Session.[2] The application to state a special case under sec. 36 (7) shall be made by minute in the petition proceedings.[3]

(i) *Under the Pilotage Act*, 1913.[4]—Where a pilot is aggrieved by the action of the pilotage authority in suspending or revoking his licence; refusing or failing to renew his licence, or to return his licence to him after having obtained the same from him; or imposing upon him a fine exceeding £2, he may appeal to the Sheriff, with a further right of appeal to the Court of Session on a question of law or a question of mixed law and fact. Special leave to appeal to the Court of Session must be obtained from the Sheriff.[5]

(j) *Under the Burgh Police (Scotland) Acts*, 1892 *and* 1903.[6]—Although the Summary Prosecutions Appeals (Scotland) Act, 1875,[7] has been repealed by the Summary Jurisdiction (Scotland) Act, 1908,[8] which enacts that "where any statute provides for . . . appeal under the Summary Prosecutions Appeals (Scotland) Act, 1875, such . . . appeal shall be taken under" the Summary Jurisdiction (Scotland) Act, 1908, to the High Court of Justiciary, it is still competent in civil causes under statutes which provide for an appeal to be taken to the Court of Session "in terms and subject to the provisions of the Summary Prosecutions Appeals (Scotland) Act, 1875," to take an appeal by stated case to the Court of Session.[9] Such statutes are the Burgh Police (Scotland) Acts, 1892 and 1903.[9]

The procedure is as follows:—The party desiring a stated case must by himself, or his agent, apply in writing, within three days after the determination of the inferior Judge, to the said Judge to state and sign a case stating the facts and grounds of such determination.[10] In calculating the period of days the date of the determination of the inferior Judge is not counted. Sunday is counted unless it is the last of the three days, when it is competent to make the application on the day following.[11]

[1] 53 & 54 Vict. cap. 55. [2] Ibid., sec. 36 (7), (8).
[3] C. A. S., L, x. 7.
[4] 2 & 3 Geo. V. cap. 31. [5] Ibid., sec. 28.
[6] 55 & 56 Vict. cap. 55; and 3 Edw. VII. cap. 33.
[7] 38 & 39 Vict. cap. 62. [8] 8 Edw. VII. cap. 65.
[9] Burgh of Cumnock *v.* Murdoch, 1910, S. C. 571.
[10] 38 & 39 Vict. cap. 62, sec. 3.
[11] Hutton *v.* Garland, 1883, 5 Couper, 274.

The appellant must, within the said three days, lodge with the Clerk of Court a bond with sufficient cautioner, or consign such sum as may be fixed by the inferior Judge.[1] The Court may allow a bond of caution to be lodged after the expiry of the three days in special circumstances.[2] The appellant must also pay the Clerk of Court his fees for preparing the case.[3]

Within five days after caution or consignation and payment has been made or found the Clerk of Court must prepare the case and submit the draft thereof to the parties;[4] and should the latter fail to agree, the inferior Judge shall settle the terms of the case.[5]

A form of case is set forth in Schedule A of the Summary Prosecutions Appeals Act, 1875, and shall bear to be stated and signed by the inferior Judge.[6]

The appellant, within three days after receiving the case, must give notice in writing, together with a copy of the case, to the respondent, and within the same time transmit the case to one of the Clerks of the superior Court, together with a certificate of the above intimation.[7] The Clerk of the superior Court, on receiving the case, must forthwith lay the same before a Judge of the superior Court, who may grant a sist of execution, or make such *interim* order as the justice of the case may require.[8] He must also, as soon as he has received the case, require the Clerk of the inferior Court to transmit the process and notes of evidence, if any.[9]

The question of law is thereafter heard and determined by the superior Court, no note of appeal or written pleadings being required.[10]

The superior Court has power to affirm, reverse, or amend the determination in respect of which the case is stated, or may remit the matter to the inferior Court with the opinion of the superior Court thereon, or may make such other order as it may think fit.[11] It may also send the case back for amendment, and decide the case after the amendment has been made.[11]

[1] 38 & 39 Vict. cap. 62, 3rd section, 1 (1).

[2] Thom *v.* Caledonian Rly. Co., 1886, 14 R. (J. C.) 5. See also M'Gregor *v.* Rose, 1887, 15 R. (J. C.) 10.

[3] 38 & 39 Vict. cap. 62, 3rd section, 1 (2); Robertson *v.* Malcolm, 1891, 19 R. (J. C.) 18.

[4] 38 & 39 Vict. cap. 62, 3rd section, 2.

[5] Ibid., 3rd section, 3.

[6] Ibid., 3rd section, 4.

[7] Ibid., 3rd section, 5; Gairns *v.* Main, 1887, 1 White, 521. See also Charleson *v.* Duffes, 1881, 4 Couper, 470.

[8] 38 & 39 Vict. cap. 62, 3rd section, 6.

[9] Ibid., 3rd section, 7.

[10] Ibid., 3rd section, 8.

[11] Ibid., 3rd section, 9; Macbeath *v.* Fraser, 1886, 14 R. (J. C.) 16.

All orders made by the superior Court are final.[1]

No inferior Judge who states and signs a case shall be liable in costs as the result of the stated case.[2]

Where the inferior Judge refuses to state a case, he must give a certificate of refusal, if asked for, provided that where the application to state a case is made by the Lord Advocate or by a procurator-fiscal, the inferior Judge must grant the application.[3]

Where an inferior Judge refuses to state a case the appellant may, within three days of such refusal, apply by a written note to the superior Court to which the case would, if stated, have to be transmitted for an order on the Judge and on the other party to show cause why a case should not be stated. The note is accompanied by the certificate of refusal and by a statement of the nature of the cause and the facts therein, and of the appellant's reasons in support of his application. Any Judge of the superior Court may order intimation thereof to be made to the inferior Court and the other party, and thereafter dispose of the note in a summary way and order the inferior Judge to state a case, or to do otherwise as he shall think fit, and his judgment is final. No costs may be awarded against the inferior Judge.[4]

The Court will be slow to interfere with the discretion of an inferior Judge who refuses to state a case on the ground that the application to do so is frivolous, if it appears that the facts of the case raise no question of law.[5]

Where there is no certificate of refusal to state a case, the note for an order to state a case is incompetent.[6]

(k) *Under the Local Government (Scotland) Act*, 1908.[7]—Any person who thinks himself aggrieved by any resolution or act of a county council under the powers conferred by secs. 10 and 11 of this Act has the like right of appeal, and subject to the like incidents, as a person who thinks himself aggrieved by the act of a town council has under the Burgh Police (Scotland) Acts, 1892 to 1903.[8] (See *Under the Burgh Police (Scotland) Acts*, 1892 *and* 1903, *supra*, p. 1020.)

[1] 38 & 39 Vict. cap. 62, 3rd section, 10.
[2] Ibid., 3rd section, 11.
[3] Ibid., sec. 4.
[4] Ibid., sec. 5.
[5] Ross *v.* M'Leod, 1891, 19 R. (J. C.) 18.
[6] Walker *v.* Hunter, 1902, 4 Adam, 73.
[7] 8 Edw. VII. cap. 62.
[8] Ibid., sec. 11 (6).

CHAPTER IX

SUSPENSION AS A MODE OF REVIEW

This subject is fully dealt with in the author's work on Bill Chamber Practice, p. 80 *et seq.*

CHAPTER X

REDUCTION AS A MODE OF REVIEW

THIS subject is dealt with under the heading *Reduction—Of Decrees* (*supra*, p. 692 *et seq.*).

PART X

COMMISSION AND DILIGENCE

CHAPTER I

INTRODUCTION

For some time after the institution of the Court of Session the evidence of witnesses in causes depending before that tribunal was led in two ways, viz.:—

(1) Before certain Judges of the Court, who were specially deputed in rotation to take in Edinburgh the evidence of witnesses;[1] and

(2) Before commissioners appointed by the Court to take the depositions of such witnesses as were unable, through age or infirmity, to travel to Edinburgh.[2]

About the end of the eighteenth century, however, the hardship of bringing witnesses to Edinburgh from distant parts of Scotland and the increase of business in the Court of Session combined to make an alteration advisable. Accordingly, in the year 1800 an Act of Sederunt[3] was passed by which it was provided that commissions might be directed to persons duly qualified to act as delegates of the Court to take the evidence of witnesses in *all* causes. This Act of Sederunt was taken advantage of to such an extent that in the year 1815 it is recorded "proof is always taken before a commissioner."[4] The last-mentioned year, however, saw the re-introduction of jury trial to Scotland,[5] and this considerably curtailed the practice of proof on commission. Proof on commission was further curtailed by the Court of Session Act, 1850,[6] but the same Act[7] made it competent for the Court to allow proof on commission in causes enumerated as appropriate for jury trial by the Act 6 Geo. IV. cap. 120, where the action was not an action for libel or for nuisance, or properly and in substance an action of damages. A further curtailment of proof on commission

[1] Act of Sederunt, 27th May 1532 (Ilay Campbell's edition, 1811, p. 4).

[2] Stair, iv. 41. 7.

[3] Act of Sederunt, 11th March 1800—made perpetual by Act of Sederunt, 22nd June 1809.

[4] Ivory's Form of Process, vol. i. p. 229.

[5] Jury Trials (Scotland) Act, 1815 (55 Geo. III. cap. 42)—subsequently amended by Court of Session Act, 1825 (6 Geo. IV. cap. 120), sec. 28.

[6] 13 & 14 Vict. cap. 36, secs. 46, 48.

[7] Ibid., sec. 49.

was made by the Conjugal Rights (Scotland) Amendment Act, 1861,[1] which enacted that proof in consistorial causes should be taken before a Lord Ordinary, with a proviso, however, that the evidence of a witness or haver resident beyond the jurisdiction of the Court, or, by reason of age, infirmity, or sickness, unable to attend the diet of proof, might be taken on commission.

Finally, by sec. 1 of the Evidence (Scotland) Act, 1866,[2] proof on commission was abolished. Sec. 2 of the last-mentioned Act, however, provides as follows:—"Provided always, that it shall be competent to the Judges of either Division of the Court or to the Lord Ordinary to grant commission to any person competent to take and report in writing the depositions of havers; and also upon special cause shown, or with the consent of both parties, to grant commission to take the evidence in any cause in which commission to take evidence may, according to the existing law and practice, be granted; and also to grant such commission to take and report in writing according to the existing practice the evidence of any witness who is resident beyond the jurisdiction of the Court, or who, by reason of age, infirmity, or sickness, is unable to attend the diet of proof; provided that nothing herein contained shall affect the existing practice in regard to granting commission for the examination of aged and infirm witnesses to take their evidence to lie *in retentis* before a proof has been allowed."

Accordingly, the commissions that may still be granted by the Court of Session will be dealt with under the following heads, viz.:—

(1) Commission and Diligence to Examine Witnesses; and

(2) Commission and Diligence to Recover Documents.

It has been thought useful to add a chapter on Commissions from Tribunals Outwith the Jurisdiction to be Executed in Scotland.

[1] 24 & 25 Vict. cap. 86, sec. 13—amended, as regards havers, by 31 & 32 Vict. cap. 100, sec. 100 (2).

[2] 29 & 30 Vict. cap. 112.

CHAPTER II

COMMISSION AND DILIGENCE TO EXAMINE WITNESSES

I. Generally.—By the Evidence (Scotland) Act, 1866,[1] provision is made for the granting of commission by the Court or Lord Ordinary to competent persons to examine witnesses in the following cases, viz.:—*First*, where, according to the practice in existence prior to the date of the passing of said Act, commission to take evidence in any cause could be granted upon special cause shown or with the consent of both parties; *second*, where, according to the same practice, commission could be granted to take the evidence of witnesses beyond the jurisdiction or incapable of attending the proof or trial on account of age, sickness, or infirmity; and *third*, where by the same practice, before a proof was allowed, the evidence of aged and infirm witnesses could be taken on commission to lie *in retentis*. Each of these cases presumably applies to a different set of circumstances, and it would appear that the *first* was intended to refer to the practice existing before the year 1866, of granting commission to take and report in writing the whole evidence in a cause irrespective of the age and infirmity of the witnesses or their absence from the jurisdiction; that the *second* was intended to refer to the practice existing at the same date of examining on commission particular witnesses who, *after* the allowance of proof or the adjustment of issues, were resident beyond the jurisdiction of the Court, or who were unable, through age, infirmity, or sickness, to attend the ordinary diet of proof or trial; and that the *third* was intended to refer to the practice existing at the same date of examining on commission, *prior* to the allowance of proof or the adjustment of issues, aged and infirm witnesses whose depositions were ordered to lie *in retentis*. Accordingly, it may be well to deal with those several commissions by dividing them into (1) commissions granted to take and report upon the *whole* evidence in a cause; and (2) commissions granted to take and report upon the evidence of *particular witnesses* who are, or may be, unable to attend the diet of proof or trial; with a subdivision of the latter into (*a*) applications made *prior* to the

[1] Sec. 2.

allowance of proof or the adjustment of issues; and (*b*) applications made *after* proof has been allowed or issues adjusted.

II. To Take the Whole Evidence in a Cause.—At the date of the passing of the Evidence (Scotland) Act, 1866, it was competent, irrespective of the age of witnesses or their sickness, infirmity, or absence from the jurisdiction, to grant commission to take the whole evidence in any cause, except actions for libel or for nuisance, or properly and in substance actions of damages,[1] consistorial causes,[2] and two other cases now in disuse.[3] The said Act did not take away such power, but it provided that such power should only be granted by the Court or Lord Ordinary upon special cause shown or with consent of both parties. Since that date there has been only one reported case[4] where a proof on commission of the whole cause was asked for in circumstances where prior to the year 1866 it would have been competent for the Court to have granted such a commission. The reasons given for asking the commission in question were that the amount at stake was trifling and that expense would be saved by taking the proof on commission. The application was opposed and the Court refused to grant the commission. In a recent consistorial cause[5] the whole proof was taken on commission, but in that case all the witnesses were either aged or infirm or outwith the jurisdiction.

III. To Take the Evidence of Particular Witnesses who are, or may be, Unable to Attend the Diet of Proof or Trial.—(1) *Application Made Prior to Proof Being Allowed or Issues Adjusted.*—(a) *Generally.*—The Evidence (Scotland) Act, 1866,[6] while it abolishes proof on commission, does not affect the practice at that date existing "in regard to granting commission for the examination of aged and infirm witnesses to take their evidence to lie *in retentis* before a proof has been allowed."[7] Nothing, however, is said in that Act about a practice then existing of granting commission to examine witnesses going abroad to take their evidence to lie *in retentis* before a proof has been allowed,[8] but since that date the Court has on several occasions granted such

[1] 13 & 14 Vict. cap. 36, sec. 49; Nicol *v.* Britten and Owden, 1872, 10 M. 351.

[2] 24 & 25 Vict. cap. 86, sec. 13.

[3] 13 & 14 Vict. cap. 36, secs. 46, 48.

[4] Mackenzie *v.* British Linen Co., 1879, 17 S. L. R. 241.

[5] A. B. *v.* C. B., 1911, 1 S. L. T. 264.

[6] 29 & 30 Vict. cap. 112, sec. 1.

[7] Ibid., sec. 2; Bankton, iv. 30. 27; Stair, iv. 41. 7; Erskine's Inst. iv. 2. 31; Sandilands *v.* Sandilands, 1848, 10 D. 1091.

[8] Act of Sederunt, 9th December 1815, referred to in Ivory's Form of Process, vol. ii. p. 339; Brown *v.* Gilfillan, 1825, 3 S. 475 (N. E. 331); Mags. of Glasgow *v.* Dawson and Mitchell, 1827, 5 S. 915 (N. E. 849); Boettcher *v.* Carron Co., 1861, 23 D. 322.

commissions.[1] In the same way, although nothing is said in that Act about granting commissions where there is *penuria testium,* it is indicated from the opinions in one case decided since the date of said Act that the Court will grant such commission where a *primâ facie* case is disclosed.[2]

(b) *At What Stage Application may be Made.*—Application may be made before an action has been raised;[3] after a summons has been despatched but before service has been made;[4] after execution but before calling;[5] and after calling.[6]

(c) *To Whom Application is Made.*—If the summons has not been raised,[7] or has been executed but not called,[5] or if the cause is depending before the Inner House, the application is made to the Inner House. If the action has been called, the application is made to the Lord Ordinary before whom it is depending.[6] In vacation or recess the application is made to the Lord Ordinary on the Bills, but the party making the application must state, and, if required, show to the satisfaction of the Lord Ordinary on the Bills, that he was unavoidably prevented from making it to the Lord Ordinary in the cause, or to the Court during session.[8]

(d) *Discretion of Lord Ordinary.*—The granting or refusal of a commission and diligence in the Outer House lies in the discretion of the Lord Ordinary, and the exercise of his discretion will not be interfered with except on strong grounds.[9]

In order to reclaim against his judgment, the leave of the Lord Ordinary is required.[10]

(e) *Grounds upon which the Court or Lord Ordinary may Grant Commission and Diligence.*—(i.) *Age of Witness.*—Where the ground of application is that of age alone, the practice has been, and now is,

[1] Hansen *v.* Donaldson, 1873, 1 R. 237; Pringle, Petr., 1905, 7 F. 525; Neill, Petr., 1911, 48 S. L. R. 830; Anderson, Petr., 1912, S. C. 1144.

[2] Maltman's Factor *v.* Cook, 1867, 5 M. 1076.

[3] Johnstone *v.* Keyden, 1824, 3 S. 238 (N. E. 167); Bryden *v.* Scott, 1825, 4 S. 87 (N. E. 90).

[4] Anderson, Petr., 1912, S. C. 1144.

[5] Smiths, Petrs., 21st January 1802, F. C.; Blair *v.* Mags. of Brechin, 1825, 4 S. 98 (N. E. 100); Clouston *v.* Morris, 1848, 20 Jur. 228; Scott, Petr., 1866, 4 M. 1103; Sheard *v.* Haldane, 1867, 5 M. 636; Hansen *v.* Donaldson, 1873, 1 R. 237; Pringle, Petr., 1905, 7 F. 525; Neill, Petr., 1911, 48 S. L. R. 830.

[6] Hunt *v.* Commissioners of Woods and Forests, 1856, 18 D. 317.

[7] Johnstone *v.* Keyden, 1824, 3 S. 238 (N. E. 167); Bryden *v.* Scott, 1825, 4 S. 87 (N. E. 90); Anderson, Petr., 1912, S. C. 1144.

[8] A. S., 11th July, 1828, sec. 117.

[9] Reids *v.* M'Phedran, 1881, 9 R. 80.

[10] Stewart *v.* Kennedy, 1890, 17 R. 755.

that the witness must be seventy years of age or upwards.[1] It is quite sufficient if the certificate of birth is produced to the commissioner.[2]

Where there is no *penuria testium*, or risk of loss of evidence, as where an alleged slander was uttered to a congregation, the Court has refused to grant a commission to examine very old witnesses.[3]

(ii.) *Sickness or Infirmity of Witness.*—It is the practice of the Court and Lord Ordinary to insist upon the production of a medical certificate on soul and conscience.[4]

(iii.) *Intention of Witness to go Abroad.*—This is not one of the grounds mentioned in the last proviso of sec. 2 of the Evidence (Scotland) Act, 1866, but both before and since that date the Court has granted commission on this ground. Thus, sailors or artificers in the Royal Navy;[5] ship's officers and seamen in the mercantile marine;[6] soldiers about to go on foreign service;[7] and persons about to emigrate,[8] have been allowed to be examined.

Where the witness is in the service of the party desiring the commission the practice prior to 1866 has varied. In one case the Court granted the commission,[9] and in another case a commission was refused.[10]

(iv.) *Witness Abroad.*—In the last proviso of sec. 2 of the Evidence (Scotland) Act, 1866, there is no mention of an existing practice of granting commission for the examination of witnesses abroad to take their evidence to lie *in retentis* before proof has been allowed. In certain exceptional circumstances, however, the Court prior to that date seems to have granted such commissions. In an early case the question arose but was not decided, as both parties desired the commission, and the Court gave effect to the desire of parties without deciding the

[1] Forbes *v.* Smyth, 11th March 1820, F. C.; Harvey's Trs. *v.* Leslie, 1827, 5 S. 896 (N. E. 832); Morison *v.* Cowan, 1828, 6 S. 1082; Watsons, Petrs., 1829, 8 S. 261; Hunt *v.* Commissioners of Woods and Forests, 1856, 18 D. 317; Wilson *v.* Young, 1896, 4 S. L. T. 73; A. S., 11th July 1828, sec. 117.

[2] Morison *v.* Cowan, 1828, 6 S. 1082; Watsons, Petrs., 1829, 8 S. 261.

[3] Dudgeon *v.* Forbes, 1832, 10 S. 810.

[4] Nairn *v.* Smith, 1833, 11 S. 465.

[5] A. S., 11th July 1828, sec. 117; Clouston *v.* Morris, 1848, 20 Jur. 228; Pringle, Petr., 1905, 7 F. 525.

[6] Sutter *v.* Aberdeen Arctic Co., 1858, 30 Jur. 300; Scott, Petr., 1866, 4 M. 1103; Hansen *v.* Donaldson, 1873, 1 R. 237; Neill, Petr., 1911, 48 S. L. R. 830.

[7] A. *v.* B., 1831, 4 Deas & Anderson, 252.

[8] Munro *v.* Mackenzie and Fraser, 23rd June 1831, 6 Fac. 506.

[9] Sutter *v.* Aberdeen Arctic Co., 1858, 30 Jur. 300.

[10] Munn *v.* Macgregor, 1854, 16 D. 385.

point.[1] In a later case a pursuer asked for such a commission and offered to pay all expenses, and in respect of this undertaking the commission was granted.[2] Still later a similar application was superseded, as there was a chance that the witness would be in this country for the trial.[3]

A power to grant such commissions seems to have existed in the Court from the earliest times.[4]

(v.) *Penuria Testium.*—Where one or two witnesses alone know the facts of a case, it is competent for the Court or Lord Ordinary *in initio litis* to grant a commission to take down their depositions. Thus, where it was suspected that a deed had been impetrated,[5] where there was a question whether a deed had been read over and explained to the granter,[6] the instrumentary witnesses were allowed to be examined, even though there was no immediate danger of their testimony being lost and their ages were respectively under seventy years.

A commission was refused in a multiplepoinding where a claimant moved for a commission to take the deposition of two witnesses in New Brunswick, and offered to pay the expenses of a solicitor to appear on behalf of a competing claimant, the Court holding that a *primâ facie* case of *penuria testium* had not been made out.[7]

It must be pointed out, however, that *penuria testium* is not one of the grounds mentioned in the last proviso of sec. 2 of the Evidence (Scotland) Act, 1866.

(vi.) *Consent of Parties.*—In an early case where both parties were anxious to examine certain witnesses residing on the Continent before the record was closed, the Lord Ordinary doubted whether it was competent for him to do so, and reported it verbally to the Court. Their Lordships, without deciding the point, granted the motion in respect of the consent of both parties.[1] Although the consent of parties is not one of the grounds given in the last proviso of sec. 2 of the Evidence (Scotland) Act, 1866, it is thought that the consent of both parties would enable the Lord Ordinary or the Court to grant a commission in circumstances which would not otherwise justify them in so doing.

[1] Malcolm *v.* Stewart, 1829, 7 S. 715.
[2] Ross *v.* Forbes, 1856, 18 D. 986.
[3] Hay *v.* Binny, 1859, 22 D. 183.
[4] Boettcher *v.* Carron Co., 1861, 23 D. 322, per Lord Cowan, p. 325.
[5] Earl of Lauderdale *v.* Duchess of Lauderdale, 1696, Mor. 12095. See also Gloag *v.* Wilson, 1840, 12 Jur. 667.
[6] Copland *v.* Bethune, 1827, 5 S. 272 (N. E. 253). See also Earl of Fife *v.* Earl of Fife's Trs., 11th March 1815, F. C.
[7] Maltman's Factor *v.* Cook, 1867, 5 M. 1076.

(f) *The Examination of a Party to a Cause.*—A party in a cause has been granted a commission to have himself examined as a witness before the summons was called in respect of being aged and infirm,[1] and also in respect of being about to sail on a voyage.[2] A pursuer was granted a commission to examine a defender as an aged witness upon the pursuer waiving his right to refer to the defender's oath.[3] (See also next paragraph.)

(g) *Consistorial Causes.*—A commission may be granted to take the pursuer's oath of calumny where the pursuer is abroad[4] and in ill-health,[5] and where he is a sailor and about to start on a voyage.[6] A commission has also been granted to take the pursuer's oath of calumny and his evidence where he was a sailor and about to start on a voyage.[7]

(h) *Effect of Deposition as Evidence at Proof or Trial.*—If the person whose deposition has been taken to lie *in retentis* has died, there is no doubt that his deposition may be used as evidence at the proof or trial.[8] A similar result is reached where the witness having gone abroad is still abroad at the date of the proof, or is disabled by infirmity from attending the proof.[9] It is true that if a witness whose deposition has been taken is alive and in this country at the date of the trial the opposite side can demand a re-examination, but in practice this is not insisted in.[10]

(2) *Application made after Proof Allowed or Issues Adjusted.*—(a) *Generally.*—"When it shall be made out upon oath, to the satisfaction of the Court, that a witness resides beyond the reach of the process of the Court, and is not likely to come within its authority before the day of trial, or cannot attend on account of age or permanent infirmity, or is labouring under severe illness, which renders it doubtful whether his evidence may not be lost, or is a seafaring man, or is obliged to go into foreign parts, or shall be abroad and not likely to return before the day of trial, it shall be competent to examine such witness by commission, on interrogatories to be settled by the parties,

[1] Sheard *v.* Haldane, 1867, 5 M. 636.
[2] Hansen *v.* Donaldson, 1873, 1 R. 237.
[3] Laing *v.* Nixon, 1866, 4 M. 327.
[4] A. B. *v.* C. D., 1838, 16 S. 1143.
[5] Orde *v.* Murray, 1846, 8 D. 535.
[6] Scott, Petr., 1866, 4 M. 1103.
[7] Pringle, Petr., 1905, 7 F. 525; Neill, Petr., 1911, 48 S. L. R. 830. See also Anderson, Petr., 1912, S. C. 1144.
[8] Boettcher *v.* Carron Co., 1861, 23 D. 322, per Lord Cowan, p. 326.
[9] Ibid., and Lord Justice-Clerk Inglis, p. 327; *cp.* Watson *v.* Glass, 1837, 15 S. 753.
[10] Boettcher *v.* Carron Co., 1861, 23 D. 322, per Lord Cowan, pp. 325, 326.

and approved of by one of the Principal Clerks of Session, or Record Clerk; and it being established at the trial, to the satisfaction of the Court, by affidavit, or by oath in open Court, that such witness is dead, or cannot attend, owing to absence, age, or permanent infirmity, it shall be competent to use at the trial the evidence so taken, subject to all legal objections to its admissibility; and in all cases where a commission is granted, upon the application of one party, for examining witnesses as aforesaid, it shall be competent to the other party to have a joint commission, or to propose cross-interrogatories to such witnesses, to be settled as aforesaid; and in addition to the interrogatories so settled, it shall be competent to the commissioner to put such additional questions to the witnesses as may appear to him to be necessary, taking care to mark the question so put as put by him; that when one party obtains a commission to examine witnesses, and does not use the evidence obtained under the commission, the other party may use the evidence given under it at the trial, provided he satisfies the Court at the trial that he could not bring the witness or witnesses whose evidence he proposes to read, in which case he shall be liable for the expenses of the commission. The depositions taken on commission shall not be used if the witnesses so examined shall afterwards be brought forward at the trial."[1]

The above-mentioned section of the Act of Sederunt, 16th February 1841, applies to jury trials, but by decision it has been made applicable to proofs also.[2] Although it has not been included in the Codifying Act of Sederunt, 1913, it is in its main features declaratory of the present law and practice, and this is especially so as regards the considerations which weigh with the Court in dealing with applications for a commission. No oath is now required in practice with regard to the particular circumstances of a witness whose evidence is required except in the case of a witness suffering from sickness or infirmity, and the necessity for interrogatories has been considerably modified. With these exceptions, however, the above-mentioned section is likely to be followed by the Court or Lord Ordinary in dealing with applications for commission and diligence to examine witnesses after proof has been allowed or issues adjusted.

(b) *At what Stage Application may be Made.*—The application may be made whenever proof is allowed or issues are finally adjusted.[1]

It has been held competent to make an application in the course of a trial where the witness took ill after citation.[3] If previous to the

[1] A. S., 16th February 1841, sec. 17.
[2] M'Lean and Hope *v.* Fleming, 1867, 5 M. 579.
[3] Stone *v.* Aberdeen Marine Insurance Co., 1849, 11 D. 1041.

proof or trial it is ascertained that a material witness cannot attend owing to illness or other cause, the trial may be postponed instead of a commission being granted,[1] especially if the cause of absence is only temporary.[2] Where a trial was postponed from time to time owing to the pursuer's ill-health, and when after about a year the pursuer did not seem to be getting better, the Court appointed a commissioner to take his evidence.[3]

Where a defender at the conclusion of a proof moved for a commission to examine a witness, it was granted on condition that all expenses thereby caused were paid by the defender.[4]

(c) *To whom Application is Made.*—During session the application is made to the Court or Lord Ordinary before whom the cause is depending.[5] In vacation the application is heard before the Judge who is to preside at the proof or trial, and in his absence it may be made to the Lord Ordinary on the Bills, it being shown to the satisfaction of either Judge that it could not have been made during session.[6]

(d) *Grounds upon which Commission and Diligence may be Granted.*—Besides the grounds set forth in the Act of Sederunt, 16th February 1841, sec. 17, all the grounds upon which the Court or Lord Ordinary is used to grant commission to take the evidence of witnesses *prior* to the allowance of proof or adjustment of issues may be taken to apply to the case where the application is made *after* proof has been allowed or issues adjusted. (See *supra*, p. 1030 *et seq.*)

Where the ground is the age of the witness, he or she must be seventy years of age or upwards.[7]

In the case of sickness or infirmity of a witness, the practice is for the Court to insist upon a certificate by a medical man on soul and conscience. In one case where the statements contained in the medical certificates were denied, and the Court was moved for an order for access in order to satisfy themselves as to the state of the witnesses' health, the Lord Ordinary granted the commission without making any order for access, but appointed a neutral medical man to examine the witnesses and to report as to their fitness to attend the trial.[8] Where

[1] A. S., 16th February 1841, sec. 25; C. A. S., F, i. 14.
[2] Gordon *v.* Orrok, 1849, 11 D. 1358.
[3] Anderson *v.* Morrison, 1905, 7 F. 561.
[4] Cecil *v.* Marchioness of Huntly, 1905, 13 S. L. T. 189.
[5] Hunt *v.* Commissioners of Woods and Forests, 1856, 18 D. 317; Riddell *v.* Riddell, 1890, 18 R. 1.
[6] A. S., 16th February 1841, sec. 21; C. A. S., F, i. 11.
[7] Wilson *v.* Young, 1896, 4 S. L. T. 73.
[8] Lunn *v.* Watt, 1911, 2 S. L. T. 479.

the sickness or infirmity is only temporary, the Court has postponed the trial and refused to grant a commission.[1]

With regard to witnesses resident furth of Scotland, while commission to take their evidence is specially provided for, it is seldom that a commission is granted where the sole ground of the application is that the witness is resident in England or Ireland. This is owing to the fact that since the year 1854 it has been possible for Judges of the Court of Session to issue warrants of citation in special form commanding persons resident in the United Kingdom to appear as witnesses at proofs or trials in the Court of Session.[2] Thus it has been held to be no reason for granting a commission to examine witnesses in England that they were unwilling to attend the trial—one of them being a doctor who threatened to throw every obstacle in the way of compelling his attendance—another being a stationmaster who pleaded his duties as a reason for non-attendance—and two others who had recently returned from India in bad health, but not incapacitated from travelling or attending the trial.[3] In exceptional cases, however, the Court may grant a commission to examine a witness resident in England who is neither unable to attend at the proof or trial in the Court of Session owing to sickness or infirmity, nor who is seventy years of age or upwards. Thus, where the Court was satisfied that the granting of a warrant of citation commanding the attendance of a London medical man at a trial in the Court of Session would result in loss and inconvenience to himself, and would certainly be disastrous to some of his numerous patients, the warrant was refused and a commission granted to take his evidence.[4]

(e) *The Examination of a Party to a Cause.*—Although it is usually inexpedient to allow parties to be examined for themselves on commission,[5] the Court has made exceptions. Thus, where a pursuer resident within the jurisdiction had been in ill-health for a considerable time and the proof had been postponed several times in order to allow him to appear, a commission was granted to take his evidence.[6] In another case a commission was granted where the pursuer was over seventy years of age.[7] With regard to parties to a cause abroad, a

[1] Gordon *v.* Orrok, 1849, 11 D. 1358.

[2] Attendance of Witnesses Act, 1854 (17 & 18 Vict. cap. 34), sec. 5. See Gray *v.* Sutherland, 1849, 11 D. 1489.

[3] Mackintosh *v.* Fraser, 1859, 21 D. 783.

[4] Henderson *v.* North British Rly. Co., 1870, 8 M. 833.

[5] Sofio *v.* Gillespie and Cathcart, 1867, 3 S. L. R. 285.

[6] Anderson *v.* Morrison, 1905, 7 F. 561.

[7] Campbell *v.* Kennedy, 1853, 16 D. 322.

pursuer in ill-health,[1] a pursuer who would suffer great pecuniary loss if he had to attend the trial,[2] and a pursuer who was a clergyman and could not get leave of absence[3] were each granted commissions. A pursuer, however, who was resident in New York, and who raised an action of reduction on the ground of facility, fraud, and circumvention, was refused a commission to have himself examined, as the Court was of opinion that his presence at the trial was of the utmost importance.[4]

An application by a pursuer to examine an aged defender was granted upon pursuer waiving his right to refer to defender's oath.[5]

(f) *Insane Witnesses.*—The Court has granted a commission to examine a witness confined in a lunatic asylum, the commissioner being directed to satisfy himself that the deponent understood and was fit to answer questions.[6] In a recent case a pauper lunatic was allowed to be examined on commission provided the commissioner was satisfied that the examination would not injuriously affect the witness.[7]

(g) *Effect of Deposition as Evidence at Proof or Trial.*—If it is established to the satisfaction of the Court at the proof or trial that the witness whose deposition has been taken on commission is dead, or cannot attend owing to absence from the country, age, or infirmity, his deposition may be used at the proof or trial.[8] If, however, the witness so examined is brought to the proof or trial, his deposition shall not be used.[9] If the party to obtain a commission does not use the deposition so obtained, the other party may use it provided he satisfies the Court that he could not bring the witness or witnesses whose evidence he proposes to use.[8]

Legal evidence of the inability of a witness to attend the proof or trial is not necessary, and it has been held that if the Judge is satisfied by any evidence that is sufficient.[10] In the case of a foreigner resident permanently abroad it is unnecessary to prove at the proof or trial that he is unable to appear.[11]

[1] Mercer *v.* Anstruther's Trs., 1870, 7 S. L. R. 431.
[2] Samson & Co. *v.* Hough, 1886, 13 R. 1154.
[3] Robertson *v.* Robertson, 1897, 4 S. L. T. 358.
[4] Watt *v.* Watt, 1857, 19 D. 787. See also Western Ranches, Ltd. *v.* Nelson's Trs., 1898, 25 R. 527.
[5] Laing *v.* Nixon, 1866, 4 M. 327.
[6] Riddell *v.* Riddell, 1890, 18 R. 1 ; *cp.* Riley *v.* M'Laren, 1853, 16 D. 323.
[7] Kilpatrick Parish Council *v.* Row Parish Council, 1911, 2 S. L. T. 32.
[8] A. S., 16th February 1841, sec. 17.
[9] Ibid. ; Kitchen *v.* Fisher, 1821, 2 Murray 584, at p. 590.
[10] Willox *v.* Farrell, 1848, 10 D. 807, per Lord Mackenzie, p. 811.
[11] Sutton *v.* Ainslie, 1852, 24 Jur. 428.

All legal objections to the admissibility of depositions being used as evidence may be discussed at the proof or trial.[1]

IV. PROCEDURE.—(1) *The Application.*—Where the application is made before an action has been raised or called, the application is by *petition* to the Inner House.[2] If the action is already depending in the Inner House the application is made by *note*[3] in the Single Bills; in the Outer House it is made by *motion* on the Motion Roll. In either case the enrolment should be intimated to the opposite party forty-eight hours before the motion is made,[4] although in cases of emergency such intimation may be curtailed,[5] or dispensed with altogether.[6] A condescendence stating the facts which the witness is expected to prove is unnecessary in session,[7] although it would seem that this is necessary in vacation or recess.[8]

The names of the witness or witnesses desired to be examined must be given.[9] An application to take the depositions of certain witnesses named, and "of such other witnesses as should be proved before the commissioner to be in bad health or above seventy years old," has been granted;[10] but where the power of determining what witnesses ought to be examined is delegated to the commissioner, it is usual to add a proviso that a list of the witnesses should be delivered to the opposite party several days before their examination.[11]

Where the application is made *prior* to the allowance of proof or adjustment of issues the examination need not be upon interrogatories.[12] Until the year 1907, the examination, where the application was made *after* the allowance of proof or adjustment of issues, was by

[1] A. S., 16th February 1841, sec. 17.

[2] Hansen *v.* Donaldson, 1873, 1 R. 237; Pringle, Petr., 1905, 7 F. 525; Anderson, Petr., 1912, S. C. 1144. For *Form of Petition*, see *infra*, p. 1040.

[3] For *Form of Note*, see *infra*, p. 1041.

[4] A. S., 11th July 1828, sec. 117. This section, while referring to vacation or recess, is declaratory of the practice during session.

[5] Hansen *v.* Donaldson, 1873, 1 R. 237.

[6] Earl of Winton *v.* Kingston, 1710, Mor. 12096; A. *v.* B., 1831, 4 Deas & Anderson, 252.

[7] Watsons, Petrs., 1829, 8 S. 261; Cameron, Petrs., 1830, 8 S. 435 (note).

[8] A. S., 11th July 1828, sec. 117.

[9] Gray *v.* Sutherland, 1849, 11 D. 1023; M'Lean and Hope *v.* Fleming, 1867, 5 M. 579; Western Ranches, Ltd. *v.* Nelson's Trs., 1898, 25 R. 527; Crawford and Law *v.* Allan Steamship Co., Ltd., 1908, 16 S. L. T. 434.

[10] Morison *v.* Cowan, 1828, 6 S. 1082; Watsons, Petrs., 1829, 8 S. 261; Hunt *v.* Commissioners of Woods and Forests, 1856, 18 D. 317.

[11] Oswald *v.* Lawrie, 1824, 3 S. 381 (N. E. 269); Gardner *v.* Mags. of Kilrenny, 1825, 3 S. 613 (N. E. 431); Ramsay *v.* Cochrane, 1825, 3 S. 643 (N. E. 450); Aikman *v.* Aikmans, 1852, 2 Stuart, 108.

[12] Wemyss *v.* Lord Advocate, 1894, 1 S. L. T. 561.

interrogatories,[1] but since that year interrogatories may be dispensed with by the Court or Lord Ordinary in all cases where the commission is to be executed within the United Kingdom, and also where the commission is to be executed abroad, on being satisfied that such a cause is most expedient in the interests of all parties to the cause, and most conducive to the administration of justice.[2] Where the witness is abroad and there are no skilled lawyers to examine and cross-examine, interrogatories may be advantageous.[3]

A joint commission may be asked for by both parties.[4]

In the case of applications for the examination of sick or infirm witnesses, certificates of medical men on soul and conscience should be produced.

The following is a form of a *petition* for a commission before an action is called:—

Unto the Right Honourable the Lords of Council and Session.
The Petition of [*designation*].

Humbly sheweth,—

That the petitioner has raised before your Lordships an action against *C. D.* [*designation*] for payment of the sum of £ [*here narrate briefly the ground of action*], all as set forth in the summons and condescendence, a copy of which is annexed hereto.

The summons was signeted on , and was executed against the defender on the same date, but it cannot be called in Court until .

E. F. [*designation*] and *G. H.* [*designation*] of the steamship "X," presently lying at *Y.*, are material witnesses in the cause, and the petitioner is in danger of losing their evidence, as they are about to leave the kingdom, and, being seamen and foreigners, it is uncertain if they may return to this country.

Further, *J. K.* [*designation*] is a material witness in the cause, and the petitioner is in danger of losing her evidence on account of her age (she being now years of age) and infirmity, as appears from the medical certificate herewith produced, a copy of which is hereto annexed.

May it therefore please your Lordships to grant a warrant for citing the said *E. F.*, *G. H.*, and *J. K.* as witnesses for the pursuer in said action, and to appoint a commissioner to take their evidence in regard to the matters at issue between the parties in the said action, at such time and place as the commissioner may appoint; and to dispense with interrogatories; and to order the

[1] A. S., 16th February 1841, sec. 17; M'Lean and Hope *v.* Fleming, 1867, 5 M. 579.

[2] A. S., 20th March 1907, sec. 9; C. A. S., B, ii. 2; Crawford and Law *v.* Allan Steamship Co., Ltd., 1908, 16 S. L. T. 434.

[3] M'Lean and Hope *v.* Fleming, 1867, 5 M. 579, per Lord Justice-Clerk Patton, p. 582.

[4] A. S., 16th February 1841, sec. 17.

depositions of the said witnesses and productions, if any, to be sealed up by the commissioner, and thereafter to be transmitted to the Clerk of Court to lie *in retentis*, subject to the orders of your Lordships or the Lord Ordinary; and in respect of the urgency of the case, to dispense with the reading of the Minute-Book; or to do further or otherwise in the premises as to your Lordships shall seem proper.

According to justice, etc.

The following is the form of a *note* for a commission where the cause is to be tried at the sittings of the Inner House:—

Unto the Right Honourable the Lord President.

Note for

A. B. [*designation*], Pursuer.

in the action at his instance

against

C. D. [*designation*], Defender.

My Lord President,—

On the said *A. B.* raised an action in the Court of Session against the said *C. D.*, concluding for payment of the sum of £ as damages for personal injuries sustained by him through the fault of the said *C. D.*

On Lord , Ordinary, before whom the cause depended, closed the record in the said action, and on an issue was approved of for the trial of the cause.

Notice has been given by the pursuer that he is to proceed to trial at the next sittings of the Court for jury trials.

E. F. [*designation*] is a material witness for the pursuer in the said cause, and the pursuer cannot safely proceed to trial without his evidence. The said *E. F.* is at present suffering under severe illness, which renders him unfit to attend the trial as a witness, as appears from the certificate by , herewith produced, and the pursuer is therefore in danger of being deprived of the testimony of the said *E. F.*, unless his evidence shall forthwith be taken on commission.

May it therefore please your Lordship to move the Court to appoint a commissioner to take the examination of the said *E. F.* upon oath as a witness for the pursuer in the said cause, and to grant warrant to cite the said *E. F.* to appear before the said commissioner, at such time and place as he may fix, and give evidence in the said matter; or to do further or otherwise in the premises as to your Lordship may seem proper.

According to justice, etc.

(2) *Interlocutors Granting Commission and Diligence.*—(a) *Aged Witness.*—

The Lord Ordinary grants diligence at the pursuer's [*or* defender's] instance for citing *A. B.*, residing at , a material witness for

the pursuer [*or* defender], whose evidence, owing to great age, is in danger of being lost: Grants commission to *C. D.*, Esq., Advocate, to take the oath and examination, and to receive the exhibits and productions of the said witness in regard to the matter at issue between the parties, at such time and place as the said commissioner may appoint, due notice thereof being given to the pursuer [*or* defender] or his known agent; and evidence to the satisfaction of the commissioner, of the witness not being under seventy years of age, being also given before the examination proceeds; dispenses with adjustment of interrogatories and with the lodging of an affidavit [*or* appoints the examination to proceed upon interrogatories adjusted at the sight of the Clerk or Assistant Clerk of Process], and appoints the deposition of the witness, and productions, if any, made by him, to be sealed up by the commissioner, and immediately thereafter transmitted to the Clerk of the Process, there to lie *in retentis* subject to the future orders of the Court or the Lord Ordinary, the said commission and diligence to be reported on or before next [or *quam primum*].

(b) *Witness Suffering from Sickness or Infirmity.*—

The Lord Ordinary, in respect of the medical certificate, No. of process, as to the state of health of *A. B.*, a material witness for the pursuer [*or* defender], grants diligence at the instance of the pursuer [*or* defender] for citing the said *A. B.* as a witness for him: Grants commission to *C. D.*, Esq., Advocate, etc. [*as in the previous interlocutor, omitting reference to proof of age*].

(c) *Witness about to Leave the Country.*—

The Lord Ordinary grants diligence at the instance of the pursuer [*or* defender] for citing *A. B.*, a material witness for the pursuer [*or* defender], whose evidence, owing to his being about to leave the country, is in danger of being lost: Grants commission, etc. [*as in immediately previous interlocutor*].

(d) *Witness Furth of Scotland.*—

The Lord Ordinary grants commission to *A. B.* [*design him*], Chicago, whom failing to *C. D.* [*design him*] there, to take the oath and examination and receive the exhibits and productions of *E. F.* [*design him*], a material witness for the pursuer [*or* defender] in the cause, in regard to the matter at issue between the parties, at such time and place as the said commissioner may appoint, due notice thereof, etc. [*as in the immediately previous interlocutor*].

(3) *Interrogatories.*—The following is the form of interrogatories adopted in practice:—

Interrogatories to be administered to , a witness to be sworn and examined on behalf of *A. B.*, pursuer [*or* defender], in a certain cause now depending before the Lords of Council and Session at his instance against *C. D.*, defender [*or* at the instance of , pursuer against the said], before , commissioner appointed by interlocutor of date the day of in the year 19 .

Imprimis. Do you know the parties, pursuer and defender, in the title of these interrogatories named, or either and which of them? Declare the truth and your knowledge herein.

[*The particular interrogatories to intervene.*]

Lastly. It shall be competent to the commissioner to put any question or questions to the witnesses touching the matter in the cause, besides those points upon which they have been interrogated; and to require the witness to make such additions and explanations as he shall think necessary; and to ask the witnesses—Whether they know of any other matter or thing touching the matters and questions in the cause, besides what he had been interrogated upon? If *yea,* to declare the same fully and at large, as if he had been particularly interrogated thereupon.

(4) *Reclaiming Note.*—A reclaiming note against an interlocutor of a Lord Ordinary granting or refusing commission and diligence is incompetent unless with the leave of the Lord Ordinary.[1] The reclaiming days are ten, dating from the date of the interlocutor granting or refusing the commission and diligence.[2]

A diligence can be executed before the expiry of the reclaiming days if leave has been obtained but no reclaiming note has been lodged.[3]

(5) *Form of Commission.*—It is not now the practice to issue a formal extract commission. A certified copy of the interlocutor granting commission and diligence is the only commission issued.[4]

(6) *Commissioners.*—(a) *Who may be Appointed.*—In the earlier practice, when proof was reported to the whole Court, a commission was (unless otherwise ordered by the Court, upon special cause shown) in the ordinary case directed only to one or other of the members of the Faculty of Advocates of more than five years' standing resident in Edinburgh and attending the Court, or to such of the Sheriff or Stewart-Deputes who were resident in Edinburgh during the time of session, or who undertook to attend upon the Court when the state of the proof was ready to be prepared and while its merits were under discussion.[5] If, however, special cause were shown on an application to the Court, in addition to the above-mentioned class of commissioner the Court was authorised to appoint any Sheriff or Stewart-Depute, or Substitute, or any inferior magistrate, or the clerk or assistant clerk of any Court.[6]

[1] Stewart *v.* Kennedy, 1890, 17 R. 755.

[2] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 11; Court of Session Act, 1868 (31 & 32 Vict. cap. 100), sec. 54.

[3] Collins *v.* North British Banking Co., 1851, 13 D. 541; Court of Session Act, 1868, sec. 54.

[4] 13 & 14 Vict. cap. 36, sec. 25.

[5] A. S., 11th March 1800, par. iii.

[6] Ibid., par. v.

Where proofs were allowed by any of the Lords Ordinary to be reported to himself, especially in matters of smaller moment, or where despatch was necessary, the commissioner appointed might be any one of the above-mentioned classes of persons.[1]

In no case were parties or their agents allowed to name their own commissioners.[1]

Where the evidence of witnesses furth of Scotland was required, the commission was directed to some person duly qualified, with instructions from the Court or Lord Ordinary.[2]

The present practice is to grant a commission to an advocate in attendance at the Parliament House to proceed to the home of the witness, where the latter resides within a reasonable distance of Edinburgh. Where the witness resides in Scotland at a distance from Edinburgh, a commissioner duly qualified to act as a delegate of the Court, and resident in or near the witness' home, such as a Sheriff-Substitute, is sometimes appointed, although in particular cases a member of the Bar resident in Edinburgh is sometimes sent, especially if he has already been commissioner in the case and is conversant with its details. Where the witness resides outwith the jurisdiction of the Court a member of the Scottish Bar is only sent to the home of the witness in cases of great nicety and where a knowledge of Scottish law and procedure is requisite, or by consent of parties. In other cases a local practitioner learned in the law is chosen.

A Judge may be his own commissioner, but the practice is not encouraged.[3]

(b) *Fees of.*—A commissioner whose assistance is sought by the Court as part of his proper judicial functions, such as a Sheriff-Substitute requested to inquire into the facts of a case and to report, is not entitled to a fee.[4] All other commissioners are entitled to a fee.[5]

A commissioner's fee varies. In the ordinary case £5, 5s. *per diem* and expenses is usual, but £6, 6s. *per diem* has been allowed to an experienced commissioner,[6] and even larger fees have been allowed when the day extends over eight hours.[7] £10, 10s. *per diem* was allowed to a British Consul to examine a witness abroad.[8]

[1] A. S., 11th March 1800, par. v.
[2] Ibid., par. vi.
[3] Baroness Gray *v.* Richardson, 1874, 1 R. 1138.
[4] Dyce, Applicant, 1868, 7 M. 31.
[5] A. S., 11th March 1800, par. ix.
[6] Tannett, Walker & Co. *v.* Hannay & Sons, 1874, 1 R. 440.
[7] Menzies *v.* Baird, 1911, reported in Maclaren on Expenses, p. 645.
[8] Owners of "Hilda" *v.* Owners of "Australia," 1885, 12 R. 547.

For the commissioner's fee the agent in the cause is personally liable.[1]

A commissioner may refuse to hand over his report until his own and his clerk's fees have been paid.[2]

(7) *Clerk to the Commission.*—The commissioner has the appointment of the clerk to the commission.[3]

A commissioner's clerk is entitled to fees.[4]

The following fees have been recommended by a former Auditor of Court:—

Each diet of commission in Edinburgh, irrespective of duration,	£0	7	6
Diet of commission out of town, per day,	1	1	0
Besides railway fares, and, if detained over night, reasonable personal expenses.			
Writing report of commission, each sheet,	0	1	6
General inventory of productions, with report—			
Where copied from inventories brought by havers, each sheet,	0	1	6
Where taken from documents handed over *per aversionem*, each sheet and copy,	0	4	6
Excerpts, per sheet,	0	1	6
Excerpts, figures, per sheet,	0	2	0
Excerpts, figures, folio,	0	4	0
Time occupied marking or arranging documents, or comparing documents, per hour,	0	5	0
Letters—			
Formal orders,	0	1	6
Important or special letters,	0	2	6

Edinburgh, 26*th February* 1877.—I am of opinion that the charges stated in the foregoing note are fair and reasonable, and I recommend the allowance of the same in cases before the Court.

EDMUND BAXTER,
Auditor of the Court of Session.[5]

(8) *Other Persons Employed by the Commissioner.*—A commissioner has no power at his own hand to appoint an accountant to assist him,[6] but he may be authorised by the Court to obtain such assistance.[7]

[1] A. B. *v.* C. D., 1843, 6 D. 95; M'Lachlan *v.* Flowerdew, 1851, 13 D. 1345.
[2] A. S., 11th March 1800, par. ix.
[3] Ibid., par. iv.
[4] Ibid., par. ix.; Brodie *v.* Cawdor, 1836, 14 S. 1097.
[5] Maclaren on Expenses, p. 584.
[6] Cassils & Co. *v.* Absalon, 1907, 15 S. L. T. 48.
[7] Wm. Whiteley, Ltd. *v.* Dobson, Molle & Co., Ltd., 1902, 10 S. L. T. 71; Johannesburg Municipal Council *v.* Stewart & Co., Ltd., 1911, 1 S. L. T. 359.

In a division of commonty a commissioner may employ a land surveyor.[1]

A person employed by a commissioner should make a motion in the cause to recover his fees, but in circumstances a separate action has been held to be competent.[2]

(9) *Fixing Diet of Commission.*—When the Court or Lord Ordinary has pronounced an interlocutor granting a commission and diligence, it is the duty of the agent for the party who has moved for the commission to obtain a certified copy of the interlocutor, and to send it, along with a print of the record in the cause, to the commissioner, with a letter requesting the latter to fix a diet for the commission. After consulting the convenience of parties the commissioner fixes the diet. This enables the party who moved for the commission to cite his witness or witnesses.

In a case where the diet of commission was not intimated to one of the parties and the diligence was partially executed, the diet was cancelled and a new diet and notice thereof was ordered.[3]

(10) *Warrant to Cite Witnesses.*—A certified copy of the interlocutor granting commission and diligence is the warrant for the citation of witnesses to the diet fixed by the commissioner.[4]

(11) *Forms of Citation.*—(a) *Personally or at the Dwelling-Place.*—

I, *A. B.*, messenger-at-arms, by virtue of an interlocutor dated the day of nineteen hundred and years, pronounced by Lord , Ordinary, in the action raised by *C. D.* [*design him*], pursuer, against *E. F.* [*design him*], defender, in His Majesty's name and authority, lawfully summon, warn, and charge you, *G. H.* [*design him*], to compear before *J. K.*, Esq., Advocate, commissioner appointed by said interlocutor, and that within [*insert place*], upon the day of at o'clock noon, with continuation of days, to answer at the instance of the said pursuer [*or* defender]; that is to say, to bear leal and soothfast witnessing, and give and declare your oath of verity, in so far as you know or shall be interrogated, respecting the points and articles admitted to probation, with certification as effeirs. This I do upon the day of nineteen hundred and years.

(*Signed*) *A. B.*

(b) *By Post.*—

I, *A. B.*, law agent [*or* messenger-at-arms], by virtue of an interlocutor dated the day of nineteen hundred and years, pronounced by in the action raised at the instance of *C. D.* [*designation*], pursuer, against *E. F.* [*designation*], defender, in His Majesty's

[1] Wilson, etc., Petrs., 10th July 1813, F. C.
[2] M'Lachlan *v.* Flowerdew, 1851, 13 D. 1345.
[3] Craig *v.* Craig, 1905, 13 S. L. T. 556.
[4] 13 & 14 Vict. cap. 36, sec. 25.

name and authority, lawfully summon, warn, and charge you *G. H.* [*designation*] as a witness, to compear before *J. K.*, Esq., Advocate, commissioner appointed by said interlocutor, and that within [*insert place*], upon the day of nineteen hundred and years, at o'clock noon, with continuation of days, to answer at the instance of the said pursuer [*or* defender]; that is to say, to bear leal and soothfast witnessing, and give and declare your oath of verity, in so far as you know, or shall be interrogated, respecting the points and articles admitted to probation, with certification as effeirs. This I do upon the day of nineteen hundred and years, being the date of the posting of this citation. (*Signed*) *A. B.*,
Law agent
or
Messenger-at-Arms.

(12) *Forms of Execution of Citation.*—(a) *Personally or at the Dwelling-Place.*—

Upon the day of nineteen hundred and years, by virtue of an interlocutor dated the day of and year aforesaid, pronounced by , in the action raised at the instance of *A. B.* [*designation*], pursuer, against *C. D.* [*designation*], defender, I, *A. D.*, messenger-at-arms, passed, and in His Majesty's name and authority lawfully summoned, warned, and charged *E. F.* [*designation*] as a witness, to compear before *J. K.*, Esq., Advocate, commissioner appointed by said interlocutor, and that within [*insert place*], upon the day of , at o'clock noon, with continuation of days, to answer at the instance of the said pursuer [*or* defender]; that is to say, to bear leal and soothfast witnessing, and give and declare his oath of verity, in so far as he knew, or shall be interrogated, respecting the points and articles admitted to probation, with certification as effeirs. This I did by delivering a citation to the effect foresaid to the said *E. F.* personally [*or* by leaving a citation to the effect foresaid for the said *E. F.* within his dwelling-place in with his servant, to be given to the said *E. F.* because I could not find him personally]; which citation was signed by me, did bear the date hereof, and contained the date of the said interlocutor. (*Signed*) *A. D.*

(b) *By Post.*—A form of execution is to be found in Schedule First of the Citation Amendment (Scotland) Act, 1882 (45 & 46 Vict. cap. 77), and must be accompanied by the post-office receipt for the registered letter.[1]

(13) *Procedure at the Diet.*—The commissioner having accepted the commission and the parties having met at the diet fixed, the first duty of the commissioner is to administer the oath *de fideli* to the clerk whom he has appointed. Parties usually agree beforehand to have the evidence taken down in shorthand, and the commissioner then administers a similar oath to the shorthand writer whom he arranged

[1] 45 & 46 Vict. cap. 77, sec. 4 (3).

to be present. The clerk usually has the preamble of the report already prepared, setting forth the place and date of the diet, the commissioner's acceptance of the commission, the appointment of clerk, the agreement of parties to employ a shorthand writer and dispense with the signature of the witness to his deposition, and the administration to the clerk and the shorthand writer of the oath *de fideli*. If he has not already prepared the preamble, this is dictated to him by the commissioner. The clerk then makes a note of those present, and the witness is called upon to depone. Before doing so, however, the commissioner administers to the witness the usual judicial oath, or, if the witness objects to take an oath, allows him to make an affirmation. These facts having been noted by the clerk, the examination of the witness proceeds in the usual way, the shorthand writer usually taking down the evidence in the form of a narrative by the witness except when asked by the commissioner to take the examination down *verbatim* in the form of question and answer. After his examination-in-chief the witness may be cross-examined, and thereafter the counsel or agent who conducted the examination-in-chief may ask questions arising out of the cross-examination. Where there has been a shorthand writer this concludes the examination and also the proceedings. (See *Report of Commission, infra*, p. 1052.)

If the evidence has been taken down by the clerk in writing, the deposition of the witness is then read over to him, and the words "All which is truth, as the deponent shall answer to God" are added. The omission of these words, however, does not annul the deposition unless it is also omitted that the witness was sworn.[1] The witness then signs at the foot of each page of his deposition and authenticates any marginal addition by writing his Christian name on one side of such addition and his surname on the other. There should be no interlineations. The commissioner and the clerk also sign their names at the same places and in the same manner, adding to their signatures the words "commissioner" and "clerk" respectively. The signature of the commissioner is essential.[2] With regard to administering the oath *de fideli* to the clerk and his signature to the deposition, see the undernoted cases.[3]

The commissioner must be present at the whole examination.[4]

[1] Galloway *v.* Gilmer, 1830, 2 Deas & Anderson, 218; A. B., 1838, 16 S. 630.

[2] Robb *v.* Campbell, 1824, 3 S. 301 (N. E. 212); Strachan *v.* Tomlins, 1825, 3 S. 560 (N. E. 386); Baxter *v.* Kilgour, 1825, 3 S. 595 (N. E. 408); M'Phun *v.* Reid & Co., 1836, 14 S. 339.

[3] Cuming *v.* Kennedy, 1707, Mor. 4433; Robertson *v.* Mason, 1841, 4 D. 159.

[4] Jaffray *v.* Murray, 1830, 8 S. 667.

When proof by commission was the rule and not the exception, there were certain recommendations made by the Court as to the duties of commissioners, and these may, with advantage, be recalled:—

"It is recommended to them to exercise their own judgment in the matter of conducting the proof, and particularly to allow no matter to be introduced which is not pertinent to the cause, nor any unnecessary pleading or alteration about the competency of questions, or the admissibility of witnesses, and to check the parties, if they attempt to load the proceedings with unnecessary evidence, or superfluous matter of any kind. It is likewise recommended to them to attend to the rules of evidence, and to give their own deliverances, either *viva voce* or in writing, as they see cause, upon any debate which may occur; it being always understood that their whole proceedings shall be subject to the after-consideration of the Court, upon application made by either party; in order to which the commissioner himself, or those acting for the parties, may take such notes, on a separate paper, as they think proper, for the due information of the Court; but nothing shall enter the report but what the commissioner himself may think material."[1]

"In the course of taking the depositions, if it shall appear to the commissioner that any witness is not disposed to tell the truth, or behaves in any unusual manner, it is recommended to him to take a note thereof at the time, by way of assistance to his memory, in case he should be appealed to on that subject by either of the parties when the proof comes to be advised; or, if he thinks proper, he may annex the same to his report of the proof."[2]

Sometimes a commissioner is specially asked to report upon the demeanour and credibility of witnesses.[3]

When the examination is on interrogatories, the commissioner may put such additional questions as may appear to him to be necessary, taking care to note the questions so put as put by him.[4] The commissioner has the same right where there are no interrogatories.

Where a question as to the competency of a question or a line of examination arises, it is the duty of the commissioner to give his decision upon the point. If his decision is not taken exception to at the time his decision is final. If, however, exception is taken to his decision, the commissioner, whatever his decision has been, should nstruct the shorthand writer or clerk to take down the evidence on a

[1] A. S., 11th March 1800, sec. iv.—made perpetual by A. S., 22nd June 1809.
[2] Ibid., sec. vii. See also Lockyer *v.* Sinclair, 1846, 8 D. 582, at p. 627, interlocutor.
[3] Scott *v.* Scott, 1913, 2 S. L. T. 278.
[4] A. S., 16th February 1841, sec. 17.

separate paper and have it sealed up for the decision of the Court or Lord Ordinary. If the Court or Lord Ordinary decides that the evidence so taken shall stand as part of the examination of the witness, it can be put by the shorthand writer or clerk at its proper place in the examination. If the judgment of the Court or Lord Ordinary is against the admissibility of the evidence, the separate paper is destroyed.

If the witness or witnesses cannot all be examined in one day, the examination should be adjourned by a short note on the report. A short preamble setting forth the date and parties present should preface the record of the next day's proceedings.

(14) *Oath.*—(a) *Of Witness.*—The usual judicial oath is now administered to a witness examined on commission. It is in the following terms:—

> I swear by Almighty God, and as I shall answer to God at the great day of judgment, that I will tell the truth, the whole truth, and nothing but the truth.[1]

It is administered by the commissioner, the witness with uncovered right hand uplifted repeating the words clause by clause. A witness may, however, insist upon the oath being administered in such form and with such ceremonies as he may declare to be binding.[2] Thus a Jew is sworn on the Old Testament, with his hat on, and a staff in his hand;[3] a Mahomedan is sworn on the Koran;[4] a Parsee on the Zend-Avesta;[5] and a Chinaman by taking a saucer and breaking it while kneeling.[6]

(b) *Of Clerk or Shorthand Writer.*—The oath which these officials take is the oath *de fideli administratione*[7]—"I do swear that I will faithfully discharge the duties of clerk [*or* shorthand writer] to this commission. So help me God."

(15) *Affirmation.*—Every person upon objecting to be sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, may make a solemn affirmation.[8]

Every such affirmation shall be as follows:—"I, *A. B.*, do solemnly, sincerely, and truly declare and affirm," and then proceed with the

[1] Dickson on Evidence, secs. 1390, 1758.
[2] 1 & 2 Vict. cap. 105, sec. 1.
[3] Horn and Maclaren, 1831, Bell's Notes on Hume, p. 265.
[4] The King *v.* Morgan, 1764, 1 Leach C. C. 54.
[5] Ford on Oaths (8th ed.), p. 47.
[6] Ibid., p. 48.
[7] Dickson on Evidence, secs. 1799, 1805; 29 & 30 Vict. cap. 112, sec. 1.
[8] 51 & 52 Vict. cap. 46 (Oaths Act, 1888), sec. 1.

words of the oath, omitting any words of imprecation or calling to witness.[1] The precise words of the above form must be used.[2]

(16) *Authentication of Deposition.*—Where the deposition of a witness is taken down in writing his evidence is read over to him and then signed by him and the commissioner[3] and the clerk to the commission.[4] Where it is taken down in shorthand by consent of parties, there is usually an agreement to dispense with the signature of the witness, in which case the extended notes do not require to be signed. This agreement should be noted in the report.[5] If a witness cannot write, the circumstance should be noted in the deposition.

(17) *Failure of Witness to Appear at Diet.*—Where a witness refuses or fails to appear at the diet to which he has been cited, the proper procedure is for the party requiring the evidence of the witness to enrol the cause, and on a motion to that effect the Court or Lord Ordinary will grant letters of second diligence, upon which the witness may be apprehended and brought up for examination before the commissioner.[6]

(18) *Form of Interlocutor Granting Second Diligence.*—

Edinburgh, .—The Lord Ordinary, in respect that , a material witness for the pursuer [*or* defender], has failed to appear at the diet fixed by , Esq., the commissioner appointed to take the oath and examination of said witness by interlocutor dated , after being duly cited thereto in terms of the execution of citation, No. of process, grants warrant to messengers-at-arms to apprehend the said and to bring him to the adjourned diet on the day of 19 at o'clock noon.

(19) *Time for Reporting a Commission.*—The interlocutor granting a commission and diligence either fixes a day on or before which the commission is to be reported or directs that the commission shall be reported *quam primum.*

If a day is specially fixed, the time cannot be prorogated, nor the diligence renewed, except on payment of such previous expenses as the Lord Ordinary or the Court shall modify, unless before the lapse of the time so fixed special application is made for such prorogation, which

[1] 51 & 52 Vict. cap. 46 (Oaths Act, 1888), sec. 2.

[2] M'Cubbin *v.* Turnbull, 1850, 12 D. 1123.

[3] Robb *v.* Campbell, 1824, 3 S. 301 (N. E. 212); Strachan *v.* Tomlins, 1825, 3 S. 560 (N. E. 386); Baxter *v.* Kilgour, 1825, 3 S. 595 (N. E. 408); M'Phun *v.* Reid & Co., 1836, 14 S. 339.

[4] Cuming *v.* Kennedy, 1707, Mor. 4433; Robertson *v.* Mason, 1841, 4 D. 159.

[5] Laird *v.* Scott, 1914, 1 S. L. T. 368.

[6] Shand's Practice, pp. 354 and 371; Collins *v.* North British Bank, 1851, 13 D. 541; National Exchange Co. *v.* Drew and Dick, 1858, 20 D. 837, per Lord Deas, p. 840.

is only granted on cause shown. The party that fails to report a commission is held to have abandoned his wish to examine witnesses or recover writings by a commission and diligence, and circumduction is granted for not reporting.[1] It is competent to appoint a commission and diligence to be reported on any box day in vacation or recess.[2] It is not competent of consent of parties to prorogate the time for complying with the order of Court.[3]

If the cause is enrolled for the purpose of obtaining a prorogation during the currency of the order, this is sufficient, although the time has expired before the motion is actually made.[4] In special circumstances a second prorogation may be granted.[5]

(20) *Report of Commission.*—The following is the usual form adopted:—

At , the day of nineteen hundred and years: There was presented to [*name and designation of commissioner*] a certified copy interlocutor, dated the day of nineteen hundred and years, pronounced by [*insert name of Division or Lord Ordinary*] in the action depending before the Lords of Council and Session at the instance of , pursuer, against , defender, by which interlocutor the said , *inter alia*, granted commission to the said [*name of commissioner*] to take the oath and examination of , a material witness for the pursuer [*or* defender] in the said action, and dispensed with the adjustment of interrogatories, of which commission the said [*name of commissioner*] accepted, and appointed to be clerk thereto, to whom he administered the oath *de fideli administratione officii*.

(*Signed*) , Commissioner.
(*Signed*) , Clerk.

Present.

A. B., Esq., Advocate, Edinburgh, instructed by
Messrs. *C. & D.*, Solicitors, Edinburgh, for the pursuer;
and
E. F., Esq., Advocate, Edinburgh, instructed by
Messrs. *G. H.*, Solicitors, Edinburgh, for the defender.

Counsel for the respective parties concerned concurred in craving the commissioner to allow the deposition of the witness to be taken down in shorthand and thereafter extended, and to dispense with the same being read over to and signed by the witness.

(*Signed*) [*Counsel for pursuer.*]
(*Signed*) [*Counsel for defender.*]

The commissioner granted the above motion of the parties, and appointed , a person skilled in shorthand writing, to take down the deposi-

[1] A. S., 11th July 1828, sec. 108; C. A. S., B, ii. 6.
[2] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 27.
[3] Court of Session Act, 1868 (31 & 32 Vict. cap. 100), sec. 26.
[4] Masson *v.* Masson, 1829, 7 S. 771. See also Dingwall *v.* Fisher, 1909, S. C. 745.
[5] Weild *v.* Weild, 1827, 6 S. 247.

tion of the witness in shorthand and thereafter to extend the same; and dispensed with the same being read over to and signed by the said witness; and he administered the oath *de fideli administratione officii* to the said .

, Commissioner.

, Clerk.

Whereupon compeared the said [*name and designation of witness*], who, being solemnly sworn and examined as a witness for the pursuer [*or* defender], depones:—

. . . . . .

[*Where the witness is being examined on commission on account of great age, the commissioner should satisfy himself that the witness is seventy years of age or upwards, and in every case the commissioner should see that the age of the witness is recorded. Where there is no shorthand writer the witness, commissioner, and clerk sign each page of the deposition.*]

. . . . . .

All which is truth, as the deponent shall answer to God.

[*Here follows an enumeration of deletions, marginal additions, etc., if any.*]

[*Signature of Witness.*]

[*Signature of Commissioner.*]

[*Signature of Clerk.*]

[*The above declaration and signatures are only required where there has been no agreement to take the deposition in shorthand and dispense with the signature. If the witness cannot write, this circumstance should be noted.*]

(*Docquet at the End of the Report.*)

What is contained on this and the preceding pages is the report of the commission mentioned on the first page hereof.

Humbly reported by

[*Signature of Commissioner.*]

[*Signature of Clerk.*]

[*Where the witness prefers to affirm, the report runs:*—Compeared [*name and designation of witness*], who, having solemnly, sincerely, and truly declared and affirmed that he would speak the truth, the whole truth, and nothing but the truth, as a witness for the pursuer [*or* defender], depones:—

. . . . . .

Affirmed at this day of .

[*Where the witness or witnesses cannot be examined in one day the examination should be adjourned by a short note, thus:*—The commissioner adjourns the diet till the day of . (Sgd.) *A. B.*, Commissioner; *C. D.*, Clerk. *On reassembling, the clerk should write a preamble in the following terms:*—At the day of , at an adjourned diet of the commission foresaid. Present [*names of parties*] in presence of said commissioner. Compeared, etc., etc.]

(21) *Attendance of Counsel.*—Counsel have always been allowed fees to prepare or revise interrogatories and cross-interrogatories for the examination of witnesses on commission.[1] As interrogatories are

[1] Gibb and M'Donald *v.* Baghott, 1830, 2 Jur. 190; Ellis *v.* Paton, 1860, 22 D. 870.

usually dispensed with, counsel are allowed by the Auditor fees for attending the examination of witnesses on commission in the same way as in open Court.

(22) *Fees of Witnesses.*—A witness compelled to appear by letters of second diligence is not entitled to a fee.[1]

The fees to witnesses who appear when called upon by ordinary citation are the same as in the Court of Session. (See Maclaren on Expenses, pp. 468-480.)

(23) *Expenses of Commission.*—See Maclaren on Expenses, pp. 491-496.

V. Commission to Examine Witnesses Resident in England or Ireland.—As a person resident in England or Ireland may be compelled to attend a proof or trial before the Court of Session,[2] it is seldom that a commission is granted by the Court or Lord Ordinary to take the oath and examination of such a person at his dwelling-place unless on the same grounds as apply to Scotland, viz. great age, sickness, infirmity, etc.[3] It is quite competent, however, to do so.[4]

Where such a commission is granted the person whose evidence is required should be served with a written notice signed by the commissioner and specifying the time and place of attendance, and if the witness refuses or fails to appear and be examined under such commission his refusal or failure to appear is certified by the commissioner, and the party suing out the commission may apply to any of the superior Courts of Law in England or Ireland for a rule or order to compel the attendance of the person so refusing or failing to appear, and that Court may command by rule or order the attendance of such person. If the rule or order is not obtempered, the disobedience will render such witness liable to the pains and penalties of disobedience to a writ of subpœna, provided always that such person is offered his conduct money and expenses, and is not required to attend on more than two consecutive days.[5]

Further provision is made by the Evidence by Commission Act, 1859.[6]

VI. Commission to Examine Witnesses Resident Furth of the United Kingdom but within His Majesty's Dominions.—As the

[1] Mason, 1830, 5 Murray, 129 (note).

[2] Attendance of Witnesses Act, 1854 (17 & 18 Vict. cap. 34).

[3] Mackintosh *v.* Fraser, 1859, 21 D. 783; Henderson *v.* North British Rly. Co., 1870, 8 M. 833.

[4] 17 & 18 Vict. cap. 34, sec. 5.

[5] Evidence by Commission Act, 1843 (6 & 7 Vict. cap. 82), secs. 5, 6, 7.

[6] 22 Vict. cap. 20.

power of the Court of Session to compel the attendance of witnesses at the Parliament House is limited to persons resident within the United Kingdom, commissions to examine persons resident furth of the United Kingdom but within His Majesty's dominions are of frequent occurrence.[1] Where such commissions are granted the witnesses sought to be examined may be compelled to attend the commissioner appointed by the Court of Session on an application being made for that purpose to the superior Courts of the dominions where the commission is to be executed.[2] Instead of appointing a commissioner, however, the Court of Session may grant a commission addressed to any Court, or to any Judge of a Court, in India or the Colonies or elsewhere in His Majesty's Dominions, and such Court, or the chief Judge thereof, or such Judge, may nominate some fit person to take such examination, and the provisions of the Evidence by Commission Act, 1859,[2] will apply.[3]

VII. Commission to Examine Witnesses Resident in a Foreign Country.—The Court of Session has no power to compel the attendance of a foreigner at a proof or trial in the Court of Session, and accordingly commissions are issued to take the foreigner's evidence in his own country.[4] It is, however, a matter entirely in the discretion of the Court. Thus a commission has been granted to examine a man who had gone abroad to avoid his creditors,[5] and to examine a man in Paris who was required to establish the authenticity of certain documents;[6] but a commission was refused where the person to be examined, although in America, occupied a position of unique importance with regard to the question at issue.[7]

In the past, certain difficulties were experienced in procuring the evidence of witnesses resident in foreign countries on commission for that purpose proceeding from the Court of Session, and the Lords of Council and Session, with a view to obviating such difficulties, passed the Act of Sederunt, 15th March 1890,[8] which enacts as follows:—

(1) Where the evidence of any witness resident outwith His Majesty's Dominions is material for the determination of a cause depending before the Court of Session, the party desiring to obtain such evidence may apply to the Division of the Court, or to the Lord Ordinary before whom such cause is depending at the time (or to the Lord Ordinary on the Bills during

[1] Napier *v.* Leith, 1859, 21 D. 1154.
[2] 22 Vict. cap. 20.
[3] Evidence by Commission Act, 1885 (48 & 49 Vict. cap. 74).
[4] A. S., 11th March 1800, sec. vi.; Duguid *v.* Duguid, 1826, 4 S. 613 (N. E. 620); Bond *v.* M'Leod, 1841, 4 D. 35.
[5] M'Culloch *v.* Babington, 1851, 14 D. 172.
[6] H.M. Advocate *v.* Fleming, 1864, 2 M. 1032.
[7] Western Ranches, Ltd. *v.* Nelson's Trs., 1898, 25 R. 527.
[8] C. A. S., B, ii. 3.

vacation), by a minute in the form hereto appended (Schedule A), for a letter of request addressed to the Judge or Judges of the foreign tribunal within whose jurisdiction the witness is residing.

(2) On considering such minute, and hearing the objections thereto, if any, the Division of the Court, or Lord Ordinary foresaid, may grant the same, and authorise a letter of request to be issued, which letter of request shall be in the terms hereto appended (Schedule B), and shall be signed by the President of the Division or the Lord Ordinary granting the same. The said letter of request shall be prepared by the party moving for the same, and shall be lodged with the Clerk to the Process along with the minute mentioned in the preceding section.

(3) It shall be a condition of granting any such letter of request that the agent for the party moving therefor shall, before the letter of request is issued, become personally bound for the whole expenses which may become due and payable in respect thereof to the Court before which the evidence is taken, as well as to the witnesses examined, and make consignation of such sum to meet said expenses as the Division of the Court or Lord Ordinary shall determine.

(4) There shall be lodged by the party obtaining a letter of request a translation into the language of the Court to which the letter is directed of the letter and of the relative interrogatories.

(5) The letter of request, when issued and signed as aforesaid, shall, along with interrogatories adjusted according to the present practice and the relative translations, be forthwith forwarded by the Clerk to the Process to His Majesty's Secretary of State for Foreign Affairs, requesting that the evidence taken under the same shall, when received, be forwarded to him, under seal, to abide the orders of Court.

SCHEDULE A.

Minute for *A. B.*, pursuer [*or* defender], in the action presently depending before [*state the Division of the Court or the Lord Ordinary*], at the instance of
against
for the pursuer [*or* defender], stated that the following persons, viz. [*state names and designations, including place of residence of proposed witnesses*], are material witnesses for the pursuer [*or* defender] in support of the claim [*or* defence] in this action, and he prayed the Court to issue a letter of request addressed to [*state the Judge or tribunal within whose jurisdiction the witnesses are resident*] to take the evidence of said witnesses.

[*Signed by Counsel.*]

SCHEDULE B.

Whereas an action is now pending in the Supreme Court of Scotland, in which *A. B.* is pursuer, and *C. D.* is defender: And whereas it has been represented to the said Court that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties, that the following persons should be examined as witnesses on oath, that is to say:—

E. F., of ;
G. H., of ;
and *I. J.*, of .

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court:—

Now I, the Right Honourable , as the President of the Division of said Court [*or* I, the Honourable Lord , one of the Judges of said Court], have the honour to request, and do hereby request, that for the reasons aforesaid, and for the assistance of said Court, you as the President and Judges of the said , or some one or more of you, will be pleased to summon the said witnesses to attend at such time and place as you shall appoint before some one or more of you, or such other person as according to the procedure of your Court is competent to take the examination of witnesses, and that you will cause such witnesses to be examined upon the interrogatories which accompany the letter of request in the presence of the agents of the pursuer and defender, or such of them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing, and all books, letters, papers, and documents produced upon such examination to be duly marked for identification; and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as is in accordance with your procedure, and to return the same through His Majesty's Secretary of State for Foreign Affairs, for transmission to the said Supreme Court of Scotland. [*Signed by the Judge.*]

[*Address to the Foreign Court.*]

Where a commissioner is appointed by the Court of Session to take evidence in a foreign country, he must be considered as holding a Scottish Court, and accordingly he must appoint a sworn interpreter to put the questions and translate the answers where the witnesses do not understand English.[1]

[1] Blasquez *v.* Levy & Sons, 1893, 1 S. L. T. 271.

CHAPTER III

COMMISSION AND DILIGENCE TO RECOVER DOCUMENTS

(1) GENERALLY.— The power to compel the parties to a cause to produce, on the application of the opposite party, documents which may have a bearing on the point or points at issue seems to have been inherent in the Court of Session from its institution. A similar power, evidently founded on the same principle as the right to compel the attendance of witnesses, is inherent in the Court of Session as regards third parties. A reference to both of these powers is made in the Act 1672, cap. 40 (record edition), cap. 15 (12mo edition), sec. 25, and it is now the established practice of the Court to grant commission and diligence, on the application of a party to a cause, to compel the opposite party, or third parties, to produce documents which may enable the party making the application either to establish his averments on record, or, in special circumstances, to make up his record.[1]

(2) DIFFERENCE BETWEEN APPLICATION AGAINST THE OPPOSITE PARTY AND APPLICATION AGAINST THIRD PARTIES.—Where the documents wanted are in the possession of the adverse party they may be recovered (*a*) by commission and diligence; or (*b*) the Court may order the adverse party to produce them. The former method is more usual. Formerly, when the adverse party did not produce the documents in his possession without diligence, or assigning a term, he was fined.[2] The present practice, where commission and diligence is not used, is to order the adverse party to produce the documents within a specified time and if he delays to do so to decide the case against him, and he will only be reponed on a reclaiming note upon production of the documents and paying the expenses occasioned by his failure to obtemper the order of Court.[3]

Where the documents are in the possession of third parties the only method of recovery is by commission and diligence.

[1] Shand's Practice, p. 368 *et seq.*; Erskine's Inst., iv. 1, 52.

[2] A. S., 20th November 1711, sec. 17.

[3] Napier *v.* Douglas, 1825, 4 S. 325 (N. E. 329); Dinsdale *v.* Ware, 1829, 8 S. 62.

(3) To whom Application should be Made.—There must be an action in dependence before commission and diligence is granted for the recovery of documents.[1] Accordingly the Court or Lord Ordinary before whom the action is in dependence is the Court or Lord Ordinary to which application is made.

Where a cause is in dependence but is not in dependence before any particular Court or Lord Ordinary there is no case authoritatively deciding before whom the application shall be made. In one case[2] where the summons had been executed but not called, Lord Moncreiff, then an Outer House Judge, entertained and granted an application for commission and diligence for the recovery of a document. The application was not opposed, and there is no indication from the report that the attention of Lord Moncreiff was directed to the question of jurisdiction. It is thought that, following the analogy of applications in similar circumstances for commission and diligence for the examination of witnesses (*q.v.*), the application should have been made to the Inner House in one of its Divisions.

(4) At what Stage Application may be Made.—Application may be made either (*a*) before, or (*b*) after, the record is closed.

(a) *Before the Record is Closed.*—An application may be made at any time after the summons has been executed.[3]

It is entirely in the discretion of the Lord Ordinary whether or not commission and diligence will be granted during the preparation of the record, and his decision will not be lightly interfered with.[4] As a general rule, commission and diligence will only be granted to a pursuer or a defender on cause shown.[5] Thus, before calling a summons a diligence was granted to a pursuer in order to recover an unstamped agreement on which the action was founded and which had been left in the defender's hands, so that it might be stamped and obviate a penalty;[2] and where pursuers would have been entitled to delivery of documents by an action of exhibition and delivery, they were held entitled to a diligence to recover the same in order to adjust the record.[5] A pursuer was also allowed during the preparation of the record a diligence for the recovery of accounts kept by the defender as to which the averments of parties differed;[6] and where an action was raised by a lady for a count and reckoning against persons who had intromitted

[1] Mackay's Practice, vol. i. p. 468.
[2] Braby & Co., Ltd. *v.* Story, 1896, 3 S. L. T. 325.
[3] Ibid. See also Greig *v.* Crosbie, 1855, 18 D. 193, per Lord Deas, p. 196.
[4] M'Ilquham & Co. *v.* Caledonian Rly. Co., 1850, 13 D. 403.
[5] Moreton *v.* Lockhart, 1849, 22 Jur. 81.
[6] Maconochie *v.* Paul, 1841, 3 D. 1261.

with her estate during her minority, a diligence was granted to recover all accounts and documents from the opposite party in order to enable her to shape her averments;[1] where a railway company was sued by an engineer for a balance due upon his accounts for engineering work done for the company, the latter was held entitled, before closing the record, to a diligence for the recovery of the pursuer's books upon which his accounts were founded;[2] where the tenants of a railway company were being interdicted from proceeding to arbitration in respect of compulsory removal they were allowed, before closing the record, a diligence to recover from the complainers their alleged lease and correspondence thereanent;[3] where an action was raised by the owners of a ship for payment of the sum contained in a policy of insurance, on the allegation that the ship was a wreck, the defenders were held entitled, before closing the record, to recover from the pursuers all reports and surveys relative to the present condition of the vessel;[4] where in an action of count and reckoning a pursuer averred that the defender was conducting a business for pursuer, and defender averred that he had purchased the business from the pursuer but produced no agreement, the pursuer was held entitled to recover the whole business books both before and after the alleged sale;[5] where a judicial factor was pursuer and averred that he was a stranger to the history of a bill which he found in the repositories of a company and which was the subject of the action;[6] where a defender in a breach of promise case was desirous of seeing the letters he had written to the pursuer;[7] and where the pursuer averred fraud.[8]

Where, however, no good cause is shown for granting a diligence before closing the record, a diligence will be refused.[9] Thus, where in an action against a bank and a bank agent, as such and as an individual, a diligence was sought by the pursuer in order to determine in which capacity the bank agent had acted, the motion was refused;[10] where in a declarator by a landlord that a lease was ended, as the defender, as heir-at-law, had failed to take it up, a diligence was refused to the

[1] Donaldson *v.* Bannatyne, 1828, 7 S. 130.
[2] Miller *v.* Edinburgh and Glasgow Rly. Co., 1849, 11 D. 1012.
[3] Caledonian Rly. Co. *v.* Crockett & Co., 1902, 10 S. L. T. 89.
[4] Marshall & Sons *v.* Spiers and Others, 1882, 19 S. L. R. 696.
[5] Currer *v.* Dickson, 1857, 19 D. 991.
[6] Fullarton *v.* Dumbarton Mags., 1833, 11 S. 361.
[7] Henderson *v.* Lumsden, 1838, 16 S. 398.
[8] Davidson *v.* Lyall, 1824, 3 S. 8 (N. E. 6).
[9] National Exchange Co. of Glasgow *v.* Glasgow, Kilmarnock, etc., Rly. Co., 1849, 12 D. 249; Dalgleish's Trs. *v.* Matheson's Trs., 1902, 10 S. L. T. 56.
[10] Greig *v.* Crosbie, 1855, 18 D. 193.

pursuer, before the closing of the record, relating to an agreement between the defender and a manager resident on the farm, and to the stocking and ownership of the farm;[1] and where the diligence is a fishing diligence.[2]

(b) *After the Record is Closed.*—Where the record is closed and the case has been sent to the Procedure Roll, it is not customary to grant an application for a commission and diligence before the preliminary pleas have been repelled.[3] Where, however, the competency of an action had been upheld and the decision was appealed to the House of Lords, it was held that the Court was not thereby precluded from granting a diligence for the recovery of documents to prepare the case for trial, in case the competency of the action was sustained.[4] Where the record has been closed and issues ordered, a diligence may be granted before the adjustment of issues where it is necessary to recover a document or documents so as to have the exact words thereof in the issue or schedule appended thereto, and this notwithstanding that there are preliminary pleas which require to be discussed at the adjustment of issues.[5]

A diligence will not be granted to recover documents to support a preliminary plea which, if upheld, will exclude the action.[6]

Where documents are intended for a proof or jury trial the application should be made timeously.[7] It may, however, be made during a proof,[8] and has been granted in the Inner House pending an appeal to the House of Lords.[4]

(5) What Documents May, and May Not, be Recovered.—(a) *Generally.*—In considering the application there is no rule that the documents called for in the specification should clearly be admissible in evidence. It is no part of the duty of the Court or Lord Ordinary to determine this beforehand.[9] While this is so, such

[1] Forbes *v.* Ure, 1854, 16 D. 640.

[2] Mackintosh *v.* Macqueen, 1828, 6 S. 784; Lumsdaine *v.* Balfour, 1828, 7 S. 7; Greig *v.* Crosbie, 1855, 18 D. 193.

[3] Greig *v.* Crosbie, 1855, 18 D. 193, per Lord President M'Neill, p. 195 (top); Paterson *v.* Baxter, 1856, 19 D. 37.

[4] Forbes *v.* Campbell, 1857, 20 D. 287.

[5] Graeme-Hunter *v.* Glasgow Iron and Steel Co., Ltd., 1908, 16 S. L. T. 15. See also Rose *v.* M'Leod, 1824, 3 S. 79 (N. E. 53); Stephen *v.* Paterson, 1865, 3 M. 571; *cp.* Ellis *v.* National Free Labour Association, 1905, 7 F. 629.

[6] Caledonian and Dumbartonshire Rly. Co. *v.* Lockhart, 1852, 14 D. 492.

[7] Murphy *v.* Clyde Navigation Trs., 1902, 4 F. 653; C. A. S., B, ii. 1; F, i. 10.

[8] Baroness Gray *v.* Richardson, 1874, 1 R. 1138.

[9] Livingstone *v.* Dinwoodie, 1860, 22 D. 1333, per Lord Justice-Clerk Inglis, p. 1334.

documents as are called for as are shown cannot be evidence will be refused.[1]

If the Lord Ordinary has remitted averments to probation, he cannot refuse to grant a diligence upon a specification having reference to these averments on the ground that the averments are irrelevant;[2] nor can he grant a diligence where the specification has reference to evidence which has been excluded by the terms of the interlocutor granting proof.[3]

Where a party founds on a part of a correspondence, the opposite party is entitled to a diligence to recover the remainder.[4]

Private books of a partner in a partnership action will not be allowed to be recovered where they are meant to prove the writ of the company;[5] nor will letters written but not sent;[6] defences prepared but not lodged;[7] documents prepared with reference to a special action;[8] nor memorials laid before counsel for opinion.[9]

A diligence will not be allowed to a party in order to make an amendment of his record.[10]

Private plans cannot be recovered, although judicial plans may.[11]

A diligence will not be granted to recover documents to support a preliminary plea which, if upheld, will exclude the action.[12]

Where a diligence for the recovery of business books is granted the Court is careful to confine the diligence strictly to what is necessary, and to protect from disclosure entries relating to private matters or trade secrets.[13] The necessary entries are accordingly excerpted at the sight of the commissioner.[14]

[1] Mackirdy *v.* Glasgow and Transvaal Options, Ltd., 1903, 40 S. L. R. 313, per Lord Kinnear, p. 314.

[2] Duke of Hamilton's Trs. *v.* Woodside Coal Co., 1897, 24 R. 294; Brown *v.* Evered, 1904, 12 S. L. T. 121.

[3] Scott, Simpson, and Wallis *v.* Forrest and Turnbull, 1897, 24 R. 877.

[4] Clavering *v.* M'Cunn, 1881, 19 S. L. R. 139. See also Stevenson *v.* Kyle, 1849, 11 D. 1086.

[5] Catto, Thomson & Co. *v.* Thomson & Son, 1867, 6 M. 54.

[6] Livingston *v.* Murray, 1831, 9 S. 757.

[7] Gavin *v.* Montgomerie, 1830, 9 S. 213.

[8] Addie *v.* Western Bank, 1864, 2 M. 809.

[9] Thomson's Trs. *v.* Clark, 1823, 2 S. 262 (N. E. 233); Clark *v.* Spence, 1824, 3 Murray 450, at p. 455.

[10] Thomson *v.* Gordon, 1869, 7 M. 687.

[11] Ferrier *v.* Young, 1827, 5 S. 332 (N. E. 308).

[12] Caledonian and Dumbartonshire Rly. Co. *v.* Lockhart, 1852, 14 D. 492.

[13] Addie *v.* Western Bank, 1864, 2 M. 809; North British Rly. Co. *v.* Garroway, 1893, 20 R. 397.

[14] Dickson on Evidence, sec. 1395; Paul *v.* Cadell, 1799, 4 Paton's App. 89 Graham *v.* Sprot, 1847, 9 D. 545.

Letters in the possession of parties who have no interest whatever in the case, and have nothing to do with it except that they may probably be called as witnesses, will not be allowed to be recovered where the letters cannot be used as evidence, but only for the purpose of cross-examination of the person who has written them, or to hand to him in order to stimulate his memory or curb his imagination.[1]

(b) *Fishing Diligence.* — Such a diligence will not be granted.[2] Where, however, the action was against custom house authorities for wrongful detention of a ship on an unfounded charge of smuggling, whereby a lucrative trade had been hampered, a diligence was granted to the defenders to throw light upon the whole history of the ship and the profits which she had earned;[3] and where fraud was averred a wide commission and diligence was granted.[4]

In a case involving the right to a dignity, as distinguished from the right to landed estates, a wide diligence was granted to recover all documents relating to the history of a family.[5] (See *Fraud, infra,* p. 1071.)

(c) *Writings Passing Between Master and Servant.* — Letters and reports from a person in trust to his employers immediately after an occurrence or accident, and referring to details which may easily escape the memory at a later date, may be recovered.[6] It is, however, a matter of circumstances.[7] The letter or report must not be written

[1] Livingstone *v.* Dinwoodie, 1860, 22 D. 1333; The Admiralty *v.* Aberdeen Steam Trawling and Fishing Co., Ltd., 1909, S. C. 335, per Lord Kinnear. See also M'Loskey *v.* Glasgow Marine Insurance Co., 1843, 5 D. 1013.

[2] Erskine's Inst. iv. 1. 52; Scott *v.* Napier, 1735, Mor. 358, 3965; 1749, 1 Pat. App. 441; Fisher *v.* Bontine, 1827, 6 S. 330; Pattinson *v.* Robertson, 1844, 6 D. 944; Morton *v.* Scott, 1844, 6 D. 1105; Greig *v.* Crosbie, 1855, 18 D. 193; Richardson *v.* Fleming, 1867, 5 M. 586; Silver *v.* Great North of Scotland Rly. Co., 1894, 21 R. 416; County Council of Fife *v.* Thoms, 1898, 25 R. 1097; Ogston & Tennant, Ltd. *v.* Daily Record, Glasgow, Ltd., 1909, S. C. 1000.

[3] Van Engers, Roeclofs & Co. *v.* Ellis Hughes, 1898, 6 S. L. T. 90.

[4] Tulloch *v.* Davidson's Exrs., 1858, 20 D. 1319; Dobbie *v.* Johnston, 1860, 22 D. 1113.

[5] Earl of Lauderdale *v.* Scrymgeour Wedderburn, 1904, 7 F. 1045.

[6] Tannett, Walker & Co. *v.* Hannay & Sons, 1873, 11 M. 931; M'Laren *v.* Caledonian Rly. Co., 1893, 1 S. L. T. 42; Macbride *v.* Caledonian Rly. Co., 1894, 2 S. L. T. 61; The "Talisman" *v.* The "Tyne," 1896, 4 S. L. T. 63; Morrison & Mason, Ltd. *v.* Clarkson Bros., 1896, 4 S. L. T. 157; Burnyeat *v.* The City Line, Ltd., 1897, 4 S. L. T. 284; Scott *v.* Portsoy Harbour Co., 1900, 8 S. L. T. 38; Sutherland *v.* John Ritchie & Co., 1900, 8 S. L. T. 100; Mackinnon *v.* National Steamship Co., 1904, 12 S. L. T. 411; The Admiralty *v.* Aberdeen Steam Trawling and Fishing Co., Ltd., 1909, S. C. 335; Irvine *v.* Glasgow and South-Western Rly. Co., 1913, 2 S. L. T. 452; Finlay *v.* Corporation of Glasgow, 1915, S. C. 615; Macphee *v.* Corporation of Glasgow, 1915, S. C. 990; Whitehill *v.* Corporation of Glasgow, 1915, S. C. 1015.

[7] Scott *v.* Portsoy Harbour Co., 1900, 8 S. L. T. 38; Northern Garage, Ltd. *v.* North British Motor Manufacturing Co., Ltd., 1908, 16 S. L. T. 573.

after the summons is served, or indeed after it is apparent that there is going to be a litigious contention between the parties.[1] It may, however, be recovered notwithstanding that it contains the names of bystanders when the occurrence or accident happened.[2] Of course, nothing in the way of precognition contained in such a report can be recovered.[3]

Letters by employers in reply to such letters or reports cannot be recovered.[4]

(d) *Writings Passing Between Agent and Client.*—Letters or communications passing between parties and their counsel or agents,[5] or between parties on the same side,[6] with reference to an action commenced or anticipated cannot in the general case be recovered.[7]

Agents may, however, be bound to answer interrogatories which may competently be put to their clients regarding writings that have come to the agents' knowledge in the course of their employment;[8] or where fraud is relevantly averred against their clients;[9] or where the client has been sequestrated;[10] or where there are communications between agent and client regarding transactions entered into by the former for the latter during legal proceedings in order to show the former's authority and the terms of the transactions.[11]

(e) *Injury to Business or Credit.*—A diligence to recover the business books of a pursuer who avers injury to business or credit will be granted,[12] but it must only be used on the question of damages.[13]

[1] The Admiralty *v.* Aberdeen Steam, etc., Fishing Co., Ltd., 1909, S. C. 335; Whitehill *v.* Corporation of Glasgow, 1915, S. C. 1015. See also County Council of Fife *v.* Thoms, 1898, 25 R. 1097.

[2] Macphee *v.* Corporation of Glasgow, 1915, S. C. 990; Whitehill, *supra.*

[3] Whitehill *v.* Corporation of Glasgow, *supra.*

[4] Mackinnon *v.* National Steamship Co., 1904, 12 S. L. T. 411; Devlin *v.* Spinelli, 1906, 14 S. L. T. 9.

[5] Stein *v.* Marshall, 1804, Mor. 12443; Thomson's Trs. *v.* Clark, 1823, 2 S. 262 (N. E. 233); Munro *v.* Fraser, 1858, 21 D. 103, per Lord President M'Neill, p. 107.

[6] Rose *v.* Medical Invalid Insurance Society, 1847, 10 D. 156; Tannett, Walker & Co. *v.* Hannay & Sons, 1873, 11 M. 931; Pearson *v.* Anderson Bros., 1897, 5 S. L. T. 177.

[7] Lady Bath's Exrs. *v.* Johnston, 12th November 1811, F. C.; Lumsdaine *v.* Balfour, 1828, 7 S. 7.

[8] Scott *v.* Napier, 1749, 1 Pat. App. 441; Campbell *v.* Campbell, 1823, 2 S. 139 (N. E. 128); Fisher *v.* Bontine, 1827, 6 S. 330.

[9] Inglis *v.* Gardner, 1843, 5 D. 1029; Millar *v.* Small, 1856, 19 D. 142.

[10] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. cap. 20), secs. 86 and 87; A. B. *v.* Binny, 1858, 20 D. 1058; Tod's Tr. *v.* Officer, 1872, 10 M. 980.

[11] Jaffray *v.* Simpson, 1835, 13 S. 1122; Kid *v.* Bunyan, 1842, 5 D. 193; Anderson *v.* Lord Elgin's Trs., 1859, 21 D. 654.

[12] Rhind *v.* Kemp & Co., 1894, 1 S. L. T. 434; Gray *v.* Wyllie, 1904, 6 F. 448.

[13] Aitchison & Sons, Ltd. *v.* M'Ewan, 1903, 5 F. 303.

Where the loss to business has resulted from personal injuries, the Court has granted diligence for the recovery of business books for a period of three years prior to the date of the action.[1] It has been refused for four years.[2]

In an action of damages for slander against a newspaper, a diligence to show the circulation of the paper, so that the measure of injury may be ascertained, will be granted.[3]

(f) *Income Tax Receipts.*—Diligence for the recovery of income tax receipts is granted in actions of damages in which the income of the party is a relevant subject of inquiry.[4] Where the diligence wanted extends over too long a period it will be refused.[5] (See *Inland Revenue, infra,* p. 1067.)

(g) *Medical Reports.*—The fact that a medical report has been given on the promise of being treated as confidential is no reason why a diligence should not be given for its recovery, although, if it is going to be used for a purpose antagonistic to the patient, it might be.[6] Accordingly, in an inquiry regarding the probable duration of the life of a first substitute heir of entail with the view of ascertaining the value of the expectancy of the second and third heirs prior to the disentail of the estate, diligence was granted to recover certain medical reports in the hands of insurance companies with whom the life of the heir in question was insured;[6] and in an action for reduction of a disposition by a person deceased, which involved a question as to the effect on his health of a railway accident happening prior to the date of the disposition, the Court held that the pursuer was entitled to recover from the railway company, on whose line the accident happened, medical reports supplied to the company at the time of the accident for the instruction of their own agents in connection with a claim made by the deceased.[7] Again, where an action for the reduction of a testamentary deed was raised on the ground of facility, a diligence by the defenders to recover medical reports obtained during the lifetime of

[1] Johnston *v.* Caledonian Rly. Co., 1892, 20 R. 222, per Lord President Robertson, p. 223; Bain *v.* Caledonian Rly. Co., 1902, 10 S. L. T. 56.

[2] Craig *v.* North British Rly. Co., 1888, 15 R. 808.

[3] Macdonald *v.* Hedderwick & Sons, 1901, 3 F. 674.

[4] Johnston *v.* Caledonian Rly. Co., 1892, 20 R. 222; Stroyan *v.* M'Whirter, 1901, 9 S. L. T. 242; Macdonald *v.* Hedderwick & Sons, 1901, 3 F. 674; Irvine *v.* Glasgow and South-Western Rly. Co., 1913, 2 S. L. T. 452; *cp.* Christie *v.* Craik, 1900, 2 F. 1287; Gray *v.* Wyllie, 1904, 6 F. 448; Keir *v.* Outram & Co., Ltd., 1913, 51 S. L. R. 8.

[5] Craig *v.* North British Rly. Co., 1888, 15 R. 808; Christie *v.* Craik, 1900, 37 S. L. R. 503.

[6] M'Donald *v.* M'Donalds, 1881, 8 R. 357.

[7] Kinloch *v.* Irvine, 1884, 21 S. L. R. 685.

the deceased by the pursuers was granted;[1] and in similar circumstances a diligence was granted for the recovery of books, diaries, etc., of certain doctors who had attended the deceased.[2]

Where an action was raised for payment of the contents of a policy of insurance, the insurance company resisted payment of the full sum in respect that the pursuers had failed to prove the age of the deceased, and a diligence was granted to recover the medical reports furnished to the company by their medical officer at the date of insurance.[3] Where, however, an insurance company, which resisted a claim under an accident insurance policy on the ground that the deceased died from natural causes, sought for a diligence to recover from another insurance company, by whom deceased's proposal was rejected, the medical reports upon the health of the deceased and the referee's reports, the diligence was disallowed.[4] In a subsequent case, where the insured sought reduction of a policy of insurance on the ground of misrepresentation, a diligence to recover communications between the defenders and their head office was granted in respect of the averments of misrepresentation, but the medical reports made by the defenders' medical officer regarding his examination of the pursuer was refused.[5]

(h) *Models.*—These may not be recovered by diligence.[6]

(i) *Registered Deeds.*—The originals of registered deeds cannot be recovered by diligence so as to be produced in process. It is sufficient production if extracts are lodged. If it is necessary to show the deeds to witnesses in course of precognition, the witnesses may be taken to the Register House. If required at the trial, an official from the Register House will attend and show them.[7]

A diligence to recover foreign registers and deeds in the custody of foreign Courts will not be granted. The proper course is to cite the custodiers as witnesses.[8]

(j) *Title Deeds.*—A party or his agent is not bound to produce in an action between third parties, or even to exhibit to the commissioner, his title deeds;[9] nor can a party get a general diligence to ransack his opponent's charter chest[10]—a special case must be stated, or a point

[1] Henderson *v.* Hedrich, 1892, 20 R. 95.
[2] Fraser *v.* Fraser's Trs., 1897, 4 S. L. T. 228.
[3] Elder *v.* English and Scottish Law Life Assurance Co., 1881, 19 S. L. R. 195.
[4] Hope's Trs. *v.* Scottish Accident Insurance Co., 1895, 3 S. L. T. 164.
[5] Macdonald *v.* New York Life Insurance Co., 1903, 11 S. L. T. 120.
[6] H.M. Advocate *v.* Fleming, 1864, 2 M. 1032, at p. 1063.
[7] Maclean *v.* Maclean's Trs., 1861, 23 D. 1262.
[8] Maitland *v.* Maitland, 1885, 12 R. 899.
[9] Fisher *v.* Bontine, 1827, 6 S. 330; Riggs *v.* Drummond, 1861, 23 D. 1251.
[10] Scott *v.* Napier, 1737, Mor. 358; 1749, 1 Pat. App. 441; Pattinson *v.* Robertson,

made, and special documents referred to.[1] In the latter case, where the titles are hypothecated for a business account, the adversary of the owner of the titles can compel their production, although their owner cannot.[2]

(k) *Diary.*—The diary of a living person is generally irrecoverable,[3] except in cases of a person charged with fraud,[4] or in the case of a doctor in respect of the health of one of his patients.[5] (See *Log-Book, infra.*)

The diary of a dead person has been rejected as evidence against an accused person.[6]

(l) *Log-Book of a Ship.*—The log of a ship may be recovered in order to contradict the master and mate, and to afford evidence against the ship or against the writers of the log or those directing the entries made therein.[7]

(m) *Public Interest.*—(i.) *Generally.*—The Court will not order the production of official papers, reports, etc., in the possession of a public department where the head of the department affirms that the production would be against the public interest, even in a case between a department and a member of the public.[8] If the objection is not taken by the head of the department, it cannot be taken by the opposite party.[9]

(ii.) *Inland Revenue.*—Instructions by the Inland Revenue to its officials,[10] and letters to the Inland Revenue by a party to a cause,[11] and by an informer,[12] are not recoverable; nor are income tax returns when objected to by the Inland Revenue.[13]

1844, 6 D. 944; Greig *v.* Crosbie, 1855, 18 D. 193; Earl of Lauderdale *v.* Scrymgeour Wedderburn, 1904, 7 F. 1045, per Lord President Kinross and Lord M'Laren; Dickson on Evidence, secs. 1371-3.

[1] Richardson *v.* Fleming, 1867, 5 M. 586, per Lord Justice-Clerk Patton, p. 589.

[2] Murray *v.* Scott, 1829, 8 S. 161; Montgomerie *v.* A. B., 1845, 7 D. 553.

[3] Hogg *v.* Campbell, 1864, 2 M. 1158; M'Neill *v.* Campbell, 1880, 7 R. 574; *cp.* Devlin *v.* Spinelli, 1906, 14 S. L. T. 9.

[4] Strachan *v.* Barlas, 1894, 2 S. L. T. 59.

[5] Fraser *v.* Fraser's Trs., 1897, 4 S. L. T. 228.

[6] Madeline Smith, 1857, 2 Irv. 641, 647, 662.

[7] The "Singapore," 1866, L. R. 1 P. C. 378; The "Earl of Dumfries," 1885, 10 P. D. 31; The "Solway," 1885, 10 P. D. 137, per Sir James Hannen, p. 138; The "Talisman" *v.* The "Tyne," 1896, 4 S. L. T. 63; Burnyeat *v.* The City Line, Ltd., 1896, 4 S. L. T. 284; Von Engers, Roeclofs & Co. *v.* Ellis Hughes, 1898, 6 S. L. T. 90.

[8] Admiralty *v.* Aberdeen Steam Trawling, etc., Co., Ltd., 1909, S. C. 335; Forrest *v.* Macgregor, 1913, 1 S. L. T. 372.

[9] Henderson *v.* Robertson, 1853, 15 D. 292; Mills *v.* Kelvin & James White, Ltd., 1912, S. C. 995.

[10] Tierney *v.* Ballingall & Son, 1896, 23 R. 512.

[11] Brown's Trs. *v.* Inland Revenue, 1897, 35 S. L. R. 340.

[12] Brown *v.* Hay, 1897, 5 S. L. T. 149.

[13] Dunlop *v.* Scottish North-Eastern Rly. Co., 1866, 1 S. L. R. 102; Shaw *v.* Kay, 1904, 12 S. L. T. 359, 429, 495.

(iii.) *Navy.*—The report by an officer in charge of one of His Majesty's ships to his senior officer, or to the commander-in-chief, after a collision, cannot be recovered.[1]

(iv.) *Board of Lunacy.*—Reports, letters, or other communications between the doctor, superintendent, or other official of a lunatic asylum and the officials of the General Board of Lunacy, Edinburgh, are not recoverable.[2]

(v.) *Government Inspector of Schools.*—A motion for diligence to obtain an excerpt from the report of a Government Inspector of Schools to the Government was refused.[3]

(vi.) *Post Office.*—Diligence to recover telegrams, postal orders, etc., from the post office has been refused on the ground of inconvenience. The argument as to confidentiality was rejected.[4] Excerpts from the Post Office Savings Bank books relating to the account of a deceased depositor have been ordered.[5]

(vii.) *Police.*—Reports by a police inspector to the procurator-fiscal,[6] or to their superiors by policemen,[7] cannot be recovered; nor can Crown precognitions,[8] nor the charge books and other books kept by the procurator-fiscal, nor records and notes kept by him.[9]

Communications passing between a defender, in an action for giving false information to the police, and the procurator-fiscal relative to such information, will be recoverable, if the Lord Advocate does not object,[9] or if the defender pleads that he gave the information at the instigation of his employers and there is a question whether the information was given *in bonâ fide.*[10] In this last case it was left open to plead confidentiality at the diet of examination. A report by a procurator-fiscal to the local authority was allowed to be recovered where the action was by a constable for damages for illegal dismissal.[11]

A report by a police constable paid by Dock Commissioners to

[1] Admiralty *v.* Aberdeen Steam Trawling, etc., Co., Ltd., 1909, S. C. 335.

[2] Purves *v.* Gilchrist, 1905, 13 S. L. T. 460; *cp.* Leigh *v.* Gladstone, 1909, 26 T. L. R. 139.

[3] Sturrock *v.* Greig, 1849, 12 D. 166.

[4] Somervell *v.* Somervell, 1900, 8 S. L. T. 112.

[5] Forrest *v.* Macgregor, 1913, 1 S. L. T. 372.

[6] Hastings *v.* Chalmers, 1890, 18 R. 244.

[7] Campbell *v.* Gibson Maitland, 1893, 1 S. L. T. 127; Muir *v.* Edinburgh and District Tramways Co., Ltd., 1909, 46 S. C. 244.

[8] Arthur *v.* Lindsay, 1895, 22 R. 417; Sheridan *v.* Peel, 1907, S. C. 577. See also Donald *v.* Hart, 1844, 6 D. 1255.

[9] Sheridan *v.* Peel, 1907, S. C. 577.

[10] Forbes *v.* Gracie, 1901, 9 S. L. T. 217. See also Henderson *v.* Robertson, 1853, 15 D. 292.

[11] Halcrow *v.* Shearer, 1892, 20 R. 216.

patrol the docks was allowed to be recovered,[1] as were also all communications passing between a private detective and his employers.[2]

(n) *Insurance.*—Communications between an insurance company and its agent with regard to the insurable interest of an insurer cannot be recovered.[3] See also *supra*, p. 1066.

(o) *Rate Collector.*—It has been held that a collector of cess was bound to exhibit his public records to allow excerpts to be taken therefrom, and, when made, to certify their authenticity.[4]

(p) *Breach of Promise and Seduction.*—In a case of breach of promise the Court, in respect that the question of income was not of importance, refused a diligence at the instance of a pursuer for the recovery of business books, bank books, account books, and deposit-receipts of the defender in order to show his income, and Lord Young remarked that he was of opinion that the pursuer of an action of damages for breach of promise was not entitled to a diligence in order to disclose the defender's financial position.[5] This opinion has not been followed, however, and in subsequent cases a diligence for the recovery of the defender's books has been granted to ascertain his income.[6]

In actions of seduction a diligence to ascertain the income of the defender will not be granted.[7] Where the defender averred that the pursuer after the alleged seduction entered into an engagement to marry another man, a diligence to recover letters, etc., to prove this was granted.[8]

(q) *Declarator of Marriage.*—In an action by a woman against a man for declarator of marriage, a diligence was *granted* to recover (1) letters between the parties; and (2) letters between either of the parties and their respective brothers and sisters; but was *refused* for the recovery of letters between the brothers and sisters *inter se*.[8]

(r) *Newspaper.*—Where a pursuer raises an action of damages against a newspaper for slander contained in an anonymous letter and the newspaper undertakes responsibility, a diligence to recover the original letter will not be granted.[9] Where, however, the pursuer avers

[1] Ritchie *v.* Leith Dock Commissioners, 1902, 10 S. L. T. 395.

[2] Macfarlane *v.* Macfarlane, 1896, 4 S. L. T. 28; Thomson *v.* Thomson, 1907, 14 S. L. T. 643.

[3] Simcock *v.* Scottish Imperial Insurance Co., 1901, 9 S. L. T. 234.

[4] Mackintosh *v.* Grant, 1829, 8 S. 184.

[5] Somerville *v.* Thomson, 1896, 23 R. 576.

[6] Brodie *v.* M'Gregor, 1900, 8 S. L. T. 200; Stroyan *v.* M'Whirter, 1901, 9 S. L. T. 242; Robertson *v.* Hamilton, 1915, 2 S. L. T. 195.

[7] A. *v.* B., 1875, 12 S. L. R. 621.

[8] Walker *v.* Walker, 1896, 4 S. L. T. 151.

[9] Lowe *v.* Taylor, 1843, 5 D. 1261; Brims *v.* Reid, 1885, 12 R. 1016; Morrison

that anonymous letters are not genuine letters, but are the result of a deliberate plot to injure him by putting in fictitious letters, a diligence will be granted.[1] Where a pursuer avers malice in the report of a meeting he may recover the materials from which the report was printed, the communications between the defenders and their correspondents, and letters by members of the public.[2] (See also *Injury to Business or Credit, supra,* p. 1064.)

(s) *Trade Society.*—Letters passing between a society for the protection of trade and one of its members regarding a third party are not confidential and may be recovered.[3]

(t) *Fatal Accidents Inquiry.*—The notes of evidence given at a fatal accidents inquiry may be recovered by an order of the Court, but not by a diligence.[4]

(u) *Bankrupt's Examination.*—The report of a bankrupt's statutory examination may be recovered in order to contradict the evidence of the bankrupt in a subsequent litigation.[5]

(v) *Arbitration Proceedings.*—In a suspension and interdict involving the question whether freestone is a mineral, the respondent averred that in arbitration proceedings between the parties more than sixty years previously freestone was treated and regarded by the complainers as a mineral, and the respondent was granted a diligence to recover (1) letters passing between the complainers' law agents and (*a*) arbiters, (*b*) engineers, (*c*) contractors, and (*d*) officials acting on behalf of, or employed by, the complainers in said arbitration proceedings, and tending to show whether the complainers regarded the freestone as a mineral or otherwise; and (2) entries in the business books of the complainers' law agents referring to the same proceedings. The Court, however, expressly reserved all questions of confidentiality.[6]

(w) *Railway Rates.*—Where a railway company increased its rates against traders and was challenged by them to show that the increase was reasonable, a diligence for the recovery of the business books of the traders, in order that their profits and items of their expenditure might be ascertained, was refused.[7]

v. Smith & Co., 1897, 24 R. 471. See Ogston & Tennant, Ltd. *v.* Daily Record, Glasgow, 1909, S. C. 1000.

[1] Cunningham *v.* Duncan and Jamieson, 1889, 16 R. 383; Falconer *v.* Docharty, 1893, 1 S. L. T. 96.

[2] Reid *v.* Johnston & Co., 1912, S. C. 187.

[3] Mathieson *v.* Scottish Trade Protection Society, 1897, 5 S. L. T. 213.

[4] Brown *v.* Glenboig Union Fireclay Co., Ltd., 1911, 1 S. L. T. 27.

[5] Emslie *v.* Alexander, 1862, 1 M. 209; Low *v.* Low's Trs., 1907, 15 S. L. T. 330, per Lord Kinnear, p. 332.

[6] Caledonian Rly. Co. *v.* Symington, 1913, S. C. 885.

[7] John Watson, Ltd. *v.* Caledonian Rly. Co., 1901, 3 F. 791.

In a question between a trader and a railway company which involved a comparison of the rates charged by the latter with the rates charged by other carriers, a diligence for the recovery of the rival traders' books was granted.[1] The terms of such a diligence are given in the report.

(x) *Fraud.*—Where fraud is relevantly averred, a diligence for the recovery of documents will be allowed on a wide and comprehensive scale.[2]

It has been held that a defender who, in answer to an action of damages for slander, made an averment that he had been induced by the fraudulent misrepresentation of the pursuer to take shares in a mining company and obtained a counter issue thereon, was not entitled to a diligence to recover the business books, letter books, and balance-sheets of the company since its formation, in order to prove his averments.[3]

(y) *Dominus Litis.*—In actions to recover expenses in another process on the ground of *dominus litis*, communications passing between parties and agents and counsel on the same side of the cause concerned have been allowed to be recovered.[4]

(6) Procedure to Obtain Commission and Diligence.—Where the action is in dependence in the Outer House and before a particular Lord Ordinary, the party desiring a commission and diligence enrols on the Motion Roll of the Lord Ordinary and gives intimation to the opposite party that he is to move the Court to grant a commission and diligence in terms of the specification which he has lodged in process and a copy of which he encloses to the opposite agent. He also sends a copy of the specification to the Judge's clerk. Such a motion may be made on any sederunt day in session or at the Court held by the Lord Ordinary on the Bills in vacation.[5]

Where the action has not been called, it is thought that the proper procedure is by *petition* to the Inner House, although in one case where the summons had been executed but not called, a motion before the Lord Ordinary before whom the action was to be called was entertained and granted.[6]

[1] North British Rly. Co. *v.* Garroway, 1893, 20 R. 397.

[2] M'Cowan *v.* Wright, 1852, 15 D. 229; Tulloch *v.* Davidson's Exrs., 1858, 20 D. 1319; Dobbie *v.* Johnston, 1860, 22 D. 1113; Assets Co., Ltd. *v.* Shirres' Trs., 1897, 24 R. 418.

[3] Macleod *v.* Marshall, 1891, 28 S. L. R. 865.

[4] Fraser *v.* Malloch, 1895, 3 S. L. T. 211.

[5] Court of Session Act, 1868, sec. 93.

[6] Braby & Co., Ltd. *v.* Story, 1896, 3 S. L. T. 325.

The following is a form of petition in such a case:—

Unto the Right Honourable the Lords of Council and Session.

The Petition of .

Humbly sheweth,—

That the petitioner has raised before your Lordships an action against *C. D.* [*designation*] for payment of the sum of £ [*or as the case may be*] [*here narrate the ground of action*], all as set forth in the summons and condescendence, a copy of which is annexed hereto.

The summons was signeted on , and was executed against the defender on , but it cannot be called in Court until .

The petitioner is desirous of obtaining a commission and diligence for the recovery of documents in terms of the specification of documents lodged herewith in order that [*here narrate the reason which necessitates an application at such a stage of the case. Cause must be shown*].

May it therefore please your Lordships to grant commission and diligence to examine havers for the petitioner in terms of said specification of documents, and in respect of the urgency of the case to dispense with the reading of the Minute-Book; or to do further or otherwise in the premises as to your Lordships shall seem proper.

According to justice, etc.

Where the action is depending in the Inner House, the application is made in the Single Bills by note. Thirty-six hours before the application is made a notice of motion, along with a specification of the documents required, must be lodged with the Clerk of the Process and the Keeper of the Rolls of the Division, and a copy of said motion and specification must at the same time be intimated to the opposite party.[1] For form of note, see *supra*, p. 835, with necessary alterations, as in the preceding petition.

A joint commission may be asked for by the parties.[2]

(7) Specification.—A specification is a document containing an articulate statement of the particular and general documents, or classes of documents, which are sought to be recovered by either party to the case from his opponent or from third parties, with the intention of showing, or tending to show, the accuracy of any, or all, of the averments, or denials, on record. Where the specification is of an extensive and sweeping character, the documents required must be of a *primâ facie* and incontestable relevancy.[3] Except in very special cases,[4] a general call for all documents tending to instruct the averments and

[1] A. S., 16th February 1841, sec. 9; C. A. S., F, iv. 3, 6.
[2] A. S., 16th February 1841, sec. 17.
[3] Pattinson *v.* Robertson, 1844, 6 D. 944.
[4] Foggo *v.* Hill, 1839, 1 D. 1238.

denials of any of the parties will not be allowed.[1] Sometimes a call is made for all books showing or tending to show the accuracy or otherwise of some particular averment. Such a call should be qualified by asking for the books in order that excerpts may be taken therefrom at the sight of the commissioner, unless the condition of the books or entries therein is the subject of the action. Moreover, the period of the call should be limited as "from the beginning of until the date of raising the present action," or otherwise as the case may be.

The following is a form of specification containing articles which have been allowed in various cases:—

Specification of Documents
for the recovery of which a diligence
is sought by the pursuer [*or* defender]
in the action
at the instance of
, *Pursuer*,
against
, *Defender*.

1. All reports, memoranda, or other written communications, made at or about the time of the accident, to the defenders or anyone on their behalf by any inspector, car driver, car conductor, pointsman, or other employee of the defenders present at the time of the accident relative to the matter mentioned on record.

2. All time-tables, Bundy clock records, or other records showing or tending to show the scheduled time of running of the tramway car causing the accident and the actual time of running for , 19 .

3. Rules and regulations for officers and servants of the defenders relating to the driving of tramway cars applicable to the date of the accident referred to on record, viz. , and to the place thereof specified thereon.

4. All letters, telegrams, memoranda, and other written communications passing between (*a*) , or anyone on his behalf, on the one part, and (*b*) or any one on his behalf, on the other part, having reference to (*a*) the design; (*b*) the stability; (*c*) the erection; and (*d*) the superintendence of the erection of said building; and all letter books of said parties in order that excerpts may be taken therefrom at the sight of the commissioner of all such written communications as aforesaid.

5. All plans of said building which were (*a*) submitted to and (*b*) approved of by the Dean of Guild of , and all plans and working drawings from which the said building was erected.

6. All contracts, subcontracts, and specifications relating to the erection of said building.

7. All books of the Infirmary, Glasgow, in order that excerpts

[1] Morton *v.* Scott, 1844, 6 D. 1105.

may be taken therefrom showing or tending to show the nature and extent of the injuries from which the pursuer was suffering when he was admitted to that institution on , and all reports upon, and charts of, his condition while there, and his certificate of discharge.

8. All books of any hospital, nursing home, or other institution into which the pursuer was received subsequent to his said accident, in order that excerpts may be taken therefrom at the sight of the commissioner, showing or tending to show the state of the pursuer's health while in said institutions, or any of them.

9. All accounts incurred for medical or other attendance, or in any way occasioned by said accident, and paid by, or rendered to, the pursuer.

10. All business books, cash books, ledgers, bank books, balance-sheets, statements of profits, and all other books and documents kept by or for the pursuer during the last three years, in order that excerpts may be taken therefrom of all entries showing or tending to show the profits of the pursuer's business during that period.

11. All receipts for income tax paid by the pursuer for the years , , (*three years*).

12. All written estimates for repairs rendered necessary to said motor car in respect of said accident and obtained by the pursuer.

13. All accounts incurred for repairs rendered necessary to said motor car in respect of said accident and paid by, or rendered to, the pursuer.

14. The minute of meeting of the creditors of the said , dated , and all other minutes of meeting of such creditors prior to this action being raised.

15. The sederunt book, minutes of meetings of creditors, minutes of commissioners, circulars to creditors, states of affairs, and all other documents and writings referring to the sequestrated estate of .

16. All cheques, pay-in slips, deposit-receipts, and other documents in the hands of (*a*) the Commercial Bank of Scotland, Limited; (*b*) the National Bank of Scotland, Limited; (*c*) the Royal Bank of Scotland or in the hands of the branches of the said banks, written or signed by or on behalf of the deceased or of the defender , or of both jointly, between and the date of raising the present action.

17. Failing principals, drafts, copies, or duplicates of the above, or any of them.

(8) Interlocutors Granting Commission and Diligence.—

The Lord Ordinary grants diligence against havers at the instance of the pursuer [*or* defender *or* both parties] for the recovery of documents called for in his [*or* her *or* their respective *or* their joint] specification, No. of process [as amended at the bar, *if it has been so amended*]: Grants commission to *A. B.*, Esq., Advocate, to take the oaths and examinations of havers, and to receive their exhibits and productions, to be reported on or before next [*or quam primum*].

Where the diligence is to be executed at more than one place and more than one commissioner is appointed the interlocutor runs:—

. . .; Grants commission to *A. B.*, Esq., Advocate, Edinburgh; *C. D.*,

Esq., Glasgow; *E. F.*, Esq., Aberdeen, to take the oaths and examinations of the havers, and receive their exhibits and productions in Edinburgh, Glasgow, and Aberdeen respectively.

(9) Reclaiming Note from Interlocutor of Lord Ordinary.—This reclaiming note is similar in all respects to a reclaiming note against an interlocutor of a Lord Ordinary in an application for a commission and diligence to examine witnesses. (See *supra*, p. 1043.)

(10) Form of Commission.—See *supra*, p. 1043.

(11) Commissioners.—(a) *Who may be Appointed.*—Commission to recover documents may be granted to advocates, Sheriff or Stewart-Deputes, Sheriff-Substitutes, inferior magistrates, clerks or assistant clerks of Court.[1] Law agents have also been appointed and also Justices of the Peace.[2] Where the commission is to be executed abroad, commission is granted to someone acquainted with Scottish practice and procedure, such as a consul.[3]

(b) *Fees of.*—See *supra*, p. 1044.

(12) Clerk to Commission.—See *supra*, p. 1045.

(13) Other Persons Employed by Commissioner.—See *supra*, p. 1045.

(14) Fixing Diet of Commission.—See *supra*, p. 1046.

(15) Warrant to Cite Havers.—See *supra*, p. 1046.

(16) Persons to be Cited.—It is not the practice to mention in the specification the names of the persons to be cited to produce the several documents called for. Accordingly, a copy of the specification, or of so much thereof as is applicable, is served upon each person who has, or may reasonably be expected to have, in his possession the documents called for, to appear at the diet fixed by the commissioner.

A *minor pubes* may be cited to appear and be examined.[4] A pupil, however, cannot be called as a haver.[5] The tutor and not the pupil is the party who should be examined.[6] The opinion has been expressed that if there be no tutor an application must be made to the Court for the appointment of a curator *ad litem*,[7] but the competency of this procedure has been doubted.[8]

[1] A. S., 11th March 1800, par. iii. and v.; A. S., 22nd June 1809.
[2] Macleod *v.* Crawford, 1856, 18 D. 778.
[3] Owners of "Hilda" *v.* Owners of "Australia," 1885, 12 R. 547.
[4] Earl of Marr *v.* His Vassals, 1628, Mor. 8918; Shand's Practice, p. 374.
[5] Aitken *v.* Hewat, 1628, Mor. 8907.
[6] Fraser on Parent and Child (3rd ed.), p. 218.
[7] Ibid., p. 219.
[8] Shand's Practice, p. 374. See also Macdonald's Tr. *v.* Medhurst, 1915, S. C. 879.

Either a third party[1] or the opposite side[2] may be cited to produce.

(17) Forms of Citation.—(a) *Personally or at Dwelling Place.*—

I, *A. B.*, messenger-at-arms, by virtue of an interlocutor dated the day of nineteen hundred and years, pronounced by Lord , Ordinary, in the action raised at the instance of *C. D.* [*design him*], pursuer, against *E. F.* [*design him*], defender, in His Majesty's name and authority lawfully summon, warn, and charge you, *G. H.* [*design him*], to compear before *J. K.*, Esq., Advocate, commissioner appointed by said interlocutor, and that within [*insert place*] upon the day of at o'clock noon, with continuation of days, to answer at the instance of the said pursuer [*or* defender]; That is to say, to bring with you, exhibit, and produce before the said commissioner, upon oath, all such writings and documents as you may have in your hands, custody, or keeping which you may be required so to exhibit and produce in evidence of any of the matters at issue, and to declare where and in whose hands, custody, or keeping all or any of said writings and documents are or may be [*here either describe the documents to be produced, or refer particularly to the specification sent with the citation*], and that at your highest peril, with certification as effeirs. This I do upon the day of nineteen hundred and years.

(*Signed*) *A. B.*

(b) *By Post.*—

I, *A. B.*, law agent [*or* messenger-at-arms], by virtue of an interlocutor dated the day of nineteen hundred and years, pronounced by Lord , Ordinary, in the action at the instance of *C. D.* [*design him*], pursuer, against *E. F.* [*design him*], defender, in His Majesty's name and authority lawfully summon, warn, and charge you, *G. H.* [*design him*], as a haver, to compear before *J. K.*, Esq., Advocate, commissioner appointed by said interlocutor, and that within [*insert place*] upon the day of nineteen hundred and ten years at o'clock noon, with continuation of days, to answer at the instance of the said pursuer [*or* defender]; That is to say, to bring with you, exhibit, and produce before the said commissioner, upon oath, all such writings and documents as you may have in your hands, custody, or keeping which you may be required so to exhibit and produce in evidence of any of the matters at issue, and to declare where and in whose hands, custody, or keeping all or any of said writings and documents are or may be [*here either describe the documents to be produced, or refer particularly to the specification sent with the citation*], and that at your highest peril, with certification as effeirs. This I do upon the day of nineteen hundred and years, being the date of the posting of this citation.

(*Signed*) , Law Agent *or* Messenger.

[1] Graham *v.* Sprot, 1847, 9 D. 545; Porter *v.* Phœnix Assurance Co., 1867, 5 M. 533.

[2] Robertson *v.* Earl of Dudley, 1875, 2 R. 935

(18) Forms of Execution of Citation.—(a) *Personally or at Dwelling Place.*—

Upon the day of nineteen hundred and years, by virtue of an interlocutor dated the day of and year aforesaid, pronounced by Lord , Ordinary, in the action raised at the instance of *A. B.* [*design him*], pursuer, against *C. D.* [*design him*], defender, I, *A. D.*, messenger-at-arms, passed and in His Majesty's name and authority lawfully summoned, warned, and charged each of *E. F.* [*design him*], *H. G.* [*design him*], and *H. I.* [*design him*] as havers, to compear before *J. K.*, Esq., Advocate, commissioner appointed by said interlocutor, and that within [*insert place*] upon the day of at o'clock noon, with continuation of days, to answer at the instance of the said pursuer [*or* defender]; That is to say, to bear leal and soothfast witnessing, and give and declare their oath of verity, in so far as they knew, or shall be interrogated, respecting the points and articles admitted to probation; As also to bring with them, exhibit, and produce before the said commissioner, upon oath, all such writings and documents that they may have in their hands, custody, and keeping, which they may be required so to exhibit and produce in evidence of any of the matters at issue, and to declare where and in whose hands, custody, or keeping all or any of said writings and documents are or may be, and that at their highest peril, with certification as effeirs. A specification of the writings required to be produced, having a just copy of citation to the effect foresaid subjoined, I delivered to the said *E. F.* personally; the like specification and copy of citation I left for the said *H. G.* within his dwelling place in F. Street, E.; and the like specification and copy of citation I left for the said *H. I.* within his dwelling place in N. Street, E., with their respective servants, to be given to them severally, because I could not find themselves personally; which copies of citation were signed by me, did bear the date hereof, and contained the date of said interlocutor.

(*Signed*) *A. D.*

(b) *By Post.*—A form of execution will be found in the First Schedule of the Citation Amendment (Scotland) Act, 1882 (45 & 46 Vict. cap. 77), and must be accompanied by the post office receipt for the registered letter.[1]

(19) Procedure at the Diet.—(a) *Generally.*—The procedure is generally similar to the procedure at a diet for the examination of witnesses. (See *supra*, p. 1047.) There are one or two points, however, in which the procedure differs, and these are noted below.

(b) *Oath of Clerk and Shorthand Writer.*—See *supra*, p. 1050.

(c) *Oath of Haver.*—See *supra*, p. 1050.

(d) *Affirmation.*—See *supra*, p. 1050.

(e) *Failure of Haver to Appear.*—Should a haver fail to attend the diet, letters of second diligence will be granted against him by the

[1] 45 & 46 Vict. cap. 77, sec. 4 (3).

Lord Ordinary or Court that granted the diligence, and the haver may be arrested and put in prison until he finds security to depone.[1] A peer must attend and depone,[2] and will be imprisoned until he do so.[3] A widow of a peer is in the same position.[4] If there is any reason to presume that a witness will not attend, first and second diligence will be granted at the beginning.[5] A husband may appear and be examined for his wife, and an agent or clerk is frequently allowed to attend and be examined on behalf of a landed proprietor, a partnership, or a company; but if there is reason to suspect concealment the parties themselves should be examined.[6]

(f) *Form of Interlocutor Granting Second Diligence.*—

Edinburgh, .—The Lord Ordinary, in respect that , a haver for the pursuer [*or* defender], has failed to appear at the diet fixed by , Esq., the commissioner appointed to take the oath and examination of said haver and receive his exhibits and productions by interlocutor dated , after being duly cited thereto in terms of the execution of citation, No. of process, grants warrant to messengers-at-arms to apprehend the said and to bring him to an adjourned diet on the day of 19 at o'clock noon.

(g) *Haver Appears and Refuses to Produce.*—Where the haver appears, or offers to appear, but does not produce the document called for, it is not competent to ask for letters of second diligence.[1] The proper motion—if the document is one which the haver is bound to produce—is to ask the Lord Ordinary or Court for an order upon the haver to produce it, and, if he does not obtemper the order, to have him imprisoned for contempt of Court until he obeys the order.[7]

(h) *Questions which may be put to Haver.*—By Act of Sederunt, 22nd February 1688, it is ordained "That in all time comeing, parties shall be obleidged to answer to all speciall pertinent interrogators, in relation to their haveing of the wrytes, or putting the same away, or as to their knowledge and suspicion, by whom the samen were taken away, or where they presently are, that the pursuar may thereby make discovery, and recover the same; Declaring always, that upon advyseing of the defender's oath, they shall not be otherwise decerned

[1] National Exchange Co. *v.* Drew and Dick, 1858, 20 D. 837.

[2] Duke of Montrose *v.* M'Auley, 1711, Mor. 10029; Fraser *v.* Nicholl, 1840, 2 D. 1254.

[3] Fraser *v.* Nicholl, *supra.* See also Young *v.* Earl of Bute, 1716, Mor. 10030.

[4] M'Donald *v.* Widow of a Peer, 1756, Mor. 10031.

[5] Shand's Practice, p. 371, 372.

[6] Mackay's Manual, p. 242.

[7] Shand's Practice, vol. i. p. 373.

against, as havers of the saids wrytes, unless it be found, that they had the same since the citation, or fraudulently put them away at any time."

"The questions which may be asked havers are:—(1) If they have the writs. (2) If they have had them since their citation. (3) If they have fraudulently put them away at any time. (4) If they know, or suspect, where they are. (5) If they know by whom the same were taken away."[1]

It is competent to ask questions to show that a document has been in existence,[2] or has never existed,[3] or was destroyed.[4] If a haver depones that he has destroyed a document, it is competent to ask him—(*a*) When did he destroy the document referred to; (*b*) where did he destroy it; and (*c*) why did he destroy it?[5] but he may not be asked if he destroyed it under instructions, or who prepared the document.[6] He may not be examined on the merits of the cause,[7] nor can he be examined as to the terms of a document alleged to have existed.[8]

A haver cannot refuse to produce documents by deponing that he is not in possession of any which can benefit the party on the question in issue, as this would be usurping the right of the commissioner.[9]

He must produce documents, and answer questions tending to the discovery of writings which may be injurious to his character,[10] or to his private interests or the interests of those whom he represents,[11] but it has been held that he need not answer if the fact put to him infers a criminal charge.[12]

Where a haver has been examined by the party to whom the diligence was granted and has produced documents, it is competent for the opposite side to put questions necessary to secure a full and fair

[1] Shand's Practice, vol. i. p. 372.

[2] Boyd *v.* Anderson, 1821, 1 S. 144 (N. E. 140).

[3] Home *v.* Hardy, 1842, 4 D. 1184.

[4] Boyd *v.* Anderson, 1823, 2 S. 363 (N. E. 323).

[5] Cullen *v.* Thomson and Kerr, 1863, 1 M. 284; Gordon *v.* Davidson, 1865, 3 M. 938.

[6] Cullen *v.* Thomson and Kerr, 1863, 1 M. 284.

[7] Scott *v.* M'Gavin, 1821, 2 Murray 484, at p. 494; Campbell *v.* Davidson, 1827, 4 Murray 171, at p. 178; Dye *v.* Reid, 1831, 9 S. 342; Falconer *v.* Stephen, 1849, 11 D. 1338; Cullen *v.* Thomson and Kerr, 1863, 1 M. 284.

[8] Somervell *v.* Somervell, 1900, 8 S. L. T. 84.

[9] Lady Mary Campbell *v.* Earl of Crawfurd, 1783, Mor. 3973.

[10] Murray *v.* Murray's Trs., 1744, Mor. 16752; Don *v.* Don, 1848, 10 D. 1046; Somervell *v.* Somervell, 1900, 8 S. L. T. 84.

[11] Graham *v.* Sprot, 1847, 9 D. 545.

[12] Murray *v.* Murray's Trs., 1744, Mor. 16752; Livingston *v.* Murrays, 1830, 9 S. 161.

production of documents so as to exhaust the diligence,[1] and to obtain their production.[2]

It was held that where the commissioner refused to give an undertaking that he would not allow the defenders access to the books of a haver outwith the presence of the pursuers, the haver was justified in locking up his books until the point had been decided by the Court.[3] Although the Court will not grant a diligence with regard to documents obviously confidential, it may happen that the confidentiality of documents does not emerge until the diet of examination, especially as the haver is not represented when the specification is adjusted.[4] A haver may accordingly object to answer questions or to produce documents at the diet on the ground of confidentiality, even though there is no qualification inserted that only such documents are to be recovered as are not subject to the objection of agency or confidentiality.[5] In such a case the document is produced to the commissioner alone, and it is necessary that he should apply his mind to the question, for if he does not do so the Lord Ordinary or Court may remit to the commissioner to state on what grounds he declines to deal with the question.[6] If the commissioner decides the question and an appeal is intimated, it is his duty to seal up the document until the appeal is heard.[7]

(i) *Copies.*—Copies should not be allowed to be produced instead of principals until the party has exhausted his power to recover the latter.[8] In one case the Court allowed both a minute-book and a draft minute-book of a kirk-session to be recovered in respect that they contained the deposition of witnesses and that the draft alone was signed by them.[9]

(j) *Authentication of Deposition.*—The evidence of the haver may be taken down either in writing or in shorthand. If the documents produced are not numerous, a description of them is given in the deposition, but if numerous, it is usual to mention their number as *per* inventory produced. The writings and the inventory are marked by the haver, commissioner, and clerk as relative to the deposition. If, how-

[1] Dunlop's Trs. *v.* Lord Belhaven, 1852, 14 D. 825.
[2] Thorburn *v.* Hoby & Co., 1853, 15 D. 767.
[3] Cassils & Co. *v.* Absalon, 1907, 15 S. L. T. 48.
[4] Elder *v.* Black, 1838, 16 S. 1183.
[5] M'Donald *v.* M'Donald, 1844, 6 D. 954.
[6] Stewart, Govan & Co. *v.* Birrell, 1897, 5 S. L. T. 174.
[7] Munro *v.* Fraser, 1858, 21 D. 103, at p. 106; County Council of Fife *v.* Thoms, 1898, 25 R. 1097.
[8] Mann *v.* Smith, 1861, 23 D. 683; Caledonian Rly. Co. *v.* Symington, 1912, S. C. 1033.
[9] Sturrock *v.* Greig, 1849, 12 D. 166.

ever, the documents would be injured by such marking, it may be omitted, on the writings being specified in the deposition so as to render it easy to identify them.[1] The evidence, if taken in writing, is then read over to the haver and signed by him, the commissioner, and his clerk. If the evidence is taken in shorthand the signature of the haver may be dispensed with by consent of parties, which should be noted in the report of the commission.[2] If a haver cannot write, the fact and cause should be noted.[3]

(20) Time for Reporting Commission.—See *supra*, p. 1051.

(21) Report of Commission.—The following is a form of report:—

At the day of nineteen hundred and years: There was presented to [*name and designation of commissioner*] a certified copy of an interlocutor dated the day of nineteen hundred and years, pronounced by in an action in dependence before , at the instance of , pursuer, against , defender; By which interlocutor the said granted diligence against havers at the instance of the pursuer [*or* defender] for the recovery of the documents and others mentioned in the specification, No. of process, and commission to the said to take the oaths and examinations of the havers and receive their exhibits and productions and to report *quam primum;* Of which commission the said accepted and appointed to be clerk thereto, to whom he administered the oath *de fideli administratione officii* in common form.

Present.

[*Here enter those present at the diet.*]

. . . . . .

, Commissioner.
, Clerk.

Counsel for the respective parties concerned concurred in craving the commissioner to allow the depositions of the havers to be taken down in shorthand and thereafter extended, and to dispense with the same being read over to and signed by the havers. (*Signed*) [*Counsel for Pursuer.*]
(*Signed*) [*Counsel for Defender.*]

The commissioner granted the above motion of the parties and appointed , a person skilled in shorthand writing, to take down the depositions of the havers in shorthand, and thereafter to extend the same, and dispensed with the same being read over to and signed by the said havers; And he administered the oath *de fideli administratione officii* to the said .

, Commissioner.
, Clerk.

Whereupon compeared , who, being solemnly sworn and called upon to produce [*or* exhibit] under Article of the specification, No.

[1] Shand's Practice, p. 372. [2] Laird *v.* Scott, 1914, 1 S. L. T. 368.
[3] Shand's Practice, p. 356; Dickson on Evidence, sec. 1802.

of process, deponed and produced [*or* exhibited]. . . . [*If the documents produced are few in number they may be described in the deposition. If numerous, they may be referred to "as per inventory produced." If the deposition is taken down in ordinary writing the haver requires to sign each page of his deposition along with the commissioner and clerk. This is not necessary where the deposition has been taken down in shorthand.*]

[*Where the deposition is taken down in ordinary writing the following declaration and signatures are required*:—]

All which is truth, as the deponent shall answer to God.

[*Here follows an enumeration of deletions, marginal additions, etc., if any.*]

[*Signature of Haver.*]
[*Signature of Commissioner.*]
[*Signature of Clerk.*]

[*Docquet at the end of the report in every case.*]

What is contained in this and the preceding pages is the report of the commission mentioned in the first page hereof.

Humbly reported by

[*Signature of Commissioner.*]
[*Signature of Clerk.*]

For *Affirmation by Haver and Adjournment of Diet*, see *supra*, p. 1053.

(22) Attendance of Counsel.—It is not usual to allow fees for the attendance of counsel at commissions for the recovery of documents,[1] except where the commission is of importance,[2] or questions of nicety are likely to arise.[3]

(23) Fees of Havers.—A haver is entitled to be paid his fee before being called upon to produce under a specification.[4] He is entitled to a fee for attendance at the commission,[5] and also for his trouble in searching out the documents called for,[6] but not for copying extracts, unless specially requested to do so by the party citing him.[7] He may also refuse to produce a document until an account previously incurred to him by the party citing him has been paid.[8] (See Maclaren on Expenses, pp. 497, 498.)

(24) Expenses of Commission.—See Maclaren on Expenses, pp. 491-498.

(25) Commission and Diligence to Examine Havers in England

[1] Fairly *v.* M'Gown, 1836, 14 S. 470; Craig *v.* Craig, 1906, 14 S. L. T. 130.

[2] Alison *v.* Blair Iron Co., 1856, 18 D. 851.

[3] Smith *v.* Murdoch, 1829, 7 S. 777; Gibb and M'Donald *v.* Baghott, 1830, 2 Jur. 190; Renton *v.* Hamilton, 1846, 8 D. 1085.

[4] Forsyth *v.* Pringle Taylor and Lamond Lowson, 1906, 14 S. L. T. 658.

[5] Ibid.; Moreton *v.* Lockhart, 1851, 13 D. 717.

[6] Cuthbertson *v.* Eliott, 1860, 22 D. 389; Mackinnon *v.* Guildford, 1894, 2 S. L. T. 309; Forsyth, *supra*.

[7] Burden *v.* Leitch, 1840, 2 D. 1380; Forsyth, *supra*.

[8] Mackinnon *v.* Guildford, 1894, 2 S. L. T. 309.

OR IRELAND, OR ANY OF HIS MAJESTY'S DOMINIONS.—The Court of Session frequently grants commissions to be executed in England or Ireland, or in His Majesty's dominions beyond the seas.

Where a commission obtained in the Court of Session requires to be executed in England or Ireland, and any person, after being served with a written notice to attend any commissioner (such notice being signed by the commissioner and specifying the place and time of attendance), refuses or fails to appear, application may be made to any of the superior Courts of Law in that part of the kingdom within which such commission is to be executed, to compel his attendance, and the Court or Judge to whom such application shall be made may command by rule or order the attendance and examination of such person, or the production of any writings or documents to be mentioned in such rule or order,[1] and if such rule or order is not obtempered, the disobedience will render such person liable to the pains and penalties of disobedience to a writ of subpœna;[2] provided always that such person is offered his conduct money and expenses, and is not required to attend on more than two consecutive days.[3]

A later statute makes provision for the haver being within any of His Majesty's dominions, including England and Ireland.[4]

If the documents are not required before the trial or proof, the citation of witnesses within the United Kingdom to bring documents with them to the proof or trial is provided for by the Attendance of Witnesses Act, 1854.[5] By that Act the Court before which any action is pending, or the Lord Ordinary on the Bills in vacation, may, in order to compel the personal attendance at any trial of any witness who may not be within the jurisdiction of the Court in which such action is pending, order that a warrant of citation shall issue in special form or a writ of *subpœna ad testificandum* or of *subpœna duces tecum* commanding such witness to attend such trial wherever he may be within the United Kingdom; and the service of such warrant of citation in any part of the United Kingdom shall be as valid and effectual to all intents and purposes as if the same had been served within the jurisdiction of the Court from which it has issued.[6] Every such writ must have at the foot thereof a statement or notice that the same is issued by the special order of the Court or Judge, as the case may be; and no such writ

[1] Evidence by Commission Act, 1843 (6 & 7 Vict. cap. 82), sec. 5.
[2] Ibid., sec. 6. [3] Ibid., sec. 7.
[4] 22 Vict. cap. 20; Campbell *v.* Earl of Breadalbane, 1867, 5 M. 850.
[5] 17 & 18 Vict. cap. 34.
[6] Ibid., sec. 1; Northern Garage, Ltd. *v.* North British Motor Manufacturing Co., Ltd., 1908, 16 S. L. T. 573.

shall issue without such special order.[1] If the witness does not obey such citation, the Court, upon proof of the notice and default, may transmit a certificate to the Supreme Court of the jurisdiction where the service was made, and the latter Court may punish such witness in the same way as if said witness had disobeyed one of its own writs,[2] but not until it be shown that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence and of returning from giving such evidence had been tendered to such witness at the time of citation.[3] The Act does not affect the issuing of a commission for the examination of witnesses out of the jurisdiction,[4] nor does it affect the admissibility of any evidence.[5]

Where a party applying under the last-named statute presented a note to the Court which consisted of a signed statement by the agent that the witnesses designed would not attend without special citation, and concluded for a warrant to cite, signed by counsel, it was held that this was a proper form of application and that an affidavit was unnecessary.[6] In a later case it was held that an affidavit by the agent, to the effect that witnesses desired to be cited under the above statute were necessary and material, must be lodged and sworn to.[7]

Where a party to a suit has resided in Scotland, and has an estate and all his great interests in Scotland, the slightest suggestion that he has anything to say material to the case will be sufficient ground for granting warrant to cite.[8] (See *supra*, pp. 1054, 1055.)

(26) Commission and Diligence to Examine Havers in a Foreign Country.—The Court of Session frequently grants commissions to be executed in a foreign country. If the haver refuses to appear before the commissioner there was formerly no method of compelling him to appear. By the Act of Sederunt, 15th March 1890,[9] however, a method was adopted with a view to obviating such difficulty, and by its provisions a letter of request may be issued by the President of either Division of the Court of Session or by the Lord Ordinary before whom the cause is depending addressed to the Judge or Judges of the foreign tribunal within whose jurisdiction the haver is residing.

For procedure for and under *Letter of Request*, see *supra*, p. 1055 *et seq.*

[1] 17 & 18 Vict. cap. 34, sec. 2.
[2] Ibid., sec. 3.
[3] Ibid., sec. 4.
[4] Ibid., sec. 5.
[5] Ibid., sec. 6.
[6] Pirie *v.* Caledonian Rly. Co., 1890, 17 R. 608.
[7] Macdonald *v.* Highland Rly. Co., 1892, 20 R. 217.
[8] Duke of Athole *v.* Robertson, 1878, 5 R. 845, per Lord President Inglis, p. 846.
[9] C. A. S., B, ii. 3.

CHAPTER IV

COMMISSIONS FROM TRIBUNALS OUTWITH THE JURISDICTION TO BE EXECUTED IN SCOTLAND

(1) English or Irish.—Where a commission to examine witnesses or havers has been issued by the Courts of Law or Equity in England or Ireland to be executed in Scotland, and any person, after being served with a written notice to attend any commissioner appointed to execute any such commission (such notice being signed by the commissioner and specifying the time and place of attendance), shall refuse or fail to appear to be examined under such commission, such refusal or failure to appear shall be certified by such commissioner, and it shall thereupon be competent to apply to the Court of Session for a rule or order to compel the person or persons so refusing or failing as aforesaid to appear, and it shall be lawful for the Court or Judge to whom such application shall be made to command the attendance and examination of such person or persons to be named in such rule or order;[1] and if the person fails to appear, letters of second diligence may be used against such person;[2] provided that such person shall be entitled to the like conduct money and expenses, and for loss of time as for attendance at any trial in a Court of Law, and shall not be required to attend upon more than two consecutive days.[3]

The Evidence by Commission Act, 1859,[4] also applies.[5] (See *Colonial, infra*, para. (2).)

The procedure is by petition to the Inner House.[5]

(2) Colonial.—Where a Court or tribunal of competent jurisdiction in any of His Majesty's dominions has authorised by commission, order, or other process the obtaining of testimony of a person resident in Scotland in or in relation to any action, suit, or proceeding pending in or before such Court or tribunal, the Court of Session may order the examination of such person before the commissioner appointed by such commission, order, etc., and in the manner and form directed by such

[1] Evidence by Commission Act, 1843 (6 & 7 Vict. cap. 82), sec. 5.
[2] Ibid., sec. 6. [3] Ibid., sec. 7.
[4] 22 Vict. cap. 20.
[5] Campbell *v.* Earl of Breadalbane, 1867, 5 M. 850.

commission, order, etc., and the Court of Session may, by the same order, or by a subsequent order, command the attendance of such person resident in Scotland in order to be examined, or for the production of any writings or other documents to be mentioned in such order, and to give all such directions as to time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just, and any such order may be enforced, and any disobedience thereof punished, in like manner as in the case of an order made by the Court of Session in a cause depending before it.[1]

This provision seems also to apply to cases where commissions have been issued in England or Ireland to be executed in Scotland.[2]

The procedure is by petition to the Inner House.[2]

(3) FOREIGN.—Similar procedure to that of colonial commissions is provided where a Scottish witness is desired to give evidence to be laid before a Court or tribunal of competent civil jurisdiction in a foreign country. A certificate under the hand of an Ambassador, Diplomatic Agent, or Consul of such foreign power, received and admitted as such by His Majesty, is sufficient evidence that such deposition is desired.[3]

The procedure is by petition to the Inner House.[4]

The Court has sometimes appointed the petitioner to be the commissioner,[5] but where the petitioner suggested himself as commissioner, the Court refused to make the appointment and appointed the Sheriff-Substitute of the district where the witnesses resided.[6] In one case the Court decided that the evidence should be taken not before a Court of law but only before a commissioner.[7] Where, however, the request is made by the Lord Advocate as an act of comity, the Court will appoint a Sheriff-Substitute to take the evidence.[8]

The Court has extended the privilege to a case where evidence was required for a criminal trial before a foreign Court.[9]

[1] 22 Vict. cap. 20.
[2] Campbell *v.* Earl of Breadalbane, 1867, 5 M. 850.
[3] Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. cap. 113).
[4] Stemrich, Petr., 1886, 13 R. 1156.
[5] Robinow, Petr., 1883, 10 R. 1246.
[6] Blair, Petr., 1883, 10 R. 1223; Reid, Petr., 1890, 17 R. 790.
[7] Baron de Bildt, Petr., 1905, 7 F. 899.
[8] Lord Advocate, Petr., 1909, S. C. 199.
[9] Quosbarth, Petr., 1892, 29 S. L. R. 456.

PART XI

DECREES, EXTRACTS, ETC.

CHAPTER I

INTERLOCUTORS OR DECREES

(1) Definition.—The terms "interlocutor" and "decree" are frequently used as being synonymous, but, more correctly, interlocutors are the official expression of the result of the various judgments pronounced by the Court or the Lord Ordinary in the course of a cause, while decrees are such interlocutors as finally determine the whole, or part, of a cause, whether the interlocutor is a simple, or mixed, interlocutor.

(2) Classification.—Interlocutors or decrees may be classified according to whether (*a*) the defender has failed to enter appearance, or, having entered appearance, has failed to lodge defences; or (*b*) the defender has joined issue with the pursuer in the case by lodging defences. This classification is into (i.) decrees in absence; and (ii.) decrees *in foro.*

Decrees *in foro* may, in the *first* place, be classified according to whether the whole or only a portion of the cause has been decided, either on the merits or on matters of procedure, thus: (*a*) interlocutory decrees; (*b*) *interim* decrees; and (*c*) final decrees.

Decrees *in foro* may, in the *second* place, be classified according to the effect of the decree, thus: (*a*) decrees of absolvitor; (*b*) decrees of dismissal; (*c*) decrees of condemnator; and (*d*) mixed decrees of absolvitor or dismissal and condemnator.

Decrees *in foro* may, in the *third* place, be classified as (*a*) decrees obtained after compliance with the rules and orders of Court; and (*b*) decrees where either party being ordered by the Court to do anything fails to do so is held as confessed. The former are ordinary decrees *in foro;* the latter are decrees by default.

(3) Decrees in Absence.—A decree in absence is a decree pronounced by the Lord Ordinary against a defender where the latter has not entered appearance, or, where having entered appearance, he has failed to lodge defences within the appointed period.[1] A decree in absence is not *res judicata.* (See *Procedure in an Ordinary Action,*

[1] Court of Session Act, 1868, sec. 22.

Chap. vi., *Decree in Absence, supra,* p. 369; *Particular Actions,* Chap. v., *Action of Reduction, etc.*; ii. *Reduction of Decrees* (1), p. 692.)

(4) Decrees in Foro.—A decree *in foro,* or *in foro contradictorio,*[1] or *in foro contentioso,*[2] is a decree pronounced in a cause which has been litigated by both parties. Accordingly, where there is once compearance for a defender, and defences are proponed, the decree is a decree *in foro.*[1]

When it is pronounced in the Outer House and not reclaimed against, or in the Inner House and not appealed to the House of Lords, it operates as *res judicata* where the pleas are properly contested on the merits between the same parties and on the same grounds,[3] and even between different parties where the action is a public right-of-way or other public action.[4] It accordingly cannot be altered except on the grounds—(*a*) that the decree is *ultra petita;* (*b*) that it is disconform to its warrants; (*c*) that it is founded on an error *calculi;* or (*d*) on the plea of *res noviter veniens ad notitiam.* (See also *Particular Actions,* Chap. v., *Action of Reduction, etc.*; ii. *Reduction of Decrees* (2), p. 694; *Bill Chamber,* Chap. v., *Suspension of Decrees* (1).)

(5) Interlocutory Decrees.—These are decrees which deal with procedure or which do not dispose of the whole subject-matter of the cause.

Interlocutory decrees pronounced in the Outer House, except in the case of interlocutors settling the mode of proof,[5] require the leave of the Lord Ordinary before they can be taken to review of the Inner House.[6]

Interlocutory decrees of the Inner House require the leave of the particular Division before they can be appealed to the House of Lords, except in the case where there is a dissent.[7] (See *Review, Removal, and Report,* Chap. ii.; *Reclaiming Days* (e), (f), pp. 950, 951; *Petitions,* Chap. xv., *Petitions Relative to Appeals to the House of Lords* (1), p. 919.)

(6) Interim Decrees.—*Interim* decrees may be divided into two classes—*First,* where the decree is for the purpose of making an *interim* provision until the merits of the case are finally decided. Under this head are decrees for *interim* aliment and expenses in a consistorial

[1] Act 1672, cap. 40 (record edition), cap. 16 (12mo edition), sec. 19.

[2] Stair, iv. 46. 23.

[3] North British Rly. Co. *v.* Lanarkshire and Dumbartonshire Rly. Co., 1897, 24 R. 564, per Lord Kinnear; Glen *v.* Dunlop & Co., 1906, 13 S. L. T. 898.

[4] Jenkins *v.* Robertson, 1864, 2 M. 1162; 1867, 5 M. (H. L.) 27.

[5] Court of Session Act, 1868, sec. 28.

[6] Ibid., sec. 54.

[7] 48 Geo. III. cap. 151, sec. 15.

cause, *interim* interdict, and *interim* appointment. *Second*, an *interim* decree may be pronounced on the merits of the cause. Thus, where it appears from the defences that a balance is admittedly or plainly due, the pursuer may obtain an *interim* decree for such sum. Again, it may happen that one portion of a case can be decided in favour of the pursuer after a discussion upon the Procedure Roll, while the rest of the case can only be decided in his favour after a proof. In such a case the Lord Ordinary, after deciding in favour of the pursuer on the Procedure Roll, may give an *interim* decree in his favour, and allow a proof *quoad* the rest of the case.

An *interim* decree can be pronounced for a balance admittedly due both before[1] and after[2] the record has been closed. The sum must, however, be presently exigible.[3]

An *interim* decree dealing with only a portion of the subject-matter of a cause is not a final decree in terms of sec. 53 of the Court of Session Act, 1868, and therefore requires leave of the Lord Ordinary in order that it may be taken to review of the Inner House.

An *interim* decree can be extracted without special leave.[4]

Where an *interim* decree has been implemented and the Inner House recalls or alters it on a reclaiming note, it may order repayment of the money paid or pronounce such an order as may give effect to the recall or alteration, even after the *interim* decree has been extracted and put to execution.[5]

(7) Final Decrees.—A final decree in the Outer House is a decree which, either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified, or decerned for.[6]

A similar definition is to be found in the Sheriff Courts (Scotland) Act, 1907, sec. 3 (*h*), of a final decree in the Sheriff Court.

A final decree in the Inner House has not been defined by statute, but it would appear to be a decree on the whole merits of the cause, including

[1] M'Kinlay *v.* M'Kinlay, 1849, 11 D. 1022; Conacher *v.* Conacher, 1857, 20 D. 252.

[2] Cameron *v.* M'Niell, 1822, 1 S. 389 (N. E. 364); Lauder *v.* Fraser, 1822, 1 S. 439 (N. E. 407).

[3] Banks *v.* Lang, 1845, 17 Jur. 536.

[4] Court of Session Act, 1850, sec. 28.

[5] Court of Session Act, 1868, sec. 57.

[6] Ibid., sec. 53.

expenses.[1] There is, however, no provision that a decree of the Inner House may be a final decree, although judgment has not been pronounced upon all the questions of law or fact raised in the cause, as in the case of an Outer House final decree. (See *Review, Removal, and Report*, Chap. ii., *Reclaiming Days* (b), p. 948; Chap. iv., *Ordinary Appeals from Inferior Courts* (2) (c), p. 974.)

(8) Decrees of Absolvitor.—A decree of absolvitor is a decree in favour of the defender after a consideration of the merits of a cause, or in respect of the failure of the pursuer to conform to a peremptory statutory enactment, or obtemper a peremptory order of Court. Accordingly, where a pursuer has been ordained to find caution for expenses,[2] or to sist a mandatary,[3] and has failed to do so, the decree is one of absolvitor. Again, where a pursuer failed to proceed to trial within twelve months of the granting of a new trial, the defenders were assoilzied;[4] and where a pursuer was allowed to amend his record and to proceed with his action only on payment of expenses, and he intimated that he did not intend to pay expenses or proceed with the cause, the interlocutor was one of absolvitor.[5]

A decree of absolvitor is *res judicata*, but it does not prevent the pursuer from raising a new action upon grounds which he omitted to state in his former action, as the plea of "competent and omitted" does not apply to pursuers.[6]

Where a pursuer in abandoning a case does not take advantage of sec. 10 of the Judicature Act, the decree is of absolvitor.[7]

Where he abandons under the Judicature Act, but fails to pay full expenses, the decree is absolvitor.[8]

Where a husband abandoned an action of divorce against his wife before the record was closed, and was found liable in expenses but failed to pay them, the Lord Ordinary refused to grant decree of absolvitor.[9]

Where a pursuer restricted his action of declarator and for damages

[1] Court of Session Act, 1808 (48 Geo. III. cap. 151), sec. 15; Judicature Act, 1825, sec. 21.

[2] Gray *v.* Ireland, 1884, 11 R. 1104; Teulon *v.* Seaton, 1885, 12 R. 1179; Cunningham *v.* Skinner, 1902, 4 F. 1124, per Lord Young, p. 1129.

[3] Train *v.* Little, 1911, S. C. 736. See also Gibson *v.* Gordon, 1822, 2 S. 93 (N. E. 86).

[4] Smith *v.* Wm. Dixon, Ltd., 1910, S. C. 230.

[5] Dougall *v.* Caledonian Rly. Co., 1913, S. C. 349.

[6] Dawson and Hill *v.* Murray, 1706, Mor. 12149; M'Donald *v.* M'Donald, 1840, 2 D. 889; affd. 1 Bell's App. 819; Phosphate Sewage Co., Ltd. *v.* Molleson, 1879, 4 App. Cas. 801, per Lord Blackburn, p. 820.

[7] Hare *v.* Stein, 1882, 9 R. 910.

[8] Ross *v.* Mackenzie, 1889, 16 R. 871; Donnelly *v.* Morrison, 1895, 2 S. L. T. 582.

[9] Nicolson *v.* Nicolson, 1902, 10 S. L. T. 464.

to the declaratory conclusions, it was held that the defender was entitled to absolvitor from the conclusion for damages.[1]

(9) Decrees of Dismissal.—A decree of dismissal is a decree which is used when it is intended to decide that the particular action should not be allowed to proceed against the defender, but which is intended to leave it open to the pursuer to bring another action.[2] Accordingly, it is the appropriate decree where a plea that the pursuer's averments are irrelevant and insufficient,[3] or that the action is incompetent,[4] is sustained. It is also the proper decree where a pursuer abandons his action under the Judicature Act, 1825.[5]

Sometimes an interlocutor, although not using the words "dismisses the action," has been interpreted to mean dismissal. Thus, where a pursuer abandoned his action in terms of the Judicature Act and was found liable in expenses, and the Lord Ordinary assoilzied the defenders from the whole conclusions of the libel, the Court held that it was obvious that it was not intended to bar the pursuer from bringing a new action;[6] and where the interlocutor ran that the Lords assoilzied the defenders from the action *as laid*, the same decision was arrived at.[7]

(10) Decrees of Condemnator.—A decree of condemnator is a decree pronounced, after a defender has joined issue with a pursuer, against the defender upon the merits of the cause. It is *res judicata*, and the defender cannot subsequently raise an action or state a defence founded upon the pleas which he set forth in the previous action, or which he could have set forth but omitted to do so.[8]

A decree by default in respect of a defender's failure to observe a peremptory statutory enactment or obtemper a peremptory order of Court is a decree of condemnator.[9]

[1] Earl of Ancaster *v.* Sandeman, 1893, 1 S. L. T. 291.

[2] Stewart *v.* Greenock Harbour Trs., 1868, 6 M. 954, per Lord Deas, p. 958; Cunningham *v.* Skinner, 1902, 4 F. 1124.

[3] Menzies *v.* Menzies, 1893, 20 R. (H. L.) 108, per Lord Watson, pp. 110, 111. See also Waterson *v.* Murray & Co., 1884, 11 R. 1036; Wallace *v.* Baird, 1900, 2 F. 754; Govan Old Victualling Society, Ltd. *v.* Wagstaff, 1907, 44 S. L. R. 295.

[4] Duke of Sutherland *v.* Reed, 1890, 18 R. 252.

[5] 6 Geo. IV. cap. 120, sec. 10.

[6] Shirreff *v.* Brodie, 1836, 14 S. 825.

[7] Gillespie *v.* Russel, 1859, 3 Macq. 757; Waterson *v.* Murray & Co., 1884, 11 R. 1036.

[8] Glasgow Shipowners' Association *v.* Clyde Navigation Trs., 1885, 12 R. 695; Crawford & Co. *v.* Scottish Savings Investment and Building Society, 1885, 12 R. 1033; Edinburgh, etc., Water Trustees *v.* Clippens Oil Co., Ltd., 1899, 1 F. 899. See also Ewing *v.* Wallace, 1832, 6 W. & S. 222; Phosphate Sewage Co., Ltd. *v.* Molleson, 1879, 4 App. Cas. 801; Rennie *v.* James, 1907, 15 S. L. T. 56.

[9] Hutton *v.* Kilgour, 1805, Hume's Dec. 650; Mackenzie *v.* Smith, 1861, 23 D.

(11) Mixed Decrees of Absolvitor or Dismissal and Condemnator.—These are decrees where the defender is assoilzied, or the case dismissed against him, as regards certain conclusions, and is found liable with regard to the remainder; or where one defender is assoilzied, or the case dismissed against him, while the other defender is found liable.

(12) Decrees by Default.—A decree by default is a decree pronounced after the parties have joined issue in a cause against either of the parties in respect of his failure to obey a peremptory statutory provision or an order of the Court under certification.

It is a decree *in foro* and is *res judicata* so long as it subsists.[1]

Where pronounced in the Outer House, it can only be recalled by a reclaiming note, sometimes called a reponing note, or by reduction.[2] (See *Review, Removal, and Report*, Chap. ii., *Reponing Notes* (b), p. 954.)

Where pronounced in the Inner House, it can only be recalled by an appeal to the House of Lords.[3]

Suspension of a decree by default is incompetent.[4]

Where the Court ordains a party to do a certain thing, and the party refuses to do it, the Court may authorise the thing to be done by another person. Thus, where the Court ordained a defender to execute a disposition and he refused to do so, the Lord Ordinary authorised the Clerk of Court to subscribe the disposition on his behalf.[5]

(13) Decrees for Expenses.—See Maclaren on Expenses, pp. 37 *et seq.*, 177-181, 228, 229, 353.

(14) Form of Interlocutor or Decree.—Where a decree is a final interlocutor of the Inner House in an appeal from an inferior Court, it must distinctly specify the several facts material to the case which is found to be established by the proof, and express how the judgment of the Court proceeds on the matter of fact so found, or on matter of law, and the several points of law which were meant to be decided.[6]

1201; Trs. of the Free Tron Church *v.* Morrison, 1876, 13 S. L. R. 384; Traill *v.* Andrew, 1877, 14 S. L. R. 234; Vickers & Sons *v.* Nibloe, 1877, 4 R. 729; Bainbridge *v.* Bainbridge, 1879, 6 R. 541; Duff *v.* Steuart, 1882, 9 R. 423; Lanarkshire County Council *v.* Motherwell Burgh Commissioners, 1901, 4 F. 151; C. A. S., D, i. 5.

[1] Forrest *v.* Dunlop, 1875, 3 R. 15.

[2] Mackenzie *v.* Smith, 1861, 23 D. 1201; Forrest *v.* Dunlop, 1875, 3 R. 15. See also Clark *v.* Newmarch and Grant, 1825, 4 S. 182 (N. E. 184).

[3] Tough *v.* Smith, 1832, 10 S. 619.

[4] Lumsdaine *v.* Australian Co. and Brown, 1834, 13 S. 215; Maule *v.* Tainsh, 1878, 6 R. 44. See, however, Steel *v.* Black, 1829, 7 S. 648.

[5] Whyte *v.* Whyte, 1913, 2 S. L. T. 85.

[6] Judicature Act, 1825, sec. 40; Wemyss *v.* Wilson, 1849, 6 Bell's App. 394.

It is also desirable that all the facts material to the contentions of either of the parties, even though not material to the point on which the judgment proceeds, should be found in the interlocutor in such cases.[1]

Other interlocutors or decrees of the Court of Session may be expressed in whatsoever language and form suits the particular case, the word "decerns" being inserted where the interlocutor finally determines the whole, or part, of a case. This word must be used where the decree is to be extracted.[2] It may, however, be added at a date later than the date of the decree.[3] It is only now necessary to use the word at the end of the decree, even although the decree is a mixed decree of absolvitor or dismissal and condemnator.[4]

Notwithstanding secs. 17 and 21 of the Judicature Act, where it is provided that the Lord Ordinary and the Inner House respectively, in deciding a cause, shall also determine the question of expenses, it has been held that a final interlocutor or decree need not contain a finding for expenses, but that the question may be expressly reserved for disposal by a subsequent interlocutor.[5]

An interlocutor pronounced "of consent" should bear to be so, or there should be a minute lodged giving consent.[6] Although an interlocutor bears to be "of consent," the Court may deal on equitable principles with a representation by a party who denies that it was so.[7]

All Inner House interlocutors and acts of the Court must be signed by the Judge in the chair, in presence of a quorum of the Lords sitting in judgment, under pain of nullity and deprivation of the writer,[8] and accordingly his Lordship always adds to his subscription "*I.P.D.*," *i.e. In Præsentia Dominorum.*[9]

The date of an interlocutor is not the date when judgment was delivered in open Court, but when the interlocutor was signed.[10]

An interlocutor not signed may result in all the subsequent proceedings being declared null and void.[11]

[1] Little *v.* Stevenson & Co., 1896, 23 R. (H. L.) 12.
[2] Anderson *v.* Moon, 1836, 14 S. 863.
[3] Laurie *v.* Donald, 1833, 11 S. 246.
[4] Greig *v.* Lamb's Trs., 1830, 8 S. 908 (note).
[5] Wilson's Trs. *v.* Wilson's Factor, 1869, 7 M. 457; Bannatine's Trs. *v.* Cunninghame, 1872, 10 M. 317.
[6] Morison *v.* Mackay, 1895, 2 S. L. T. 502.
[7] Whyte *v.* Whyte, 1895, 23 R. 320.
[8] Act 1686, cap. 4 (record edition), cap. 3 (12mo edition); Act 1693, cap. 31 (record edition), cap. 18 (12mo edition).
[9] Shand's Practice, p. 968.
[10] Cleland *v.* Clason and Clark, 1849, 11 D. 601.
[11] Smith *v.* M'Aulay & Co., 1846, 9 D. 190.

(15) Mistake or Omission in an Interlocutor.—The Lord Ordinary may, with consent of both parties, correct or alter any interlocutor at any time before extract, provided that the consent be given by the counsel of the parties in a minute signed by them.[1] It seems to be too late for the Lord Ordinary's judgment to be corrected in substance where it has been reclaimed against to the Inner House and a judgment given thereupon sustaining it, although it is not too late to suggest any error in figures or in expression.[2]

A mistake, clerical error, or omission in an interlocutor pronounced by the Inner House may be corrected, but it must be pointed out *de recenti*,[3] and before extract.[4] Where a correction was made by the Clerk of Court before extract, but it was not authenticated, the Court held the interlocutor as corrected to be good.[5] In one case an omission of a finding for expenses was refused to be rectified in respect that the consent of the other parties to the case had not been obtained to the correction;[6] in another case an interlocutor pronounced in the Inner House was, by consent of parties, recalled in respect of a subsequent judgment of the House of Lords in a similar case, and a different interlocutor substituted.[7]

An interlocutor pronounced by mistake in point of fact may be cancelled,[8] but the fact must have been mentioned in the course of the argument.[9]

In a special case, where a question had been amended and the answer of the Inner House did not correspond to the question as amended, the interlocutor was altered.[10]

In one case the Court refused to alter an interlocutor which was said to be disconform to its judgment.[11]

[1] A. S., 11th July 1828, sec. 63; C. A. S., C, ii. 10.

[2] Cuthill *v.* Burns, 1862, 24 D. 849, at p. 859.

[3] Cathcart *v.* Cathcart, 1830, 8 S. 497, at p. 508; Kerr *v.* Bremner, 1835, 14 S. 180, at p. 185 (note); Gray *v.* Young, 1839, 2 D. 128; Walker *v.* Caledonian Rly. Co., 1858, 20 D. 1102; Marshall *v.* Caledonian Rly. Co., 1899, 2 F. 6; Gillon's Trs. *v.* Gillon, 1903, 5 F. 533; Kennedy *v.* Clyde Shipping Co., 1908, S. C. 895.

[4] Ritchie *v.* Ferguson, 1849, 12 D. 119.

[5] Clark and Macdonald *v.* Bain, 1895, 23 R. 102. See also Allan *v.* Wormser, Harris & Co., 1894, 21 R. 866, per Lord Rutherfurd Clark, p. 875.

[6] Walker *v.* Flint, 1863, 1 M. 417, at p. 423. See, however, Lock *v.* Muir, 1914, 1 S. L. T. 106.

[7] Forth Bridge Rly. Co. *v.* Incorporation of Guildry of Dunfermline, 1910, S. C. 316.

[8] Harvey *v.* Lindsay, 1875, 2 R. 980; Rottenburg *v.* Duncan, 1896, 24 R. 35.

[9] Hard *v.* Anstruther, 1862, 1 M. 14.

[10] Ferguson Bequest Fund *v.* Commissioners on Educational Endowments, 1887, 14 R. 717.

[11] Moncreiffe *v.* Perth Police Commissioners, 1886, 13 R. 921.

After an interlocutor has been issued and seen, corrections should only be made in presence of the parties.[1]

(16) Interlocutor Sheets.—When lodged, the interlocutor sheets must contain at least two sheets (eight pages) of process paper.[2] They are written up by the Clerks to the Process, who add such further sheets as may be necessary.[3] They cannot be borrowed, but the Clerks of the Process are bound to give copies. When they have been lost or destroyed, a copy thereof, proved in the cause to the satisfaction of the Court before whom the cause is depending at the time, and authenticated in such manner as he or they shall require, may be substituted, and shall be held equivalent to the original for the purposes of the action.[4]

[1] White *v.* M'Ewen's Trs., 1873, 11 M. 602.

[2] A. S., 15th July 1909, sec. 2; C. A. S., A, iii. 6.

[3] A. S., 24th December 1838, sec. 11.

[4] C. A. S., A, iii. 8; A. S., 20th March 1907, sec. 12; Court of Session Act, 1868, sec. 15. See also Learmonth's Tr., Petr., 1883, 20 S. L. R. 579; Romanes, Petr., 1894, 21 R. 1082.

CHAPTER II

EXTRACTS

(1) Definition.—An extract of a decree pronounced in the Court of Session "is not a document of debt, or a principal document of any kind. It is a mere copy of the decree, or, to speak more correctly, a certificate by the proper officer that such a decree exists in the records of the Court."[1] The proper officer is the Extractor of the Court of Session.[2] (See *infra*, (2).) An extract is the authority for doing diligence against the person or property of the unsuccessful party in a cause, and accordingly, where required, contains a warrant to charge the debtor or obligant to pay the debt or perform the obligation within the days of charge, under the pain of poinding and imprisonment (where the latter is competent), and to arrest and poind, and for that purpose to open shut and lockfast places.[3]

An extract proves itself,[4] and, if *ex facie* regular, is admissible without proof either that it is accurate or that it bears the signature of the proper officer.[5]

(2) The Extractor.—See *supra*, p. 11.

(3) Form of Extract.—By the Court of Session Act, 1810,[6] the old and cumbrous forms of extract were abolished, and abridged forms of extract for particular actions substituted therefor, the extracts of decrees in actions not particularly described being varied as the circumstances required.[7] They did not, however, contain a warrant for diligence, which was at that time a separate document. Accordingly, by the Debtors (Scotland) Act, 1838,[8] it was provided that all extracts of decrees in the Court of Session, and the Teind and Justiciary Courts, should contain a warrant to arrest, charge, poind, and imprison. By the Court of Session Act of the same year[9] a Principal Extractor of the

[1] Inglis *v.* M'Intyre, 1862, 24 D. 541, per Lord Justice-Clerk Inglis, p. 544.

[2] Court of Session Act, 1838 (1 & 2 Vict. cap. 118), sec. 18.

[3] Debtors (Scotland) Act, 1838 (1 & 2 Vict. cap. 114), sec. 1; A. S., 8th January 1881, secs. 1 and 2; C. A. S., B, vi. 2.

[4] Dickson on Evidence, sec. 1286.

[5] Ibid., sec. 1293.

[6] 50 Geo. III. cap. 112. See also 1 & 2 Vict. cap. 118, sec. 18.

[7] 50 Geo. III. cap. 112, sec. 10.

[8] 1 & 2 Vict. cap. 114, sec. 1.

[9] 1838 (1 & 2 Vict. cap. 118), sec. 18.

Court of Session was appointed, and since the date of that Act his name is appended to such extracts instead of that of a Principal Clerk of Session. The Act of Sederunt,[1] which was empowered to be passed by the last-mentioned Act, provided an abbreviated form of warrant, and the form of extract thus evolved is the form now in use, with this single exception, that the words "and imprisonment" are now omitted from the warrant except in the case of extract decrees for payment of taxes, fines, or penalties payable to His Majesty; rates and assessments; aliment; or decrees *ad factum præstandum*.[2] Accordingly, the form of extract decree in an ordinary defended action is as follows:—

[*Dates.*]

At Edinburgh, the day of in the year one thousand nine hundred and and the day of in the year one thousand nine hundred and . In the summons and action instituted before the Lords of Council and Session at the instance of *A. B.*, Pursuer; against *C. D.*, Defender: After procedure, in the course of which defences were lodged, and the record was closed: Sitting in judgment the said Lords, of the first date hereof, having considered the cause, decerned and ordained, and hereby decern and ordain, the said *C. D.* to make payment to the said *A. B.* of the sum of £ , with interest upon said sum at the rate of five per centum per annum from [*as is the decree*] until payment; Found and hereby find the said *C. D.* liable in expenses, and remitted the account thereof, when lodged, to the Auditor of Court to tax and to report; And the said Lords, of the second date hereof, approved, and hereby approve, of the Auditor's report on the pursuer's account of expenses; and decerned and ordained, and hereby decern and ordain, the defender to make payment to the pursuer of the sum of £ , being the taxed amount thereof, together with the sum of £ sterling, being the dues of extract; And the said Lords grant warrant to messengers-at-arms, in His Majesty's name and authority, to charge the said *C. D.*, defender,[3] personally, or at his dwelling-place if within Scotland, and if furth thereof by delivering a copy of charge at the office of the Keeper of the Record of Edictal Citations at Edinburgh, to make payment of the foresaid sum or sums of money, principal, interest, and expenses[3] [*or* to implement and perform the haill foresaid obligations] [*or both to pay and perform, as the case may require*], all in terms and to the effect contained in the decree and extract above written, and here referred to, and held as repeated *brevitatis causa;* and that to the said *A. B.* within [*insert the appropriate days, as*] fifteen days, if within Scotland, and if furth thereof, within sixty days, next after he is charged to that effect, under the pain of poinding and imprisonment [*if the sum, or any part thereof, be payable at a future time, add here* "the terms of payment being always first come and byegone"]; and also grant warrant to arrest the said *C. D.'s* readiest goods, gear, debts, and sums of money, in payment and satisfaction of the said sum,

[1] A. S. (Extracts), 24th December 1838, sec. 1 and Schedule A; C. A. S., B, vi. 1.
[2] A. S., 8th January 1881; C. A. S., B, vi. 2.
[3] Hanna *v.* Neilson, 1849, 11 D. 941.

interest, and expenses; and if the said *C. D.* fail to obey the said charge, then to poind the said *C. D.'s* readiest goods, gear, and other effects, and if needful for effecting the said poinding, grant warrant to open all shut and lockfast places, in form as effeirs. Extracted upon pages by me, Principal [*or* Assistant] Extractor in the Court of Session at Edinburgh, this day of one thousand nine hundred and years.

[*Extractor's Signature.*]

It will be observed that an extract decree proceeds in the name of the Lords of Council and Session, although the judgment extracted is pronounced by a Lord Ordinary. This is owing to the fact that the Lord Ordinary represents the Court.[1]

An extract may be either printed or in writing, or partly both.[2] It should enumerate the number of pages of which it consists.[3] The Extractor must sign each page,[4] and either initial any deletions or marginal additions or mention them at the end.[5] He must also sign the last page, and should add the date and place of subscription. Although it has been held that the place of subscription is not imperative, and that the date does not require to be inserted before the signature of the Extractor, but may be put after it,[6] the place and date must be able to be ascertained from some part of the extract.[7]

Where there are two separate acts of decerniture of the Court, *e.g.* decerning for the principal sum and expenses as taxed, and later decerning for the taxed amount of expenses, it is the proper course to make the extract decree bear the dates of both, but the omission of the double date will not infer a nullity.[1] Where the Inner House adheres to the judgment of the Lord Ordinary or the Sheriff, it is now the practice that an award of expenses in the Inner House must be asked for, otherwise it will not be included in the decree.[8] Accordingly, the dates of both the Outer and Inner House interlocutors should be given.

(4) When Extract may be Obtained.—No decree *in foro* of the Inner or Outer House can be extracted until the expiry of twenty-four hours after the same is read in the Minute-Book, *i.e.* on the eighth day free of the date of the decree,[9] unless extract is specially dispensed with.

[1] Thomson *v.* Macdonell, 1841, 3 D. 1167.

[2] 1 & 2 Vict. cap. 114, sec. 32.

[3] Tait on Evidence (3rd ed.), p. 191.

[4] H.M. Advocate *v.* Fraser, 1839, 2 Swinton, 436.

[5] Dickson on Evidence, sec. 1290.

[6] Cleland *v.* Clason and Clark, 1849, 11 D. 601; affd. 1850, 7 Bell's App. 153.

[7] Ibid. See also C. A. S., B, vi. 4; Sim *v.* Yuile, 1845, 8 D. 8; Jameson *v.* Wilson, 1853, 15 D. 414.

[8] Macdonald *v.* M'Eachan, 1880, 7 R. 574.

[9] A. S., 20th January 1671; Regulations and Memoranda by the Principal Extractor, dated August 1907.

No decree in absence can be extracted until the lapse of ten days from the date of the decree.[1]

Acts which are interlocutors which do not contain a decerniture, if pronounced in the Inner House, may be extracted immediately without abiding the reading thereof in the Minute-Book.[2]

Acts pronounced in the Outer House require to be read in the Minute-Book unless specially dispensed with.

All decrees pronounced in the Exchequer Court may be extracted immediately without abiding the expiration of the days of the Minute-Book.[3]

Extracts may be issued of decrees pronounced many years before;[4] and if *final* decrees are extracted after the lapse of a year, the actions do not require to be wakened for that purpose.[5]

Decrees cannot be extracted after they have been borrowed up for the purpose of reclaiming.[6]

(5) Who may Demand an Extract.—The party in whose name the decree runs, whether he is principal, or, in the case of expenses, the agent-disburser, may demand an extract of the decree.[7] So also may an assignee on production of the assignation, or an executor on production of his confirmation.

The Lord Clerk Register and his deputies and assistants may issue to any person desiring the same certified copies of any interlocutors or steps of process, or productions in an unextracted process in their custody, on payment of certain fees.[8]

(6) Where Extracts not now Necessary.—It is not necessary to obtain a formal extract of any commission or diligence granted by a Lord Ordinary or the Court; but a copy of the interlocutor granting such commission and diligence, or one or other of them, certified by the Clerk of Process or by his assistant, has the same effect as such formal extract.[9]

(7) Expense of Extract.—Although a successful party is entitled to as many extracts as he chooses to pay for,[7] he is entitled to one extract at the expense of the unsuccessful party.[10]

[1] 31 & 32 Vict. cap. 100, sec. 23.
[2] A. S., 11th July 1828, sec. 116.
[3] Court of Exchequer (Scotland) Act, 1856 (19 & 20 Vict. cap. 56), sec. 28.
[4] M'Hardy *v.* Alexanders, 1909, 2 S. L. T. 117.
[5] Watson's Form of Process (2nd ed.), 1799, p. 315; *cp.* Douglas, Petr., 1883, 20 S. L. R. 579; M'Lachlan *v.* Campbell, 1846, 8 D. 574.
[6] Regulations and Memoranda by the Principal Extractor, dated August 1907.
[7] Inglis *v.* M'Intyre, 1862, 24 D. 541, per Lord Justice-Clerk Inglis, p. 544.
[8] A. S., 22nd January 1876, sec. 8; C. A. S., A, v. 7.
[9] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 25.
[10] Hunter *v.* Stewart, 1857, 20 D. 60; Scott *v.* North British Rly. Co., 1860,

(8) Tender of Expenses and of Dues of Extract.—Such a tender does not entitle the party tendering to the delivery of the extract,[1] as the successful party is entitled to an extract at the expense of his opponent.[2] It will, however, entitle the party tendering, whether the unsuccessful party or a third party, to an assignation of the decree,[3] and will also save him the expense of the motion for the approval of the Auditor's report,[4] but it is necessary that the offer of expenses should include the dues of extract before the expense of the motion for approval can be saved,[5] and that the offer be received before enrolment to have the Auditor's report approved of.[6]

(9) Loss of Original Writ, or Pleading, or Interlocutor Sheets.—Where a summons, petition, or other original writ or pleading is lost or destroyed, a copy thereof, proved in the cause to the satisfaction of the Court before whom the cause is depending at the time, and authenticated in such manner as he or they shall require, may be substituted, and shall be held equivalent to the original for the purposes of the action.[7]

The foregoing also applies to lost interlocutor sheets.[8]

(10) Correction of Errors or Omissions in Extracts.—If a decree has been extracted irregularly or disconform to the warrants, redress may be had by a summary petition to the Inner House.[9] In the same way, where the error is in the summons or other pleading, and is repeated in the extract decree, a petition to have the same amended may be presented to the Inner House, and the corrections made.[10] In one case the Court authorised the Extractor to retransmit the proceedings to the Clerk of Process, and thereafter allowed the

22 D. 922; Williams *v.* Carmichael, 1874, 11 S. L. R. 530; Rutherglen Parish Council *v.* Parish Councils of Glenbucket and Dalziel, 1896, 33 S. L. R. 368.

[1] Inglis *v.* M'Intyre, 1862, 24 D. 541; Williams *v.* Carmichael, 1874, 11 S. L. R. 530.

[2] Hunter *v.* Stewart, 1857, 20 D. 60; Scott *v.* North British Rly. Co., 1860, 22 D. 922; Williams *v.* Carmichael, 1874, 11 S. L. R. 530; Rutherglen Parish Council *v.* Parish Councils of Glenbucket and Dalziel, 1896, 33 S. L. R. 368.

[3] Milne, Petr., 7th March 1822, F. C.; Smith *v.* Gentle, 1844, 6 D. 1164.

[4] Allan *v.* Allan's Trs., 1851, 13 D. 1270.

[5] Scott *v.* North British Rly. Co., 1860, 22 D. 922; Orr *v.* Smith, 1891, 28 S. L. R. 589.

[6] Campbell *v.* Campbell, 1843, 5 D. 753.

[7] Court of Session Act, 1868, sec. 15.

[8] A. S., 20th March 1907, sec. 12; C. A. S., A, iii. 8.

[9] Minister and Kirk-Session of Borrowstownness, 1764, 5 Brown's Supp. 425.

[10] Brown, Petr., 1840, 2 D. 1467; Hope *v.* Hamilton, 1851, 13 D. 1268; Scott, Petr., 1855, 17 D. 932; Small's Trs., Petrs., 1856, 18 D. 1210; M'Kellar, Petrs., 1856, 19 D. 34; Smith and Turnbull, Petrs., 1891, 29 S. L. R. 137.

necessary corrections to be made on the summons, and *de novo* pronounced decree in the action.[1]

The Lord Ordinary may also make a correction where his attention is called to the mistake *de recenti*. Thus, where an error was discovered in a title to objections in an action of multiplepoinding, which error was repeated in the extract decree, an application to the Lord Ordinary to correct the title and to allow extract to go out and be extracted in terms of the correction was granted, and a suspension of a charge upon the corrected extract was refused.[2]

Where the materials are found in the process for the correction of an error in a decree, the Extractor himself may put the matter right in the extract.[3]

Where a long period has elapsed from the date of the extract, it is possible that the Court may insist upon a reduction.[4]

(11) Extracts where Appeal Taken to the House of Lords.—Where an interlocutor pronounced by the Inner House is appealed to the House of Lords, the respondent may extract the interlocutor so long as there has been no service of an order by the House of Lords on the respondent to state cases.[5] After service of the order the respondent may present a petition for *interim* execution pending appeal and the Court may allow extract and execution to proceed.[6] (See *Petitions*, xv., *Petitions Relative to Appeals to the House of Lords* (2), p. 922.)

(12) Superseding Extract.—It is competent for the Court to supersede extract in circumstances which would otherwise result in injustice being done. Thus, where a pursuer obtained a verdict for £50, and the defenders had made a tender of £105, the Court, in applying the verdict, found the defenders entitled to expenses from the date of tender, and superseded extract of the decree for £50 until the expenses found due to the defenders were taxed and decerned for.[7]

The Court will not, however, supersede extract where the counter claim cannot be decided in the same case and has not been decided.[8]

Where the Court supersedes extracts until a condition or qualifica-

[1] Connal and Leishman, Petrs., 1853, 2 Stuart, 428.

[2] Miller *v.* Lindsay, 1850, 12 D. 964.

[3] Henderson *v.* Cullen, 1860, 22 D. 712. See also Clark and Macdonald *v.* Bain, 1895, 23 R. 102.

[4] Stair, iv. 1. 45.

[5] Edinburgh Northern Tramways Co. *v.* Mann, 1891, 19 R. 24.

[6] Court of Session Act, 1808 (48 Geo. III. cap. 151), sec. 17.

[7] Fry *v.* North-Eastern Rly. Co., 1882, 10 R. 290.

[8] Lawson *v.* Drysdale, 1844, 7 D. 153; Thomson *v.* Duncan, 1855, 17 D. 1081. See also Hugh Nelson & Co. *v.* Corporation of Glasgow, 1908, S. C. 879.

tion thereof is implemented (such as finding caution, consigning money, etc.), the Clerks of Court should see that such condition or qualification is complied with before transmission.[1]

(13) Interim Extract.—All acts, warrants, and decrees granted during the dependence of a process before the Court of Session may be extracted *ad interim*. The difference in effect of a final and an *interim* extract is that whereas in the former case the process is at an end and the Court is *functus* except to correct errors or omissions in the decree or extract, in the latter case the process is only transmitted to the Extractor for the purpose of issuing the extract *ad interim*, and when this is done he returns it to the Clerk of the Process.[2] Formerly it was necessary to have the special leave of the Lord Ordinary or the Court before a decree could be extracted *ad interim*, but now such special leave is unnecessary, and extract *ad interim* may proceed unless the Lord Ordinary or the Court gives a direction to the contrary.[3] This applies to decrees which exhaust the merits of the cause as well as to those which do not. Accordingly, where an interlocutor exhausting the merits of a cause was pronounced with expenses, and the successful party obtained *interim* extract of the decree on the merits without special authority to do so, it was held that he was not debarred from obtaining decree for the taxed amount of expenses.[4]

All extracts of decrees making appointments in petitions for factors to pupils, minors, insane persons, etc., are *interim* extracts, and the process is re-transmitted to the Bill Chamber after extract has been issued.

(14) Extract of Part of a Decree where the Remainder is Reclaimed Against.—Where in an action against two sets of defenders the Lord Ordinary granted decree for a sum of money against one set of defenders, and assoilzied the other set of defenders with expenses, and the pursuers reclaimed against this interlocutor, but intimated that they did not insist upon it in so far as it assoilzied the second set of defenders, the latter obtained a decree for the taxed amount of their expenses from the Lord Ordinary. The Extractor, however, refused to extract the latter interlocutor in respect that the process was in

[1] Regulations by Principal Extractor, dated August 1907, sec. 7.

[2] Taylor *v.* Jarvis, 1860, 22 D. 1031, per Lord Justice-Clerk Inglis, p. 1034.

[3] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 28.

[4] Crichton Bros. *v.* Crichton, 1901, 4 F. 271. See also Beveridge *v.* Liddell, 1852, 14 D. 772; Buchanan *v.* Young, 1860, 22 D. 371; *cp.* Taylor *v.* Jarvis, 1860, 22 D. 1031, per Lord Justice-Clerk Inglis, p. 1034; Baillie *v.* Cameron, 1891, 28 S. L. R. 895.

the Inner House as a result of the reclaiming note. The Lord Ordinary reported the cause and the Court authorised the Extractor to proceed with the extract.[1]

(15) Grounds of Challenge of an Extract Decree.—An extract decree may be challenged through omission of any of the requisites of an extract set forth in paragraph (3).

Besides such grounds of challenge, if its date is written on an erasure,[2] or a wrong date is inserted,[3] the extract may be challenged. It is also a good ground of objection that the extract is not conform to the decree,[4] or that it was issued before the proper time.[5]

It is difficult to challenge an extract *ex facie* regular after a lapse of time.[6]

(16) Procedure to Obtain Extract. — Where transmission of a concluded process is ordered for extract, the agent must take care that the process is fully returned to the clerk before transmission. Where transmission is ordered for *interim* extract, the numbers of the steps of process sent to the Extractor, or the numbers not sent, are specified in the inventory.[7]

Productions must be taken up before transmission where the merits are exhausted.[8]

Along with each process there must be lodged a note or memorandum by the agent specifying—

1st. The nature of the cause, and the leading names of the parties; also the name of the Lord Ordinary or clerk from whose office transmitted.

2nd. The date of the interlocutor or interlocutors of which extract is wanted.

3rd. Whether the interlocutor is *interim* or exhausts the whole cause.

4th. Any other peculiarity (such as change of party, sisting of new parties, qualification or restriction of claims) which the agent thinks should be attended to, or which may tend to facilitate the preparation of the extract and secure its entire accuracy.

[1] Ayr Road Trs. *v.* W. & J. Adams, and Blyth and Cunningham, 1883, 10 R. 1295.
[2] Brown *v.* Blaikie, 1849, 11 D. 474.
[3] Freebairn *v.* Dalrymple, 1829, 7 S. 476; Hassett *v.* Walker, 1834, 12 S. 932.
[4] Dingwall *v.* Gardiner, 1825, 4 S. 246 (N. E. 250); M'Pherson *v.* Wright, 1885, 12 R. 942; *cp.* Adamson *v.* Porteous, 1833, 12 S. 124.
[5] Grindlay *v.* Saunders, 1829, 7 S. 493; 1830, 8 S. 642; Badger *v.* Lord Blantyre, 1844, 17 Jur. 53.
[6] Dickson on Evidence, sec. 1295.
[7] Regulations by Principal Extractor, dated August 1907, sec. 1.
[8] Ibid., sec. 2.

Such note or memorandum must be written upon a full sheet of foolscap paper, so as to be folded up in uniform size, and transmitted or exhibited, when necessary, to the Lord Register or his deputy.[1]

The note or memorandum must comprehend a copy of the interlocutor or interlocutors of which extract is wanted, and must be signed by the agent, who should also state on whose behalf he acts. The Auditor will allow for such copy at the rate of one shilling and sixpence per sheet. Notes appended to interlocutors are not to be copied.[2]

No extract will be issued until stamp duty shall have been paid by the agent, and stamps lodged in the Extractor's Chambers. Law Court stamps, and not Register House stamps, must be used.[3]

When adjudications for debt are transmitted for extract, there must at the same time be lodged a state of the accumulated sum certified by the agent.[4]

Where a process has been once transmitted, extract will be forthwith prepared and issued, unless interdicted by a Lord Ordinary or the Court, or unless the Clerk to the Process shall, in terms of the regulations approved of by the Court, 21st December 1822, attend with a reclaiming note, if such shall be competent; in which case the Extractor will, upon the conditions and reservations therein mentioned, retransmit the process to the clerk.[5]

The following is the regulation referred to:—

"Where a reclaiming note is presented to a Clerk of Court, after the process has been transmitted to the Extractor's office for extract of decree, the Clerk of Court shall proceed, at sight of the agent or his clerk, to that office. If extract has already been issued, the Clerk of Court shall refuse to receive the reclaiming note. If extract has not been issued, he shall examine whether the reclaiming note be competent:—(*a*) If it is incompetent, he shall refuse to receive it, and the Extractor shall proceed with the extract. (*b*) If it is competent, the Clerk of Court shall, in common form, receive the reclaiming note, but that only upon the agents immediately paying the Extractor the expense which shall have been actually incurred in the preparation of the extract; and upon such payment being made, and the reclaiming note being so received, the Extractor shall allow the process to be retransmitted to Clerk of Court's office as being not extractable: Provided always that such payment to the Extractor shall be with-

[1] Regulations by Principal Extractor, dated August 1907, sec. 3.
[2] Ibid., sec. 4. [3] Ibid., sec. 5. [4] Ibid., sec. 6. [5] Ibid., sec. 9.

out prejudice to any question by whom the burden thereof shall be ultimately borne: and provided also, that the consent or refusal of the Clerk of Court to receive a reclaiming note shall nowise affect any question as to the competency thereof."[1]

(17) Extracts of Decrees in Absence.—In all cases in which decree is pronounced in absence of the defender or defenders, an account of expenses shall be lodged in process and taxed by the Auditor; and a report thereon by the Auditor shall be a sufficient warrant and authority to the Extractor to fill up the amount of expenses to be awarded against the defender or defenders in the extracted decree, without the said report being brought under the consideration of the Lord Ordinary, unless by his own direction, or that of the Auditor, or on the motion of any party interested.[2] (See paragraph (4).)

(18) Extracts of Verdicts of Juries.—An extract of a verdict of a jury may be obtained in the same way as the extract of a decree in an ordinary action.[3]

(19) Extracts in the Exchequer Court.—Extracts in the Exchequer Court are prepared by the Extractor of the Court of Session. He is required to give such extracts priority over all other business. The extract is as nearly as may be in ordinary form so far as consistent with the Court of Exchequer (Scotland) Act, 1856, except that in the case of extracts of decrees proceeding upon registered bonds and other obligations to His Majesty, and in the case of extracts of decrees decerning for payment of any penalty, duty, or debt due to His Majesty, the Extractor shall insert in the extract a warrant to Sheriffs to charge and execute diligence in lieu of the warrant to charge and for diligence in use in ordinary cases.[4]

(20) Extracts in the Bill Chamber.—All extracts in purely Bill Chamber proceedings are prepared not by the Extractor of the Court of Session, but by the Clerk of the Bills.[5]

(21) Extracts in Junior Lord Ordinary Petitions.—Although these petitions are disposed of in the Bill Chamber, extracts are still prepared by the Extractor of the Court of Session.[6]

[1] A. S., 21st December 1822; C. A. S., C, ii. 15.

[2] Court of Session Act, 1821 (1 & 2 Geo. IV. cap. 38), sec. 33.

[3] Fry *v.* North-Eastern Rly. Co., 1882, 10 R. 290.

[4] Court of Exchequer (Scotland) Act, 1856 (19 & 20 Vict. cap. 56), sec. 28.

[5] A. S., 15th July 1842, sec. 5 (end); C. A. S., E, i. 3; Clippens Oil Co., Ltd. *v.* Edinburgh and District Water Trs., 1906, 8 F. 731, per Lord President Dunedin, p. 749.

[6] Clerks of Session (Scotland) Regulation Act, 1889 (52 & 53 Vict. cap. 54), sec. 3.

(22) Extracts in Bankruptcy Proceedings.—All extracts of interlocutors pronounced by the Lord Ordinary or the Court under the Bankruptcy (Scotland) Act, 1913, are prepared and issued by the Clerk of the Bills in the same manner as extracts were formerly issued under the statute 2 & 3 Vict. cap. 41.[1]

All deliverances under the Bankruptcy (Scotland) Act, 1913, purporting to be signed by the Lord Ordinary or by any of the Judges of the Court of Session, or by the Sheriff, as well as all extracts or copies thereof, or from the books of the Court of Session or the Sheriff Court purporting to be signed or certified by any Clerk of Court or Sheriff-Clerk, or extracts from or copies of registers purporting to be made by the keeper thereof, or Extractor, shall be judicially noticed by all Courts and Judges in England, Ireland, and His Majesty's other dominions, and shall be received as *primâ facie* evidence, without the necessity of proving their authenticity or correctness, or the signatures appended, or the official character of the persons signing, and shall be sufficient warrants for all diligence and execution by law competent.[2]

(23) Extracts in the Teind Court.—Extracts of acts and decreets pronounced by the Court of Commissioners for Teinds, except in processes of valuation of teinds and other cases where full extracts may be required by the parties, are now in the forms prescribed by 50 Geo. III. cap. 112, and are prepared by the Teind Clerk.[3]

Abridged forms of (*a*) Extract of a Decreet of Modification and Locality, and (*b*) Warrant of Charge in terms of 1 & 2 Vict. cap. 114, secs. 1 and 8, have since been provided.[4]

(24) Extract of a Certificate of a Judgment Obtained in the High Courts of England or Ireland and Registered in Scotland.—All proceedings may be taken on such an extract as if the judgment of which it is a certificate had been a decree originally pronounced in the Court of Session on the date of registration in Scotland.[5]

No certificate can be registered in Scotland more than twelve months after the date of the judgment unless leave has been obtained, on petition, from the Lord Ordinary on the Bills.[5]

The *inducie* of charge is fifteen days.[6] The fees for registration and extract of the certificate are the fees authorised by 50 Geo. III. cap. 112,

[1] A. S., 10th February 1858, sec. 5 ; C. A. S., E, ii. 27.
[2] Bankruptcy (Scotland) Act, 1913, sec. 170.
[3] Court of Session (No. 2) Act, 1838 (1 & 2 Vict. cap. 118), sec. 27.
[4] A. S., 4th March 1840 ; C. A. S., H, ii. 26, and Schedules Nos. I. and II.
[5] Judgments Extension Act, 1868 (31 & 32 Vict. cap. 54), sec. 2.
[6] A. S., 11th July 1871, sec. 1 ; C. A. S., B, vi. 5 (*a*).

to be exacted upon registers of deeds recorded in the Books of Council and Session, and the same fees are charged for each subsequent extract.[1]

It is not necessary that the debtor should be subject to the jurisdiction of the Scottish Court to warrant registration and extract.[2]

The Court of Session cannot suspend the decree on the merits but it can sist diligence in Scotland proceeding on the extract until the complainer has had an opportunity of applying to the Courts of the country pronouncing the judgment for an arrestment of the judgment.[3]

A certificate obtained of an extract decree of the Court of Session may in like manner be registered in England or Ireland.[4] A fee of two shillings is exacted for such certificate, and no fee fund dues are exigible upon such certificate.[5]

[1] A. S., 11th July 1871, sec. 2; C. A. S., B, vi. 5 (*b*).

[2] English's Coasting and Shipping Co. *v.* British Finance Co., 1886, 14 R. 220, per Lord President Inglis.

[3] Wotherspoon *v.* Connolly, 1871, 9 M. 510; Wilson *v.* Robertson, 1884, 11 R. 893; English's Coasting and Shipping Co. *v.* British Finance Co., 1886, 14 R. 220.

[4] Judgments Extension Act, 1868, sec. 3.

[5] A. S., 11th July 1871, sec. 3; C. A. S., B, vi. 5 (*c*).

CHAPTER III

CHARGING ORDER

In cases where a successful party to a cause is in a precarious financial position, it is sometimes necessary for his law agent to take steps to ensure the payment of his account. The agent's first step in such a case is usually to obtain decree in his own name as agent-disburser for the expenses awarded to his client against the unsuccessful party. This is done by motion at the same time as the Auditor's report is approved of and decree given for the taxed amount of expenses, and is always granted unless the unsuccessful party can plead compensation in the same case. The unsuccessful party may be unable to pay, in which case the law agent's own client is liable. In addition, there may be, and usually is, an extrajudicial account of expenses, for which the successful client is alone responsible to his agent. The successful client, however, being in a precarious financial position, the law agent's recourse is to exercise his right to operate against the sum recovered for his client, and this he may do by making application for a *Charging Order*.

The procedure to obtain this has varied.

In the Outer House the earlier applications were by simple motion.[1] This was succeeded by a note to the Lord Ordinary, which was intimated to, and served upon, all parties interested.[2] In a later case the procedure was by petition,[3] and in the most recently reported case the application was made by minute.[4] It is thought, however, that the proper procedure is by note addressed to the Lord Ordinary, who will order intimation and service upon all parties interested, with answers within a limited period, and thereafter a discussion upon the note and answers.

[1] Tait & Co. *v.* Wallace, 1894, 2 S. L. T. 261; Stenhouse *v.* Stenhouse's Trs., 1903, 10 S. L. T. 684.

[2] Paton *v.* Paton's Trs., 1905, 13 S. L. T. 96; Automobile Gas Producer Syndicate, Ltd. *v.* Caledonian Rly. Co., 1909, 1 S. L. T. 499.

[3] Philip *v.* Willson, 1911, 48 S. L. R. 947.

[4] Smart & Co. *v.* Stewart, 1911, 49 S. L. R. 66.

The following is a form of note:—

Note

for

[*names, etc., of law agents*]

in the action at the instance of

, *Pursuer;*

and

, *Defender.*

[*Date.*] Of this date, the pursuer raised an action against the defender to have them ordained, etc. [*or as the case may be*].

[*Date.*] Of this date, the pursuer and defender compromised the action upon the footing that the defender was to pay to the pursuer the sum of £ ; and

[*Date.*] Of this date, the defender was in respect of said compromise assoilzied from the conclusions of the action, no expenses being found due to or by either party.

Or

[*Date.*] Of this date, your Lordship granted decree of declarator as concluded for, and decerned against the defender for payment of the sum of £ and interest, and no expenses were found due by the defender (*or as the case may be*).

In connection with the said proceedings the pursuer incurred to his agents [*insert the names of the Edinburgh and local agents*] accounts amounting to £ and £ respectively. The said accounts are herewith produced.

In terms of the Law Agents and Notaries Public (Scotland) Act, 1891, sec. 6, the said [*insert the aforesaid agents' names*], as the pursuer's agents in said proceedings, are entitled to a charging order upon the fund of £ so recovered by them on behalf of the pursuer.

May it therefore please your Lordship to declare the said [*insert agents' names*] entitled to a charge upon and against, and a right to payment out of, the said sums of £ for the said accounts incurred to them as the same may be taxed; to remit the said accounts to the Auditor of Court to tax and to report; thereafter to approve of said report, and to decern against the said defenders for payment to the said [*agents' names*] of the taxed amounts of their respective accounts out of said sum of £ , and to find the said [*agents' names*] entitled to the expense of this application.

In respect whereof,

[*Signed by Counsel.*]

In the Inner House the application may be made either by note to the Lord President of the Division,[1] or by minute.[2]

[1] Carruthers' Tr. *v.* Finlay and Wilson, 1897, 24 R. 363.

[2] Hutchison *v.* Hutchison's Trs., 1902, 40 S. L. R. 200; Bannatyne, Kirkwood, France & Co., Minuters, 1907, S. C. 705.

The following is a form of note:—

Unto the Right Honourable the Lord President.

Note
for
[*name and designation of law agents*]
in causa
A. B., Pursuer;
against
C. D., Defender.

My Lord President,

[*Date.*] Of this date, etc. [*as in note to Lord Ordinary*].

May it therefore please your Lordship to move the Court to declare, etc. [*as in note to Lord Ordinary*].

In respect whereof,

[*Signature of Counsel.*]

See Maclaren on Expenses, p. 269 *et seq.*

CHAPTER IV

MESSENGERS-AT-ARMS

(1) Generally.—A messenger-at-arms is an officer appointed by the Lyon King of Arms to execute writs proceeding from the Court of Session and the Court of Justiciary. On appointment he requires to find caution for the due exercise of his office, and after he has taken the oath of allegiance and the oath *de fideli administratione officii* he receives his wand and badge of office, sometimes called his baton and blazon.

The Citation Amendment Act of 1882[1] has seriously curtailed his business, but there are still certain steps in diligence which can only be carried through by a messenger-at-arms, such as a charge[2] and an arrestment.[3]

Where the services of a messenger-at-arms cannot be secured except at considerable expense, the Inner House has been in the habit of granting an application to allow a sheriff-officer to act as messenger-at-arms.[4]

(2) Dues for Change of Address.[5]

(3) Messenger Bound to Serve the Lieges.[6]

(4) Transmission of Diligence.[7]

(5) No Sum other than Fees to be Exacted.[8]

(6) No Messenger to Purchase Goods Sold under Diligence.[9]

(7) No Messenger to be Menial Servant.[10]

(8) Affixed Copy of Execution not to be Defaced.[11]

(9) Annual Declaration as to Cautioner.[12]

(10) Death or Bankruptcy of Cautioner.[13]

(11) Suspension or Deprivation.—When the Lyon King of Arms is of opinion that the conduct of any messenger is such as to render

[1] 45 & 46 Vict. cap. 77.

[2] Gow *v.* Thomson, 1895, 1 Adam, 534; Whyte, Ridsdale & Co., Petrs., 1912, S. C. 1095, per Lord President Dunedin.

[3] Buchanan *v.* British Natural Premium, etc., Association, Ltd., 1903, 11 S. L. T. 465.

[4] Whyte, Ridsdale & Co., Petrs., 1912, S. C. 1095.

[5] C. A. S., A, ix. 1.

[6] Ibid., 2. [7] Ibid., 3. [8] Ibid., 4. [9] Ibid., 5.

[10] Ibid., 6. [11] Ibid., 7. [12] Ibid., 8. [13] Ibid., 9.

it expedient that he should be suspended from or deprived of his office, the Lyon Clerk shall send notice to the messenger by registered post-letter that unless he shows cause to the contrary within fourteen days from the date of the said notice, sentence of suspension or deprivation will be pronounced by the Lyon Court; and if the messenger intimates his desire to be heard, he shall be cited to a diet of the Lyon Court, and shall have reasonable opportunity of showing cause why he should not be suspended or deprived of his office.[1]

There is a right of appeal to the Court of Session against any order, deliverance, or sentence of the Lyon King of Arms or the Lyon Court.[2]

The Court of Session has a concurrent jurisdiction with the Lyon Court to entertain complaints against a messenger and to suspend or deprive him of his office.[3]

(12) Sentence of Suspension or Deprivation.—When sentence of suspension or deprivation is pronounced by the Lyon Court against any messenger, the same shall be placarded or intimated upon the walls of the Court of Session, and also upon the walls of the Sheriff Court of the county in which such messenger resides, and shall be published in a newspaper circulating in the said county and in one Edinburgh newspaper; and from and after the time appointed for such sentence to take effect the messenger so suspended or deprived shall not act as a messenger in any respect under a penalty of £10 sterling for each transgression.[4]

Where the suspension or deprivation has been ordered by the Court of Session, it is presumed that the same procedure will be followed.[5]

(13) Bond of Caution for Messenger.[6]

(14) Dues Payable by Messengers.[7]

(15) Jurisdiction of Courts Competent.[8]

(16) Right of Appeal.[9]

(17) Messengers to Receive Copy Regulations.[10]

(18) Actions of Damages against Messengers.—The Court of Session alone has jurisdiction to try actions of damages by third parties against messengers and their cautioners.[11] A messenger can only be

[1] C. A. S., A, ix. 10.

[2] Ibid., 15; Lindsay *v.* Drummond, 1744, Mor. 8889; Campbell-Hook *v.* Copland and M'Coll, 1766, Mor. 7652; Clyne *v.* Murray, 1831, 9 S. 338.

[3] C. A. S., A, ix. 14; The Lords *v.* Murray, 1532, Mor. 7319; Monro *v.* Ross, 1738, Mor. 8889; M'Lachlan *v.* Black, 1821, 1 S. 217 (N. E. 206).

[4] C. A. S., A, ix. 11.

[5] Monro *v.* Ross, 1738, Mor. 8889.

[6] C. A. S., A, ix. 12. [7] Ibid., 13.

[8] Ibid., 14. [9] Ibid., 15. [10] Ibid., 16.

[11] Heriots *v.* Fleming, 1666, Mor. 7649; Grierson *v.* M'Ilroy, 1668, Mor. 7651.

made liable for his own personal fault. Accordingly, if he correctly executes a warrant *ex facie* regular, he is not liable for an illegality or irregularity in obtaining the warrant.[1] Where, however, the procedure adopted by the messenger is irregular, he and his cautioner are liable in damages directly to the debtor.[2] A messenger is also liable where, although the diligence is quite regular, he knows, or ought to know, that he should not proceed with the execution of the diligence.[3]

(19) Liability of Law Agent for Messenger's Fees.—It is the practice in Scotland that law agents are personally liable in the first instance for the fees of messengers-at-arms employed by them as such.

[1] Scot *v.* Banks, 1628, Mor. 6015.

[2] Kennedy *v.* M'Kinnon, 1821, 1 S. 210 (N. E. 198); Inch *v.* Thomson, 1836, 14 S. 1129; Struthers *v.* Dykes, 1845, 7 D. 436; 1847, 9 D. 1437; Beattie *v.* M'Lellan, 1846, 8 D. 930; Le Conte *v.* Douglas, 1880, 8 R. 175; Gray *v.* Smart, 1892, 19 R. 692; Monteith *v.* Hutton, 1900, 8 S. L. T. 250.

[3] Stewart *v.* Macdonald, 1784, Mor. 13989; Pearson *v.* Anderson, 1833, 11 S. 1008; Ritchie *v.* Dunbar, 1849, 11 D. 882; Inglis *v.* M'Intyre, 1861, 23 D. 1240; Henderson *v.* Rollo, 1871, 10 M 104.

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